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P.T. RAJAN

T.P.M. SAHIR AND ORS.

SEPTEMBER 26, 2003

B

[V.N. KHARE, CJ., BRIJESH KUMAR AND S.B. SINHA, JJ.]

*Representation of the People Act, 1950; Ss. 2(b), 21, 22 and 23(3)/ Representation of the People Act, 1951; Ss. 2(d) and (e), 62, 98 and 100/ Electors' Rules, 1960; Rules 5, 10, 11, 12, 13, 14, 21, 22 and 26.*

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*Election Petition—Electoral roll—Revision—Addition and deletion of name of electors after the prescribed time limit—Effect of—Held: Electoral roll enables the persons enlisted therein to exercise their right of franchise, and its absence in the list disabled them to exercise such rights—Section 23(3) of the 1950 Act prohibits the authorities to revise the roll by way of amendment after expiry of the time limit prescribed therefor—However, election petitioner has neither adduced any evidence to show that how many voters were deleted from the electoral roll after the prescribed time limit nor did he prove that these voters would have voted in his favour in case their names were not deleted therefrom and vice versa—He has also failed to set out material facts necessary to make out a prima facie case for inspection of Ballot Papers to ascertain the number of void votes—Hence, petition is dismissed on merit—Constitution of India, 1950; Article, 326—Registration of Electors Rules, 1982.*

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*Statute—Nature of—Mandatory or directory—Discussed.*

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Appellant was the election agent of the second respondent for Kozhikode Constituency General Assembly Election, 2001. Respondent No. 1, returned candidate secured 48,858 votes as against 48,099 votes secured by respondent No. 2, the defeated candidate. An Election Petition was filed by the election agent of respondent no. 2 challenging the election of Respondent No. 1 on the ground that electoral roll was revised by making amendment in the roll by adding 6,828 votes and deleting 19,045 votes, after the prescribed time limit and after acceptance of nominations for the election. Election Tribunal/High Court dismissed the petition. Hence the present appeal.

It was contended for the appellant that as the provisions contained in sub-section (3) of Section 23 of the 1950 Act are mandatory in nature, the violation thereof rendered the election void; that the election held pursuant to or in furtherance of the electoral roll prepared and published after the prescribed time limit must be held to be wholly illegal rendering the election void *ab initio*; that the High Court failed to take into consideration that the electoral roll could not have been published after the prescribed time limit therefor; and that in view of the evidence of the witnesses, the entire election proceeding was illegal and, thus the election in its entirety should have been set aside.

Respondent No. 1 submitted that it was incumbent upon the appellant to plead and prove that after the prescribed time limit, names of how many persons were added or names of how many persons were deleted from the electoral roll; that it has not and could not have been the case of the appellant that names of 7,003 voters were added and names of 18,839 voters were deleted after the prescribed time limit; that in law it is not necessary to make publication of the electoral roll in terms of sub-section 23 of the 1950 Act by 3 p.m. of the date fixed for filing nomination inasmuch as the said provision contemplates mere issuance of directions by the specified authorities; that while issuing such directions, the statutory authorities are required to assign reasons, as the said order would be appealable one; and that having regard to the provision of Section 100(1)(d) of the 1951 Act even if irregular electoral roll was prepared, it was necessary to plead and prove that by reason thereof, the result of the election had been materially affected.

Dismissing the appeal, the Court

**HELD 1.1.** The purport and object of preparation of an electoral roll cannot be under-estimated in view of the fact that thereby the persons included therein make the persons to decide as to whether they can contest election wherefor an enlistment of a voter is necessary. Electoral roll is also helpful for the candidates to assess their chance of success. For reference to the final electoral roll, it is also required by the candidates to enable them to canvass amongst the voters. Availability of a final electoral roll with the candidate is, thus, a matter

- A of great importance for him. There cannot further be any doubt whatsoever that the right to vote having regard to section 62 of the 1951 Act *vis-à-vis* Article 326 of the Constitution of India is a valuable right. A person in terms of Section 62 of the 1951 Act is entitled to exercise his right of franchise or is disabled therefrom if his name does or does not find place in the electoral roll. [104-B-C-D]
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- 1.2. In terms of the Registration of electors Rules, 1982, a claim or an objection can be entertained by at least seven days prior to the date of filing of nominations. Sub-section (3) of Section 23 of the 1950 Act in no uncertain terms provides for statutory injunction upon the authorities to make any revisions in the electoral roll after the last date fixed which indisputably having regard to the law laid down by this Court in a number of decisions would mean 3 p.m. of the date of filing the nominations. It, *ex facie*, is imperative in character. It has been couched in a negative language. The word 'shall' has also been used.
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- D What is thereby, however, prohibited is that after 3 p.m. of the date specified for filing of the nomination on correction by way of amendment, transposition or deletion of the entry can be made. Publication of Electoral Roll, however, is not mandatory. [104-G-H 105-A-B]

- E 2.1. The mother roll in the instant case has been published in the year 1999. Final revision had also taken place in the years 2000 and 2001. Revision in 2001 had taken place in two periods, namely, from 15.3.2001 to 18.3.2001 and from 21.4.2001 to 23.4.2001. The revision carried out in the year 2000 as also during 2001 would be valid in law.
- F
- F Having regard to the provision contained in sub-section (3) of section 23 of the 1950 Act, there cannot be any doubt that any order passed immediately before 3 p.m. on 23.4.2001, the prescribed cut-off date would be valid. The very fact that the said sub-section prohibits any amendment, transposition or deletion of any entry after the last date for making nominations for an election in that constituency is a pointer to the fact that till 3 p.m. of the date specified for filing nominations, directions for any amendment can be issued. [105-H, 106-A-B-C]
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- 2.2. It may be true that a person whose name appeared in the electoral roll at the time of filing of the nomination cannot be deleted thereafter and similarly no new names can be added. But the purport
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and object of sub-section (3) of Section 23 of the 1950 Act is to enable a person to exercise his right of affording his candidature cannot be taken away. If the name of such person was not included in the mother roll, his remedy was only to file an application for inclusion of his name in terms of Rule 26 of the 1960 Rules. An order on such application, therefore, was required to be passed in terms of Section 22 of the 1950 Act read with relevant provisions of the 1960 Rules immediately prior to 3 p.m. of the specified date for filing nominations. Once such directions are issued, evidently, publication of the list in terms of Form No. 16 would be only upon incorporation of directions for making amendment, transposition or deletion of names. [105-E-F]

2.3. A statute must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the user of the words "shall" or "may". Such a question must be posed and answered having regard to the purpose and object it seeks to achieve. In the present case, what is mandatory is the requirement of sub-section (3) of Section 23 of the 1950 Act and not the ministerial action of actual publication of Form 16. [107-D]

2.4. The construction of statute will depend on the purport and object for which the same had been used. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. A provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused. The Court cannot, it is trite, supply *casus omissus*. Rule 22(b) of the 1960 Rules cannot, therefore, be interpreted to mean that publication of the electoral roll must take place before the time of filing nomination and not thereafter. [107-G, 108-A, 108-C-D, 109-D]

*Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*, [1965] 1 SCR 970; *State Bank of Patiala v. S.K. Sharma*, [1996] 3 SCC 364; *Venkataswamappa v. Special Dy. Commr. (Revenue)*, [1997] 9 SCC 128; *Rai Vimal Krishna & Ors. v. State of Bihar & Ors.*, [2003] 6 SCC 401; *Dr. Baliram Waman Hiray v. Mr. Justice B. Lentin & Ors.*, AIR (1988) SC 2267; *Kanta Devi (Smt.) v. Union of India & Anr.*, [2003] 4 SCC 753 and *Shrimati Tarulata Shyam & Ors. v. Commissioner of Income-tax, West Bengal*, [1997] 3 SCC 305, relied on.

A *Shiveshwar Prasad Sinha v. The District Magistrate of Monghyr & Anr.*, AIR (1966) Patna 144; *Nomita Chowdhury v. The State of West Bengal & Ors.*, (1999) 2 CLJ 21 and *Garbari Union Co-operative Agricultural Credit Society Limited & Anr. v. Swapan Kumar Jana & Ors.*, (1997) 1 CHN 189, referred to.

B 3.1. The law, it stands, would require a strict pleading and proof of the factors enumerated in Section 100 of the 1951 Act for obtaining a declaration that the election was a void one. Such a declaration can only be made upon consideration of the materials brought on records. The election tribunal will have jurisdiction to issue such a direction only in the event one or the other factors enumerated in the sub-clauses contained in sub-section (1) of Section 100 of the 1951 Act are fulfilled and not otherwise. [114-E-F]

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D *The Chief Commissioner of Ajmer & Anr. v. Radhey Shyam Dani*, AIR (1957) SC 304 and *A.C. Jose v. Sivan Pillai & Ors.*, [1984] 2 SCC 656, distinguished.

*Hafiz Mohammad Anwar Khan & Anr. v. State of Madhya Pradesh & Ors.*, AIR (1967) MP 257, held inapplicable.

E 3.2. The appellant has failed to furnish any material to show as to names of how many persons were added or deleted after 3.00 p.m. after the prescribed time limit and how they have exercised their right of franchise. He has also failed to show by adducing any evidence that those persons whose names had been omitted would have voted for the second respondent. Even the electoral roll have not been produced before the High Court for its comparison. The least the appellant could do was to file an appropriate application before the Tribunal praying for inspection of ballot papers to find out the void votes which had been accepted so as to enable the High Court to arrive at a conclusion how casting of such void votes affected the outcome of such election. Further for inspection of ballot papers, the election petition must make out a strong *prima facie* case, only after setting out material facts in the Election Petition and leading evidence to that effect. [119-F-G-H; 120-A]

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H *G.K. Samal v. R.N. Rao*, 44 ELR 25/1970 UJ (SC) 295 and *Vashit Narain Sharma v. Dev Chandra & Ors.*, [1985] 1 SCR 509, relied on.

*Mahadeo v. Babu Udai Partap Singh & Ors.*, AIR (1966) SC 824, A referred to.

*Shiv Charan Singh v. Chandra Bhan Singh & Ors.*, [1988] 2 SCC 12; *Santosh Yadav v. Narender Singh*, [2002] 1 SCC 160 and *Chhedi Ram v. Jhilmit Ram & Ors.*, [1984] 2 SCC 281 and *I. Vikheshe Sema v. Hokishe Sema*, [1966] 4 SCC 53, distinguished. B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3602 of 2002.

From the Judgment and Order dated 7.3.2002 of the Kerala High Court in E.P. No. 8 of 2001. C

Romy Chacko and K.L.N.V. Veeraanjaneyulu for the Appellant.

K.K. Venugopal, E.M.S. Anam, Ms. Suchitra Menon and Fazlin Anam for the Respondents. D

The Judgment of the Court was delivered by

**S.B. SINHA, J. :** Whether non-publication of a final electoral roll would render a general election invalid in law is the core question involved in this appeal filed by the Appellant herein under Section 116A of the Representation of the People Act, 1951 (hereinafter referred to as 'the 1951 Act') which arises out of a judgment and order of the High Court of Kerala dated 7.3.2002 passed in E.P. No. 8 of 2001 whereby and whereunder his election petition was dismissed. E

#### BACKGROUND FACT :

The election in question was held for Kozhikode II Legislative Assembly Constituency on 10.05.2001. The first, second, third and fourth respondents herein contested the said election. The appellant herein was the election agent of the second respondent. The said election petition came to be filed in the following circumstances : G

A preliminary electoral roll (mother roll) was published in 1999 which was revised on 1.1.2000 and 1.1.2001 purported to be in terms of H

- A continuous and special revision scheme. One revision was carried out between 15.3.2001 and 18.3.2001 and another between 21.4.2001 and 23.4.2001. The final electoral roll was published on 23.4.2001. Despite the fact that the last date of acceptance of nomination was 3 p.m., allegedly, the final electoral roll was published at 8 p.m. on 23.4.2001. The electoral roll consisted of 1,52,225 voters out of which 1,05,437 voters exercised their franchise. The result of the election was declared on 13.5.2001. The first respondent was declared elected having secured 48,886 votes whereas the second respondent secured 48,099 votes. The third and fourth respondents herein obtained 7,345 and 1,107 votes respectively. The winning margin was, thus, only 787 votes.

- In the election petition, the appellant herein alleged that after 3 p.m. on 23.4.2001, names of 19,045 voters were deleted from the voters list : whereas 6,828 new names were added therein. The fact which, however, stands admitted is that in the 2001 revision, names of 18,839 voters were deleted whereas names of 7,003 voters were added.

- The appellant herein in the election petition further alleged that the electoral roll as it stood at 3 p.m. on 23.4.2001 which had been published prior thereto became final on the expiry of the time fixed for acceptance of nominations for election and, thus, the deletion of names of 19,045 voters from the said roll without issuance of any notice was bad in law, as thereby the genuine voters who turned up at the polling stations had been turned away. Allegedly the majority of such persons were known supporters of the Left Democratic Front whose candidate was the second respondent. It was also furthermore contended that the names of 6,828 persons were illegally added after the publication of the final electoral roll on the said date; the majority of whom voted in support of the United Democratic Front to which the first respondent herein belonged to. According to the appellant, the said electoral roll in view of the prohibition contained in Section 23(3) of the Representation of the People Act, 1950 (for short, 'the 1950 Act') was void ab initio, as a result whereof the election of the first respondent became vitiated by reason of improper refusal of votes of 9,500 persons and improper reception of votes of 4,500 persons, which being void could not have been taken into consideration for the purpose of the result of the election.

*ISSUES :*

A

Having regard the pleadings of the parties the learned Tribunal framed the following issues :

“(1) Has the petitioner adequate cause of action to challenge the declaration of results made on 13.5.2001?” B

(2) Whether the E.P. is liable to be dismissed for non-joinder of necessary parties?

(3) Whether the E.P. is liable to be rejected/dismissed for want of adequate pleadings? C

(4) Whether the names of 19045 voters were deleted from the final electoral roll after 23.4.2001 without notice to them and in violation of law? D

(5) Whether the refusal of voting right to the 19045 voters has materially affected the result of the election?

(6) Whether the additional list of 6828 voters were added to the final electoral roll after 30.4.2001? E

(7) Whether may of the said 6828 ineligible voters have voted for the 1st respondent affecting the declaration of results?”

(8) Relief and costs?” F

*FINDINGS OF THE HIGH COURT :*

The preliminary issues were decided in favour of the appellant by an order-dated 24.10.2001. The said order is not in question in this appeal. G

The Tribunal dismissed the election petition holding : (1) Although irregularities had been committed in preparation and publication of the electoral roll, as the appellant herein had not been able to prove that the H

A legal requirement contained in Section 100(1)(d) of the 1951 Act was fulfilled, the election of the first respondent cannot be set aside; (2) P.W. 1 and P.W. 2 who were examined on behalf of the appellant herein to show that their names were not included despite request were not relied upon on the ground that they had made the said request after 23.4.2001 and as such their request had rightly been denied; (3) The appellant did not produce an authenticated copy of the electoral roll in full form to find out the alterations which according to the appellant; were made subsequent to 3 p.m. nor produced any such altered roll; (4) Copies of the final electoral roll (FER) being Ext.P1 and Ext P2 filed in the proceedings being not certified ones, the same were inadmissible in evidence; (5) The appellant admitted that he had no knowledge about the precise date on which the final electoral roll was published; (6) A copy of the final electoral roll having not been filed, no finding can be arrived at for determination as to whether there had been any subsequent addition or deletion; (7) No clinching evidence had been adduced to show that there had actually been an addition of 787 votes or more after 3 p.m. or deletion of that number of votes thereafter; (8) No voters had come forward with a case that his right to vote was denied, although the same is a constitutional right under Article 326 of the Constitution of India; (9) Although the Election Officer who examined himself as P.W. 1 had not acted with responsibility, the same did not have any direct effect in the outcome of the result; (10) Though irregularities had been committed in the matter of preparation of electoral roll but the same were insufficient to upset the result of the election.

F It was observed :

G "...All these indicate that even after the last date, let alone the last hour for filing nominations, P.W. 1 might have entertained some applications for additions and effected deletions as well based on reports of Anganwadi teachers received at the 13th hour. In fact, the petitioner has created a strong suspicion whether there was, in actual fact, any publication of the final roll as claimed by him in his notice board at all. The files produced by him do not contain the office copy of any notice published by him announcing publication of the final electoral roll whether it was published at 8 p.m. on the 23rd or thereafter."

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## SUBMISSIONS :

The learned counsel appearing on behalf of the appellant, *inter alia*, submitted that in the instant case, there has been a flagrant violation of Section 23(3) of the 1950 Act. The learned counsel would further contend that as the provision contained in sub-section (3) of Section 23 of the 1950 Act is mandatory in nature, the violation thereof rendered the election void. He would urge that the election held pursuant to or in furtherance of the electoral roll prepared and published after 23.4.2001 at 8 p.m. must be held to be wholly illegal rendering the election void *ab initio*. According to the learned counsel, the High Court misdirected itself in passing the impugned judgment insofar as it failed to take into consideration that the electoral roll could not have been published at 8 p.m. on 23.4.2001. The learned counsel took us through the evidences of P.W.1, P.W.2, P.W.6, P.W. 8 and some other witnesses for the purpose of showing that the entire proceeding was wholly illegal and, thus, the election in its entirety should be set aside. The learned counsel would contend that the High Court should have exercised its suo motto power of directing recounting of votes so as to exclude the illegal ones, having regard to section 62 of the 1951 Act.

Reliance in support of the aforementioned contentions has been placed by the learned counsel for the Appellant on *Baidyanath Panjira v. Sita Ram Mahto and Others*, AIR (1970) SC 314, *Baidyanath Panjira v. Sita Ram Mahto and Others*, [1969] 2 SCC 47, *Narendra Madiyalapa Kheni v. Manikrao Patil and Others*, [1977] 4 SCC 16, *Ramji Prasad Singh v. Ram Bilas Jha and Others*, [1977] 1 SCC 260; *Bashir Ahmad Magrey v. Ghulam Quadir Mir and Others*, [1977] 1 SCC 285, *I. Vikheshe Sema v. Hokishe Sema*, [1996] 4 SCC 53, *D.B. Raju v. H.J. Kantharaj and Others*, [1990] 4 SCC 178, *Lal Babu Hussein and Others Etc. v. Electoral Registration Officer and Others Etc.*, [1995] 3 SCC 100, *The Chief Commissioner of Ajmer and Another v. Radhey Shyam Dani*, AIR (1957) SC 304 and *Hafiz Mohammed Anwar Khan & Another v. State of Madhya Pradesh and Others*, AIR (1967) MP 257.

Mr. K.K. Venugopal, learned senior counsel appearing on behalf of the first respondent, on the other hand, would submit that admittedly continuous and special revisions were carried out since 1999, the last one during the period 21.4.2001 and 23.4.2001. According to the learned counsel, a revision of electoral roll was also carried on between 15.3.2001

A and 18.3.2001 and in that situation it was incumbent upon the appellant herein to plead and prove that in between 3 p.m. and 8 p.m. on 23.4.2001, names of how many persons were added or names of how many persons were deleted therefrom.

B The learned counsel would contend that it has not and could not have been the case of the appellant herein that names of 7,003 voters were added and names of 18,839 voters were deleted after 3 p.m. on 23.4.2001, as admittedly the mother roll could be revised upto 3 p.m. on 23.4.2001.

C Mr. Venugopal would urge that in law it is not necessary to make publication of the electoral roll in terms of sub-section (3) of Section 23 of the 1950 Act by 3 p.m. of the date fixed for filing nomination inasmuch as the said provision contemplates mere issuance of directions by the specified authorities. While issuing such directions, the statutory authorities are required to assign reasons, as the said order would be appealable ones.

D The learned counsel would contend that having regard to the provision of Section 100(1)(d) of the 1951 Act despite preparation of irregular electoral roll, it is necessary to plead and prove that by reason thereof, the result of the election had been materially affected. Strong reliance in this regard has been placed on *G.K. Samal v. R.N. Rao and Others*, (1972) 44 Election Law Reports 25.

E The learned counsel in support of his aforementioned contentions also relied on *Vashit Narain Sharma v. Dev Chandra and Others*, [1955] 1 SCR 509, *Paokai Haokip v. Rishang & Others*, [1969] 1 SCR, 637, *Shiv Charan Singh v. Chandra Bhan Singh and Others*, [1988] 2 SCC 12, *J. Chandra Sekhara Rao v. V. Jagapathi Rao and Others*, [1993] Supp. 2 SCC 229, *Uma Ballav Rath (Smt.) v. Maheshwar Mohanty (Smt.) and Others*, [1999] 3 SCC 357, *Tak Chand v. Dile Ram*, [2001] 3 SCC 290 and *Santosh Yadav v. Narender Singh*, [2002] 1 SCC 160.

G Mr. Venugopal in his usual fairness has drawn our attention to a decision of three-Judge Bench of this Court in *Chhedi Ram v. Jhilmit Ram and Others*, [1984] 2 SCC 281 wherein this Court had set aside the election, having regard to margin of 373 votes *vis-à-vis* wasted votes being 6, 110 (the difference being 20 times). However, it was pointed out that the said decision was held to have been rendered in the peculiar fact situation of

H the case.

*QUESTIONS :*

A

- (1) Whether addition or deletion of names after the last date fixed for filing of nominations would invalidate the entire election?
- (2) Whether an election petitioner must plead and prove as to how far and to what extent such illegal addition or deletion of the names of voters had materially affected the election?

B

*STATUTORY PROVISIONS :*

Before embarking upon the questions referred to hereinbefore, we may look to some statutory provisions.

C

The 1950 Act was enacted to provide allocation of seats in and the delimitation of constituencies for the purpose of election to, the House of the People and the Legislatures of States, the qualifications of voters at such elections, the preparation of electoral rolls, the manner of filling seats in the Council of States to be filled by representatives of Union territories and matters connected therewith.

D

Section 2(b) provides as under :

“Assembly constituency” means a constituency provided by law for the purpose of elections to the Legislative Assembly of a State;

E

Section 21 reads as under :

*“21. Preparation and revision of electoral rolls. (1) The electoral roll for each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act.*

F

(2) The said electoral roll -

G

- (a) shall, unless otherwise directed by the Election Commission for reasons to be recorded in writing, be revised in the prescribed manner by reference to the qualifying date -

H

- A (i) before each general election to the House of People or to the Legislative Assembly of a State; and
- (ii) before each bye-election to fill a casual vacancy in the seat allotted to the constituency; and

- B (b) shall be revised in any year in the prescribed manner by reference to the qualifying date if such revision has been directed by Election Commission :

C Provided that if the electoral roll is not revised as aforesaid, the validity or continued operation of the said electoral roll shall not thereby be affected.

- D (3) Notwithstanding anything contained in sub-section (2), the Election Commission may at any time, for reasons to be recorded, direct a special revision of the electoral roll for any constituency or part of a constituency in such manner as it may think fit :

E Provided that subject to the other provisions of this Act, the electoral roll for the constituency, as in force at the time of the issue of any such direction, shall continue to be in force until the completion of the special revision so directed."

Section 22 provides as under :

F "22. *Correction of entries in electoral rolls.*—If the electoral registration officer for a constituency, on application made to him or on his own motion, is satisfied after such inquiry as he thinks fit, that any entry in the electoral roll of the constituency —

- G (a) is erroneous or defective in any particular,
- (b) should be transposed to another place in the roll on the ground that the person concerned has changed his place of ordinary residence within the constituency, or
- H (c) should be detected on the ground that the person concerned is dead or has ceased to be ordinarily resident in the

constituency or is otherwise not entitled to be registered in that roll, A

the electoral registration officer shall, subject to such general or special direction, if any, as may be given by the Election Commission in this behalf, amend, transpose or delete the entry : B

Provided that before taking any action on any ground under clause (a) or clause (b) or any action under clause (c) on the ground that the person concerned has ceased to be ordinarily resident in the constituency or that he is otherwise not entitled to be registered in the electoral roll of that constituency, the electoral registration officer shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him.” C

Section 23 provides as under : D

“23. *Inclusion of names in electoral rolls.* – (1) Any person whose name is not included in the electoral roll of a constituency may apply to the electoral registration officer for the inclusion of his name in that roll. E

(2) The electoral registration officer shall, if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein :

Provided that if the applicant is registered in the electoral roll of any other constituency, the electoral registration officer shall inform the electoral registration officer of that other constituency and that officer shall, on receipt of the information, strike off the applicant's name from that roll. F

(3) No amendment, transposition or deletion of any entry shall be made under section 22 and no direction for the inclusion of a name in the electoral roll of a constituency shall be given under this section, after the last date for making nominations for an election in that constituency or in the parliamentary constituency within which that constituency is comprised and before the H

A completion of that election.”

The 1951 Act was enacted to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

Section 2(d) defines ‘election’ in the following terms :

C “2(d) “election” means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir.”

Section 2(e) reads as under :

D “2(e) “elector” in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950);”

E Sub-section (1) of Section 33 provides as under :

F “33. Presentation of nomination paper and requirements for a valid nomination. (1) On or before the date appointed under clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O’ clock in the forenoon and three O’ clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency

G who was proposer”

Section 62 reads as under :

H “62. Right to vote. (1) No person who is not, and except as expressly provided by the Act, every person who is, for the time

being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. A

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950). B

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void. C

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police : D

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force." E

Part VI of the 1951 Act provides for resolution of disputes regarding elections. Chapter I contains interpretation clauses; Chapter II deals with presentation of election petitions to the High Court; Chapter III provides for trial of election petitions. Section 87 provides for procedure before the High Court Section 94 prohibits infringement of secrecy of voting. Section 98 read as under : F

*"98. Decision of the High Court.*—At the conclusion of the trial of an election petition (the High Court) shall make an order – G

(a) dismissing the election petition; or

(b) declaring the election of (all or any of the returned candidates) to be void; or H

- A (c) declaring the election of (all or any of the returned candidates) to be void and the petitioner or any other candidate to have been duly elected.”

Section 100(1)(d) reads as follows :

- B “100. *Grounds for declaring election to be void.* — (1) subject to the provisions of sub-section (2) if the High Court is of opinion –

Xxx

xxx

xxx

- C (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

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

- (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidates to be void.”

E

In terms of the 1950 Act, the Central Government made Registration of Electors Rules, 1960 (hereinafter referred to as ‘the 1960 Rules’). In terms of the 1960 Rules any person whose name has been deleted from the published draft roll will have to file an application for inclusion of his name.

F

Part-II thereof concerns “Electoral Rolls for Assembly Constituencies”. Rule 5 provides that the roll shall be divided into convenient parts. Rule 10 and 11 contemplate the publication of draft rolls in the first place and inviting of objections, if any thereto.

G

Rule 12 reads as under :

H

“12. *Period for lodging claims and objections.*— Every claim for the inclusion of a name in the roll and every objection to an entry

therein shall be lodged within a period of thirty days from the date of publication of the roll in draft under rule 10, or such shorter period of not less than fifteen days as may be fixed by the Election Commission in this behalf : A

Provided that the Election Commission may, by notification in the Official Gazette, extend the period in respect of the constituency as a whole or in respect of any part thereof." B

Rule 13 provides that every claim shall be made in Form No. 6 and signed by the person desiring his name to be included in the roll. Sub-rule (2) of Rule 13 provides that every objection to the inclusion of a name in the roll shall be in Form No. 7 and preferred only by a person whose name is already included in that roll. Sub-rule (3) of Rule 13 provides that every objection to a particular or particulars in an entry in the roll shall be made in Form No. 8 and preferred only by the person to whom that entry relates. C

Rule 14 to 20 provides for the mode and manner in which claims and objections and inquiry in relation thereto shall be made. D

Rule 21 provides for inclusion of names inadvertently omitted. Rule 21A provides for deletion of names. The said rules are as under :

*"21. Inclusion of names inadvertently omitted. —* (1) If it appears to the registration officer that owing to inadvertence of error during preparation, the names of any electors have been left out of the roll and that remedial action should be taken under this rule, the registration officer shall — E

(a) prepare a list of the names and other details of such electors; F

(b) exhibit on the notice board of his office a copy of the list together with a notice as to the time and place at which the inclusion of these names in the roll will be considered, and also publish the list and the notice in such other manner as he may think fit; and G

(c) after considering any verbal or written objections that may be preferred, decide whether all or any of the names should be included in the roll. H

A (2) If any statements under rule 7 are received after the publication of the roll in draft under rule 10, the registration officer shall direct the inclusion of the names of the electors covered by the statements in the appropriate parts of the roll."

B *21A. Deletion of names* – if it appears to the registration officer at any time before the final publication of the roll that owing to inadvertence or error or otherwise, the names of dead persons or of persons who have ceased to be, or are not, ordinarily residents in the constituency or of persons who are otherwise not entitled to be registered in that roll, have been included in the roll and that remedial action should be taken under this rule, the registration officer, shall –

- C
- (a) prepare a list of the names and other details of such electors;
- D (b) exhibit on the notice board of his office a copy of the list together with a notice as to the time and place at which the question of deletion of these names from the roll will be considered and also publish the list and the notice in such other manner as he may think fit; and
- E (c) after considering any verbal or written objections that may be preferred, decide whether all or any of the names should be deleted from the roll :

F Provided that before taking any action under this rule in respect of any person on the ground that he has ceased to be, or is not, ordinarily resident in the constituency, or is otherwise not entitled to be registered in that roll, the registration officer shall make every endeavour to give him a reasonable opportunity to show cause why the action proposed should not be taken in relation to him."

G

Rule 22 provides for final publication of roll. Clause (b) of sub-rule (1) mandates the registration officer to publish the roll, together with the list of amendment, by making a complete copy thereof available for inspection and displaying a notice in Form No. 16 at his office. Sub-rule

H (2) of Rule 22 provides that on such publication, the roll together with the

list of amendments shall be the electoral roll of the constituency. Rule 25 A provides for revision of rolls. Rule 26 provides for correction of entries and inclusion of names in electoral rolls. In terms of the said rule, a claim or objection must be filed in duplicate, one copy of which shall be posted in some conspicuous place in the office of the registration officer together with a notice inviting objections thereto within a period of seven days from the date of such posting. Sub-rule (4) of Rule 26 provides as under : B

“(4) The registration officer shall, as soon as may be after the expiry of the period specified in sub-rule (3), consider the application and objections thereto, if any, received by him and shall, if satisfied, direct the inclusion, deletion, correction or C transposition of entries in the roll, as may be necessary. Provided that when an application is rejected by the registration officer, he shall record in writing a brief statement of his reasons for such rejections.”

Form No. 16 referred to in clause (b) of sub-rule (1) of Rule 22 is as under : D

“FORM 16

(See rule 22 (1)

Notice of final publication of electoral roll E

It is hereby notified for public information that the list of amendments to the draft electoral roll for the ..... constituency has been prepared with reference to ..... as the qualifying date and in accordance with the Registration of Electors Rules, 1960. A copy of the said roll together with the said list of amendments has been published and will be available for inspection at my office. F

..... G  
Electoral Registration Officer

Place.....

(Address) .....

Date .....

H

Re : Question No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 8

**ELECTORAL ROLL** : List of persons who are eligible to vote in the election.

Whether Section 23(3) of the 1950 Act as well as requirement of publication of electoral roll is mandatory?

Sub-section (3) of Section 23 of the 1950 Act in no uncertain terms provides for statutory injunction upon the authorities to make any revision in the electoral roll after the last date fixed which indisputably having regard to the law laid down by this Court in a number of decisions would mean 3 p.m. of the date of filing the nominations.

The rules referred to hereinbefore clearly lay down the procedure for filing the claims and objections and the mode and manner in which they are to be dealt with. In terms of the 1960 Rules, a claim or an objection can be entertained only at least seven days prior to the date of filing of nominations inasmuch as such claim in Form No. 6 is to be posted on the notice board inviting objections before seven days as is required in terms of Rule 26. Claims or objections could have, therefore, been entertained at least upto 16.4.2001. P.W.1, however, states that no objection which was filed after the said date was entertained.

Sub-section (3) of Section 23 of 1950 Act is mandatory :

sub-section (3) of Section 23 *ex facie* is imperative in character. It has been couched in a negative language. The word 'shall' has been used. What is thereby, however, prohibited is that after 3 p.m. of the date specified for filing of the nomination no correction by way of amendment, transposition or deletion of the entry can be made.

Publication of Electoral Roll, however, is not mandatory.

The question which has been posed is whether the publication of the electoral roll was permissible after 3 p.m. on 23.4.2001. The submission of the learned counsel appearing on behalf of the appellant to the effect that having regard to the provisions contained in Section 21 of the 1950 Act, and Rule 22 of the 1960 Rules publication of an electoral roll is imperative in character, cannot be accepted.

Section 21 of the 1950 Act speaks of preparation and revision of electoral rolls. Sub-section (1) mandates that it shall come into force immediately upon its final publication in accordance with the rules made thereunder. When such finality would be attained, however, is a question of importance. The publication of an electoral roll, having regard to sub-section (2) of Section 21 can be revised in the prescribed manner by reference to the qualifying date. The said electoral roll is also required to be revised in any year in the prescribed manner by reference to the qualifying date. The proviso appended to sub-section (2) of Section 21 states that if the electoral roll is not revised, the validity or continued operation of the said electoral roll shall not thereby be affected. Sub-section (3) of Section 21 empowers the Election Commission to direct a special revision.

What is, therefore, contemplated under sub section (1) of Section 21 is a publication of final roll upon the revision thereof to be made in the prescribed manner. The manner in which such a revision would take place is enumerated in the 1960 Rules. The rules, however, do not prescribe as to when such formal publication shall be made. Form No. 16, as referred to hereinbefore clearly states that upon consideration of the claims and objections filed by the affected persons the Registration Officer shall publish the amendment carried out in the mother roll. The mother roll in

- A this case has been published in the year 1999. Final revision had also taken place in the years 2000 and 2001. As noticed hereinbefore, revision in 2001 had taken place in two periods, namely, from 15.3.2001 to 18.3.2001 and from 21.4.2001 to 23.4.2001. Indisputably, the revision carried out in the year 2000 as also during 2001 would be valid in law. Having regard to
- B the provision contained in sub-section (3) of Section 23 of the 1950 Act, there cannot be any doubt that any order passed immediately before 3 p.m. on 23.4.2001 would be valid. The very fact that sub-section (3) of Section 23 prohibits any amendment, transposition or deletion of any entry after the last for making nominations for an election in that constituency is a pointer to the fact that till 3. p.m. of the date specified for filing
- C nominations, directions for any amendment can be issued. Any order passed on the claims or objections filed in terms of Section 22 of the Act read with relevant provisions of the 1960 Rules would relate back from the date of publication of the electoral roll. Any amendment, transposition or deletion made in the electoral roll pursuant to or in furtherance of the
- D directions made by the competent authority in the electoral roll upto 3. p.m. of the specified date for filing nominations would, therefore, be valid. It would not, therefore, be correct to contend that any publication of final roll which is made after 3 p.m. on 23.4.2001 would render the entire electoral roll invalid in law. In terms of sub-section (3) of Section 23 of the 1950
- E Act what would be invalid is the addition or deletion of names which have been made by the statutory authorities after 3 p.m. on the same date. It may be true that a person whose name appeared in the electoral roll at the time of filing of the nomination cannot be deleted thereafter and similarly no new names can be added. But the purport and object of sub-section (3).
- F as noticed hereinbefore, is to enable a person to exercise his right of affording his candidature cannot be taken away. If the name of such person was not included in the mother roll, his remedy was only to file an application for inclusion of his name in terms of Rule 26 of the 1960 Rules. It would, thus, bear repetition to state that the same has to be filed at least seven days prior to the date specified for filing nomination and not
- G thereafter.

An order on such application, therefore, was required to be passed in terms of Section 22 of the 195 Act read with relevant provisions of the 1960 Rules immediately prior to 3 p.m. of the specified date for filing

H nominations. Once such directions are issued, evidently, publication of the

list in terms of Form No. 16 would be only upon incorporation of directions for making amendment, transposition or deletion of names. Whenever publication of electoral roll is made in Form 16, necessary corrections have to be carried out in the mother roll. There are ministerial acts. However, in the event any amendment, transposition or deletion is made after 3 p.m. the same would be invalid in law. By reason of any direction which is made after 3 p.m. neither any person whose name has been added becomes entitled to vote nor a person whose name has been deleted becomes disentitled therefrom. The right of such a person to vote or not to vote must be determined in terms of the position of the electoral roll as it stood at 3 p.m. on the date of filing of the nominations.

#### PRINCIPLES AS TO WHETHER A STATUTE IS MANDATORY OR DIRECTORY :

A statute as is well-known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the user of the words "shall" or "may". Such a question must be posed and answered having regard to the purpose and object it seeks to achieve.

What is mandatory is the requirement of sub-section (3) of Section 23 of the 1950 Act and not the ministerial action of actual publication of Form 16.

The construction of statute will depend on the purport and object for which the same had been used. In the instant case the 1960 Rules do not fix any time for publication of the electoral rolls. On the other hand Section 23(3) of the 1950 Act categorically mandates that direction can be issued for revision in the electoral role by way of amendment in inclusion and deletion from the electoral roll till the date specified for filing nomination. The electoral roll as revised by reason of such directions can therefore be amended only thereafter. On the basis of direction issued by the competent authority in relation to an application filed for inclusion of a voter's name, a nomination can be filed. The person concerned, therefore, would not be inconvenienced or in any way be prejudiced only because the revised electoral role in Form 16 is published a few hours later. Result of filing of such nomination would become known to the concerned parties also after 3.00 p.m.

- A Furthermore even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and
- B not mandatory. (See *Shiveshwar Prasad Sinhā v. The District Magistrate of Monghyr & Anr.*, AIR (1966) Patna 144, *Nomita Chowdhury v. The State of West Bengal & Ors.*, (1999) CLJ 21 and *Garbari Union Co-operative Agricultural Credit Society Limited & Anr. v. Swapan Kumar Jana & Ors.*, (1997) 1 CHN 189.;
- C Furthermore, a provision in a statute which is procedural in nature although employs the word “shall” may not be held to be mandatory if thereby no prejudice is caused. See *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur* [1965] 1 SCR 970, *State Bank of Patiala v. S.K. Sharma*, [1996] 3 SCC 364, *Venkataswamappa v. Special Dy. Commr.*
- D (*Revenue*), [1997] 9 SCC 128 and *Rai Vimal Krishna and Others v. State of Bihar and Others*, [2003] 6 SCC 401.

The Court cannot, it is trite, supply *casus omissus*. Reference in this regard may be made on *Dr. Baliram Waman Hiray v. Mr. Justice B. Lentin and Others*, AIR (1988) SC 2267, wherein it was observed :

- E “Law must be definite, and certain. If any of the features of the law can usefully be regarded as normative, it is such basic postulates as the requirement of consistency in judicial decision-making. It is this requirement of consistency that gives to the law much of its rigour. At the same time, there is need for flexibility. Professor H.L.A. Hart regarded as one of the leading thinkers of our time observes in his influential book ‘The Concept of Law’, depicting the difficult task of a Judge to strike a balance between certainty and flexibility :
- F
- G Where there is obscurity in the language of a statute, it results in confusion and disorder. No doubt the Courts so frame their judgments as to give the impression that their decisions are the necessary consequence of predetermined rules. In very simple cases it may be so; but in the vast majority of cases that trouble
- H the Courts, neither statute nor precedents in which the rules are

legitimately contained allow of only one result. In most important cases there is always a choice. The judge has to choose between alternative meanings to be given to the words of a statute or between rival interpretations of what a precedent amounts to. It is only the tradition that judges 'find' and do not 'make' law that conceals this, and presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the judge's choice."

See also *Kanta Devi (Smt.) v. Union of India and Another*, [2003] 4 SCC 753.

In *Shrimati Tarulata Shyam and Others v. Commissioner of Income-tax, West Bengal*, [1977] 3 SCC 305; it was held that if there be a *casus omissus*, the defect can be remedied only by legislation and not by judicial interpretation.

Rule 22(b) of the 1960 Rules cannot, therefore, be interpreted to mean that publication of the electoral roll must take place before the time of filing nomination and not thereafter.

#### CASE LAWS OPERATING IN THE FIELD :

In *Baidyanath Panjiar* (supra), it is stated :

"The question for consideration is whether it was within the competence of the electoral registration officer to amend the electoral rolls after the last date for making the nomination was over."

In *Baidyanath Panjiar* (supra), upon considering the scheme of the Act and the principles underlying thereunder the court held that sub-section (3) of Section 23 is mandatory-having regard to the provision of Section 62 of the Act. It was opined :

"...In view of that provision the electoral roll referred to in Section 62(1) of the Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election.

- A 9. It was next urged that even if we hold that in including fresh electors in the electoral roll on April 27, 1968, the electoral registration officer contravened Section 23(3) of the 1950 Act, the same cannot be made a ground for invalidating the election as the contravention in question does not come within the purview of sub-section (1) of Section 100 of the Act. This contention again does not appear to be sound. Clause (d)(iii) of sub-section (1) of Section 100 of the Act provides that if the High Court is of the opinion that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, it shall declare the election void. We have earlier come to the conclusion that the electoral registration officer had no power to include new names in the electoral roll on April 27, 1968. Therefore votes of the electors whose names were included in the roll on that date must be held to be void votes.
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- C
- D That conclusion satisfies one of the conditions prescribed in Section 100(1)(d)."

- In *Narendra Madivalapa* (supra), a two-Judge Bench of this Court following *Baidyanath Panjiar* (supra) reiterated that sub-section (3) of Section 23 is mandatory. The question which arose therein revolved round the inclusion of the 16 names in the electoral roll. Therein the Court was considering an election of the local body of Bidar district. The said 16 votes were directed to be ignored from the total tally of the returned candidate. The court in the fact of that case exercised its jurisdiction in issuing a direction upon the High Court to send for the ballot papers, pick out the 16 ballots relating to the Bidar Board, examine them without exposing the identity of the persons who had voted and to whom they had voted and record a re-tally excluding these 16 tainted votes from the respective candidates.
- E
- F

- G The said decision was considered in *I. Vikheshe Sema* (supra). In that case also the invalid votes were directed to be rejected. However, in that case the High Court did not pass any order on the application filed by the respondent therein. The respondent therein contended that the ballot papers should be summoned and examined in order to find out the void votes and
- H how the said votes affected the outcome of the election. In the aforementioned

situation, this Court made the following observations whereupon the learned counsel or the appellant placed strong reliance :

“14. Once the High Court was convinced, and it was evident from the facts on record that a large number of void votes had been received and they could have affected the outcome of the election, then it was under a duty to have taken the next logical step which would have been to examine the votes which had been cast, exclude the void votes and then re-count the valid votes in order to come to the conclusion whether the reception of the void votes had materially affected the result of the returned candidate. Without undertaking this exercise the High Court was wrong in coming to the conclusion that the election of the appellant had been materially affected and that the same should be set aside.”

The said observations were made having regard to the fact that an application to that effect was filed.

However, in *D.B. Raju* (supra), L.M. Sharma (as His Lordship then was) speaking for the Bench held that any publication made after the specified time under Section 33 would be bad in law. The learned Judge opined :

“14. The vital difference between an Act of a legislature and a subordinate legislation was earlier noted in *Harla v. State of Rajasthan*, [1952] SCR 110 : AIR (1951) SC 467. The Act of the legislature are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done, and this is done only after debates take place which are open to the public. The matter receives wide publicity through the media. But the case is different with the delegated legislation and, it we may add, also in the case of orders passed by the authorities like that in the present appeal before us. The mode of publication can vary but there must be reasonable publication of some sort. A reference may also be made to decision in *Fatma Haji Ali Mohammad Haji v. State of Bombay*, [1951] SCR 266, Which the question as to whether certain powers given to the government for issuing a direction to the Collector not to act in accordance with the prescribed rules had been actually exercised

A or not was under consideration. It was stated that the power had to be exercised in clear and unambiguous terms and, (SCR p. 275)

“the decision that the power has been exercised should be notified in the usual manner in which such decisions are made known to the public.”

B

With utmost respect, we are unable to subscribe to the extreme views for the reasons stated hereinbefore.

C In *Lal Babu Hussein* (supra), this Court was considering a situation where without giving an opportunity to the voters to place the relevant materials and solely acting on a police report removed the name of the voters for undertaking a special intensive revision. The Court held that even for that purpose the procedure must be followed.

D The learned counsel appearing on behalf of the appellant has placed strong reliance on a Constitution Bench decision of this Court in *Radhey Shyam Dani* (supra). Therein the Constitution Bench was considering an election held under Ajmer Merwara Municipalities Regulation. The name of the respondent was incorrectly described, his father's name had been mentioned as Ratan Lal instead of Chitar Mal. He filed an application for correction but no order was passed thereon. His nomination was, however, rejected on the ground that he was not one of the voters. In that situation the election was set aside stating :

F “It is of the essence of these elections that proper electoral rolls should be maintained and in order that a proper electoral roll should be maintained it is necessary that after the preparation of the electoral roll opportunity should be given to the parties concerned to scrutinize whether the persons enrolled as electors possessed the requisite qualifications. Opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objections to such enrolment. Unless this is done, the entire obligation cast upon the authorities holding the elections is not discharged and the elections held on such imperfect electoral rolls would acquire no validity and would be liable to be challenged at the instance of the parties concerned. It was in our opinion, therefore, necessary for the

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Chief Commissioner to frame rules in this behalf, and in so far as the rules which were thus framed omitted these provisions they were defective.” A

The said judgment is clearly distinguishable and cannot be held to have any application in the instant case. B

The learned counsel also relied upon a judgment of the Division Bench of the Madhya Pradesh High Court in *Hafiz Mohammad Anwar Khan* (supra) wherein in a petition for issuance of a writ of quo warranto the election was set aside on the ground that the electoral roll was invalid. C

“It is no doubt true that the petitioner could have moved this Court earlier for appropriate relief even before the election was held, but the relief now claimed is in the nature of a writ of quo warranto questioning the right of the respondents 6 to 13 to hold their offices. There is in such a case no question of delay or estoppel. On the other hand, as we have already indicated, no election on the basis of the rolls such as those in this case can be allowed to stand.” D

We do not think that the said decisions lay down the correct principles of law. E

Strong reliance has been placed by the learned counsel for the appellant *A.C. Jose v. Sivan Pillai and Others*, [1984] 2 SCC 656 for the proposition that the election contrary to the scheme of the 1951 Act and the 1960 Rules would be void. In that case the Commission in exercise of its power under Article 324 of the Constitution of India issued a notification directing that the votes be cast by mechanical process in 50 out of 84 polling stations in a particular constituency in the State of Kerala. The respondent therein was declared elected from that constituency defeating the appellant by a margin of 123 votes only. The validity of the said notification was questioned. This Court set aside the election of the respondent with respect of the 50 polling stations where voting machines were used stating that by exercise of its power under Article 324 of the Constitution of India, no direction could be issued by the Commission in contravention of the parliamentary legislation. It was held that Article 324 of the Constitution relating to superintendence, direction and control was F G H

A actually vesting merely executive powers and not the legislative powers. In the aforementioned situation, the election was set aside as voting machines were used in certain constituencies contrary to law.

B *A.C. Jose* (supra) is not an authority for the proposition that although some irregularity has been committed, an election otherwise valid will have to be declared void even without arriving at a finding that the same has materially affected the result. The question as regard the applicability of Section 100(1)(d) of the 1951 Act was not examined therein nor in the facts and circumstances obtaining therein it was necessary to be examined.

C *Re : Question No. 2*

*Effect of Section 100(1)(d) of 1951 Act :*

D The appellant herein has filed an election petition for declaring the election of the respondent herein as void. For obtaining the aforementioned relief, it was necessary for him to show that amendment, addition or deletion in the electoral roll after 3.00 p.m. on 23.4.2001 had indeed materially affected the result of the election.

E The law as it stands, in our opinion, would require a strict pleading and proof of the factors enumerated in Section 100 of the 1951 Act for obtaining a declaration that the election was a void one. Such a declaration can only be made upon consideration of the materials brought on records. The election tribunal will have jurisdiction to issue such a direction only in the event one or the other factors enumerated in the sub-clauses contained in Sub-Section (1) of Section 100 of the 1951 Act are fulfilled and not otherwise.

G The appellant herein has not placed any material to show as to names of how many persons were added, or deleted after 3.00 p.m. As discussed hereinbefore, even those electoral rolls have not been produced before the High Court for its comparison. Whether the provision of Section 100(1)(d) of the 1951 Act is required to be mandatorily complied with or not fell for consideration in *Vashit Narain Sharma* (supra). In no uncertain terms it was held that the burden of proof would be on the election petitioner.

H In *Vashit Narain Sharma* (supra), this Court observed :

“But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognized that petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by section 10(1)(c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand.”

The said view was reiterated in *Mahadeo v. Babu Udai Partap Singh and Others*, AIR (1966) SC 824. As noticed hereinbefore, even *Baidyanath Panjiar* (supra) whereupon the learned counsel, appearing on behalf of appellant placed strong reliance, this Court while holding the provisions of Section 23(3) of the 1950 Act to be mandatory held that the said illegality committed in the matter of amendment in the electoral roll has materially affected the result as envisaged under Section 100(1)(d) of the 1951 Act was required to be proved.

The question raised herein is squarely covered by a three-judge Bench decision of this Court in *G.K. Samal* (supra) wherein following *Vashit Narain Sharma* (supra), it was held :

“On the material on record we agree with the High Court that it has not been shown that the result of the election had been materially affected by the casting of votes by persons whose names were added to the electoral roll on April 27, 1968 and the

A alleged non-voting of 15 former electors whose names had been deleted.”

Upon considering the pleadings in the election petition this Court opined :

B “The High Court was rightly impressed by the omission of any allegation that all or majority of the persons whose names were included in the electoral roll for the first time in the evening of April 27, 1968, were the supporters of respondent No. 1 in the election.

C The learned counsel has not been able to show us any evidence which might indicate how many of the first preference votes counted in favour of respondent No. 1 were polled at Jamshadpur, Adityapur or Jugsalai respectively.

D On the facts and the pattern of voting it is impossible to say that there was any substantial number of votes counted in favour of respondent No. 1 which were void while those counted in favour of the petitioner were of the original electors.”

E In *Paokai Haokip* (supra) this Court in no uncertain terms held that if there existed a lacuna in the legislation, it is for it to provide for a remedy stating :

F “In our opinion, the decision of the learned Judicial Commissioner that the election was to contravention of the Act and the Rules was correct in the circumstances of this case; but that does not alter the position with regard to s. 100(1)(d)(iv) of the Act. That section requires that the election petitioner must go a little further and prove that the result of the election had been materially affected. How he has to prove it has already been stated by this Court and applying that test, we find that he has significantly failed in his attempt and therefore the election of the returned candidate could not be avoided.”

G *Chhedi Ram* (supra) was decided in somewhat peculiar situation. An H election petition was filed on the ground that a nomination of one Moti

Ram had been improperly accepted. The winning candidate obtained 17,822 votes and the appellant herein got 17,449 votes leaving a margin of 373 votes. The said Moti Ram secured 6710 votes. The election petition was filed that Moti Ram was not entitled to seek election from the reserved constituency being Kahar by caste and not a member of the Scheduled Caste. In the peculiar fact and circumstances of this case and in particular having regard to the fact that 6710 votes obtained by Moti Ram were almost 20 times the difference between the number of votes secured by and successful candidates and the candidate securing the next highest number of votes; it was held an impossible burden of proof cannot be thrown upon the appellant therein. This Court observed :

“The number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate – it was a little over one-third. Surely, in that situation, the result of the election may safely be said to have been affected.”

The Bench while agreeing with the observation of Ghulam Hasan, J. in *Vashit Narain Sharma* (supra), however, opined :

“It does not, however, mean that whatever the number of wasted votes and whatever the margin of difference between the number of votes secured by the successful candidate and the number of votes secured by the next highest candidate, the court would invariably hold that the result of the election had not been materially affected. In an appropriate case having regard to the margin of difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and the proportion which such margin bears to the wasted votes, it is permissible for the court to hold that the burden of proving that the result of the election has been materially affected has been discharged.”

*Chhedi Ram* (supra), therefore, is not a decision which can be said to be an authority for the proposition that the number of votes which were liable to be rejected would itself be a barometer for the purpose of arriving at a conclusion that the burden of the election petitioner to prove the legal requirement of Section 100(1)(d) of the 1951 Act stands discharged.

A The said decision was rightly held to have been rendered in the peculiar fact situation of that case in *Shiv Charan Singh* (supra) and *Santosh Yadav* (supra) on, thus, does not constitute a binding precedent.

B In *Santosh Yadav* (supra) this Court held :

C “The learned Senior Counsel for the appellant placed heavy reliance on *Chhedi Ram v. Jhilmit Ram*, [1984] 2 SCC 281 : AIR (1984) SC 146 and submitted that the ratio of the decision squarely applies to the present case and should govern the decision thereof. It was submitted that in *Chhedi Ram* case [1984] 2 SCC 281 : AIR (1984) SC 146 the candidate whose nomination was improperly accepted had obtained 6710 votes which was almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. So also the number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate – a little over 1/3rd. The learned Senior Counsel submitted that on availability of these twin factors it was held by this Court that “the result of the election might safely be said to have been affected”; while the case of the present appellant stands on a much better footing inasmuch as the number of votes secured by Shri Naresh Yadav is almost 59 times of the margin between the votes secured by the appellant and the respondent.

F At the first blush the submission appears to be attractive but is found to be devoid of merit on closer scrutiny. *Chhedi Ram* case [1984] 2 SCC 281 : AIR (1984) SC 146 came up for the consideration of this Court at least on three occasions. In *Shiv Charan* case [1988] 2 SCC 12 : AIR (1988) SC 637, *Tek Chand* case [2001] 3 SCC 290 : [2001] SCC L&S 555 and *J. Chandrasekhara Rao v. V. Jagapathi Rao*, [1993] Supp. 2 SCC 229 this Court has held that *Chhedi Ram* case [1984] 2 SCC 281 : AIR (1984) SC 146 rested “on its own facts” and did not overrule the earlier decisions of this Court, namely, the decisions in *Vashist Narain Sharma* case AIR (1954) SC 513 and *Samant N. Balkrishna*

case [1969] 3 SCC 238 : AIR (1969) SC 1201. In *Chhedi Ram* A  
 case [1984] 2 SCC 281 : AIR (1984) SC 146 not only the  
 proportion of wasted voted was 20 times of the margin, there were  
 six candidates in all in the election fray. The Court formed an  
 opinion that a reasonable probability was raised in favour of  
 holding that the result of the election had been materially affected. B  
 The decision in *Chhedi Ram* case [1984] 2 SCC 281 : AIR (1984)  
 SC 146 does not set out detailed facts and circumstances and the  
 nature of the evidence adduced which may have persuaded the  
 Court in arriving at a finding in favour of the election petitioner.  
 In view of the earlier decisions of this Court existing before C  
*Chhedi Ram* case [1984] 2 SCC 281 : AIR (1984) SC 146 was  
 decided, it cannot be held that merely because the number of  
 wasted votes bears a high degree of proportion to the margin of  
 votes between the winning candidate and the next highest candidate,  
 an inference must always be drawn that the result of the election D  
 was materially affected insofar as the returned candidate is  
 concerned. There must be definite evidence available before the  
 court enabling an inference being drawn as to how the wasted  
 votes would have been distributed amongst the contesting  
 candidates. The court cannot conjecturise or return findings on  
 surmises." E

The view taken by this Court in *Vashit Narain Sharma* (supra) has  
 consistently been followed also in *J. Chandra Sekhara Rao, Uma Ballav*  
*Rath (Smt.), Tek Chand* and a recent decision of this Court in *Harsh Kumar*  
*v. Bhagwan Sahai Rawat and Others*, (2003) 6 SCALE 599. F

The appellant herein has not been able to show that names of how  
 many persons were included after 3 p.m. on 23.4.2001 and how they have  
 exercised their right of franchise. He has also failed to show by adducing  
 any evidence that those persons whose names had been omitted would have  
 voted for the second respondent. The least the appellant could do was to G  
 file an appropriate application before the Tribunal praying for inspection  
 of ballot papers to find out the void votes which had been accepted so as  
 to enable the High Court to arrive at a conclusion how casting of such void  
 votes affected the outcome of sch election. Further for inspection of ballot  
 papers, the election petition must make out a strong *prima facie* case, only H

- A after setting out material facts in the Election Petition and leading evidence to that effect.

- B The learned counsel, however, would submit that such an application was not necessary to be filed as it was the duty of the Court to issue such directions. Reliance in this connection had been placed on *I. Vikheshe Sema* (supra). In that case such an application was filed but no order had been passed in that situation.

- C The fact of the matter obtaining therein was absolutely different. Furthermore, as noticed hereinbefore, therein such an application had been filed and this Court merely held that without passing any order on such an application and without inspection of the ballot papers, the High Court could not have arrived at a finding that the result was materially affected. The fact of that case was converse to the present case.

- D For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly. No costs.

S.K.S.

Appeal dismissed.