

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C)6955/2007 & CM Nos. 13208/2007, 13714/2007
NARENDER KUMAR JAIN ...Petitioner through
! Mr. Jayant Bhushan, Sr. Adv.
with Mr. Amit Gupta, Adv.

-versus-

\$ GOVT. OF NCT OF DELHI ...Respondent through
^ Mr. V.K. Tandon, Adv. for RCS
Mr. R.N. Bhardwaj, Adv. for
Respondent No.3

WITH

W.P.(C)6956/2007 & CM Nos.13209/2007, 14385/2007

NARENDER KUMAR JAIN ...Petitioner through
Mr. Jayant Bhushan, Sr. Adv.
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-versus-

GOVT. OF NCT OF DELHI ...Respondent through
Mr.V.K. Tandon, Adv. for
RCS
Mr. R.N. Bhardwaj, Adv.
for Respondent No.3
Mr. K.C. Mittal, Mr. Anil
Kumar & Mr. Saurabh
Sharma, Adv. for
Respondent Nos.5 & 7

Date of Hearing : 18th September, 2008

% Date of Decision : 21st October, 2008

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE S.L. BHAYANA

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| 1. Whether reporters of local papers may
be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be
reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

J U D G M E N T

1. Learned counsel for the parties submit that the pleadings are complete and on their request we have heard Final Arguments. Therefore, we shall proceed to deliver the Judgment.

2. These Writ Petitions have been filed by nine persons, all of whom were declared elected to the Board of Directors of Respondent No.3, namely, Jain Cooperative Bank Ltd. ('Bank' for short) in the Elections held in December, 2006. The Petitioners have assailed the Order dated 3.8.2007 passed by the Delhi Cooperative Tribunal ('Tribunal' for short) which declared the elections to the Board of Directors of the Bank as void *ab initio* and set it aside. These Orders were passed in Appeal No.171/2006 filed by Respondents 4-6, and in Appeal No.158/N/2006 filed by Respondent No.7. On 21.9.2007 the Division Bench comprising Mukul Mudgal and Reva Khetrapal, JJ. in WP(C) No.6956/2007 had stayed the operation of the said Order dated 3.8.2007. Writ Petition No.6955/2007 assails the Order dated 28.8.2007 of the Registrar of Cooperative Societies appointing an Administrator for the Bank. The same Division Bench had stayed the operation of that Order on the same date, that is, 21.9.2007.

3. Virtually at the end of the arguments an important question has cropped up which we propose to tackle at the very threshold. This conundrum is whether an appeal under Section 112 of the Delhi Cooperative Societies Act, 2003 ('DCS' Act for short) is maintainable; or whether the aggrieved parties ought to have taken recourse to Section 70 of the DCS Act in terms of which ventilation of grievances has been provided for through the aegis of arbitration.

4. Section 112 is found in Chapter-XII which is a pandect comprising Sections 112-117 dealing with "Appeal, Revision and Review". Section 112(1) enumerates the incidents against which an Appeal is maintainable. Sub-Section (d) speaks of "disputes relating to election under section 35"; sub-section (i) refers to "any decision made under section 70". The enumeration covered by Section 112 (a) to (q) are 17 in number, all of which, excepting for sub-sections (d) & (i), refer to decisions/orders that may have been taken under the sundry sections of the statute. Section 70 falls in Chapter-VIII which is a fasciculus dealing with 'Settlement of Disputes'. Section 70(1) commences with a *non obstante* clause and covers any dispute touching the constitution, management or the business of a cooperative society. The generality of this Section is abundantly clear from the fact that the only exception thereto, catered for in the

Section itself, pertains to disputes regarding disciplinary action taken by the cooperative society or its committee against its paid employee. The general application of this Section is not circumscribed by sub-clauses (a) to (d) and is, therefore, illustrative in character. Nevertheless, disputes relating to elections of the officers would be covered by sub-clause (b) which refers to disputes “between a member, past member or person claiming through a member, past member or deceased member and the cooperative society, its committee or any officer, agent or employee of the cooperative society or liquidator past or present;” Election disputes would also clearly fall in sub-clause (a) being controversies “among members”. Sub-section 4 (a) (iv) of Section 70 prescribes that “when the dispute is in respect of an election of an officer of a cooperative society be thirty days from the date of the declaration of the result of the election”. This is also indicative of the position that election disputes are governed by Section 70.

5. Section 35 of the DCS Act covers ‘election and nomination of members of committee’ and lays down in its first sub-section that – “the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of elections of the members of the committee of a cooperative

society shall be vested in the committee which shall appoint returning officer who shall not be a member or an employee of the society". Sub-Section (3) mandates that elections must be held every three years. Sub-section(6) stipulates that – “no person shall be eligible to be elected as a member of the committee of a cooperative society unless he is a shareholder of the cooperative society”. Conspicuously, the Section itself requires that the shareholder seeking election shall not be a defaulter.

6. Section 25(d) prescribes that “if a member is in default of payment of the sum demanded by the cooperative society ... he shall have no voting right in the General Body Meeting of the Cooperative Society”. Explanation I thereto clarifies that the term ‘default’ means any default in payment of loan instalment, land money, construction money and annual subscription payable as provided in the bye-laws of a cooperative society for which due notice for payment has been served on the member or an award has been passed for recovery of such sum. This Explanation, as will become manifest, has generated considerable debate before us.

7. Having given the controversy careful cogitation, our conclusion is that matters relating to the elections would stand covered by Section 70 of the DCS Act. Disputes of this category

must, therefore, be decided through arbitration. On a perusal of the entire gamut of Section 35 disputes arising therefrom would relate to secret ballots, term of office of the elected members, holding or failure to hold elections, eligibility or disqualification for sending for elections and representation on behalf of the Government if it has subscribed to the share capital of cooperative society. This confusion could have been avoided if care had been taken in drafting of Sections 35 and 70. Since it has not been the case of the Petitioners before us at any stage that the Appeal decided by the Tribunal was not maintainable, we think it inexpedient to set aside the impugned Order on this technical ground. It is obvious that all the parties proceeded on the assumption that the Appeal before the Tribunal was maintainable. There can be no gainsaying that it is only in an exceptional case that evidence is recorded by the Appellate Forum. Disputes pertaining to elections invariably raise disputed questions of fact which cannot conveniently be decided in appellate proceedings. This is another reason which has persuaded us to hold that election disputes, under the DCS Act, must be decided through arbitration, as per Section 70 of the DCS Act and against the decision or Award published thereon, an appeal would lie under Section 112. We are fortified in this view by the decision in *New Friends Cooperative House*

Building Society Ltd. -vs- Rajesh Chawla, (2004) 5 SCC 795 where it has been observed that “separate forums are available in the statutory governing and functioning of cooperative society.....Assuming without accepting that the stand taken for the alleged defaulters can be entertained and gone into in the course of conduct of election, it could, if at all, be only for the limited purpose of election and the right of the Society or the member for having their rights and liabilities finally and effectively get adjudicated by arbitration proceedings statutorily provided for under the statute in lieu of proceedings before the civil court, and the conclusions arrived at or recorded in the course of election proceedings shall be only without prejudice to and ultimately subject to all or any such proceedings and decisions by such statutory forums”.

8. This brings us to the debate, the fulcrum of which is the electoral rolls. The Tribunal has dwelt in detail on this contentious issue. Appeals were filed before the Tribunal by Respondent No.7, and jointly by Respondents 4-6. In the proceedings before us, although a *Vakalatnama* has been filed on behalf of S/Shri J.K. Jain and Sanjay Jain, Respondents 4-6 respectively, no representation or argument has been made on their behalf. Respondents 5-7 have been represented by Mr. K.C. Mittal, Mr. Anil Kumar and Mr. Saurabh Sharma,

Advocates. Respondent No.4, who was the erstwhile Chairman of the Society, has obviously discontinued representation in these proceedings for tactical reasons. These reasons palpably are that the Petitioners, of whom Petitioner Nos.2, 5, 8 and 9 were members of the previous Board of Directors, have sought to fasten blame on the previous Management, which included Respondent No.4 as the Chairman, for failure to draw up a proper List of Members. Respondents 5-7, in their own turn, have vociferously attacked the previous Management for these very alleged transgressions and it would have been inconvenient and incongruent for them to do so if Respondent No.4, who had jointly filed the Appeal before the Tribunal with them, was present in these proceedings. In our opinion, neither side can derive any benefit from the actions or inactions of the previous Board of Directors. Malafides, therefore, weigh equally on both sides. Regardless of the fact that Petitioners 1, 3, 4, 6 and 7 were not part of the previous Management, they have now decided to align themselves with Petitioners 2,5,8 and 9. It is indeed ironical that vicissitudes of elections can so quickly transform inveterate bedfellows into strangers, if not virulent adversaries.

9. Mr. K.C. Mittal contends that the widespread errors in the electoral rolls and the fact that Defaulter Members were

permitted by the Returning Officer to cast their votes vitiates the elections so substantially and completely that the Writ Court has no alternative but to countermand them. Mr. Bhushan, learned Senior Counsel for the Petitioners, however, submits that this was not the grievance of the contesting Respondent Nos.5-7 in the Appellate proceedings and could not have been legitimately agitated by Respondent No.4 since he was most intimately and influentially involved in the affairs of the Society at the relevant time. It is for this reason, according to him, that Respondent No.4 has chosen to absent himself from the present proceedings since otherwise he would be guilty of simultaneous approbation and reprobation. The decision in *J.H. Patel -vs- Subhan Khan*, (1996) 5 SCC 312 persuades us to ignore the complaint of Respondent No.4 before the Tribunal, pertaining to so-called Defaulters casting their vote, on the simple premise that he was instrumental more than any other person in this malady since he was at the helm of the management of the Society at the relevant time.

10. Two Constitution Benches have delivered Judgments within a month of each other on this interesting issue, namely, *Jabar Singh -vs- Genda Lal*, AIR 1964 SC 1200 and ***Ram Sewak Yadav -vs- Hussain Kamil Kidwai***, AIR 1964 SC 1249. On a perusal of both the Judgments, it is evident that they are of the

same opinion. For the purposes of the present Petition the gravamen of these decisions is that a petition for setting aside an election must contain an adequate narration of the material facts which the Petitioner relies on to make good his case. It is only when precise pleadings are present that the Tribunal, if *prima facie* satisfied that an inspection of the ballot papers is necessary, should proceed to do so. Flowing from the first proposition, it is palpable that an order of inspection of ballot papers should not be granted to support vague pleas made in the petition not supported by material facts; inspection should not be carried out where the petition is merely a fishing or roving inquiry. As a logical corollary, the onus is always on the petitioner to show that the result of the election has been materially affected as a result of improperly cast votes in favour of the returned candidate or incorrectly refused or illegally rejected votes with regard to any other candidate. **Ram Sewak** was followed in *Sumitra Devi -vs- Shri Sheo Shanker Prasad Yadav*, AIR 1973 SC 215. It was reiterated by the Three-Judge Bench that if the allegations in a petition are vague, and the evidence adduced by the petitioner is found unreliable, it would be inappropriate to inspect the ballot papers. Furthermore, this case lays down that a recount will not be granted as a matter of right. In *Charan Dass -vs- Surinder Kumar*, 1995 Supp (3) SCC

318, also predicated on ***Ram Sewak***, the Petitions were rejected on the ground that even after considering the entire material the allegations were very vague. In *P.T. Rajan -vs- T.P.M. Sahir*, AIR 2003 SC 460 a Three-Judge Bench observed that for obtaining the relief of declaring the election as void it was imperative “to show that amendment, addition, or deletion in electoral roll after 3:00 P.M. on 23.4.2001 had indeed materially affected the result of the election”. The second grievance that counting agents were kept away was also turned down. *T.A. Ahammed Kabeer -vs- A.A. Azeez*, AIR 2003 SC 2271 follows ***Ram Sewak***.

11. In *Santosh Yadav -vs- Narender Singh*, (2002) 1 SCC 160 their Lordships have cautioned against jural interference in the result of an election unless it is pleaded and proved that the result was materially affected by the impropriety complained of. In *Virender Nath Gautam -vs- Satpal Singh*, AIR 2007 SC 581 their Lordships drew a distinction between material facts and particulars. The Petitioner had pleaded by reference to the electoral rolls firstly that persons who had already died had mysteriously cast votes and secondly that there were sixty instances of double votes. It was in these circumstances that the case was remitted back to the High Court for a fresh decision. Most significantly, so far as the case in hand is

concerned, Respondent No.4 had not recorded any objection to the electoral rolls at any previous point in time. We have given careful consideration to the aspect of the proper time to voice objections to any aspect of the election process, and especially to the proper legal remedy in this regard.

12. This brings to the fore what appears to us to be the vexed question of the stage at which the electoral process commences and to the role of Courts in entertaining grievances pertaining to the elections. It is now firmly entrenched in our jurisprudence relating to elections to Parliament and/or to the Legislatures that it is wholly inappropriate and improper for any Court to interdict or impede the completion of the electoral process once it has commenced. The leading authority on this aspect of the law is *N.P. Ponnuswami -vs- Returning Officer, Namakkal Constituency*, AIR 1952 SC 64 : [1952] 1 SCR 218. The Constitution Bench had given full effect to Article 329 of the Constitution of India which proscribes interference at any intermediate stage of elections. This was even in the face of the following pithy passage from *Sarvothama Rao -vs- Chairman Municipal Council, Saidapet*, (1924) ILR 47 Mad. 585 AT 600, which also admirably articulates the reservations which we had entertained:

I am quite clear that any post election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidate. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored, and hence an injunction staying this election was absolutely necessary, unless the relief asked for was to be denied him altogether in limine. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time before the threatened wrong is committed; but when he has succeeded in so doing, the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit.

13. *Ponnuswami* has been favourably received in several subsequent decisions of the Supreme Court of India, including *Dr. Narayan Bhaskar Khare -vs- Election Commission of India*, AIR 1957 SC 694, *Mohinder Singh **Gill** -vs- Chief Election Commissioner*, (1978) 1 SCC 405, *The Election Commission of*

India -vs- Shivaji, AIR 1988 SC 61, *Ram Phal Kundu -vs- Kamal Sharma*, (2004) 2 SCC 759 and ***Manda Jaganath -vs- K.S. Rathnam***, (2004) 7 SCC 492. We have harboured some doubts as to whether this exposition of the law would apply to elections of societies and bodies other than Parliament and Legislatures for two reasons – (a) because the constitutional provision, such as Article 329, do not apply, (b) because the remedy is not legally circumscribed by a statute such as the Representation of the People Act, 1951 and (c) because the electoral rolls are not finalised before the Notification or Declaration of the Elections. Our study, however, discloses that neither of these points is relevant. The conclusions found in Paragraph 25 of ***Ponnuswami*** indicates that their Lordships have not found any distinction between elections to Parliament and Legislatures and other elections, and because it is their opinion that if a statute provides that a remedy shall be before a special Tribunal by means of an election petition, legal recourse should be taken to that remedy alone. This is evident from the following passage:-

25 (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the “election:” and if any irregularities are committed while it is in progress and

they belong to the category or class which, **under the law by which elections are governed**, would have the affect of vitiating the “election” and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.

14. The decision in *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha -vs- State of Maharashtra*, AIR 2001 SC 3982 was rendered in the context of the Maharashtra Cooperative Societies Act, 1960 and the several decisions pronounced on the subject by the Bombay High Court. The Apex Court had observed that the “preparation of the electoral rolls is an intermediate stage in the process of election of the Management Committee of a specified society and the election process having been set in motion, it is well-settled that the High Court would not stay the continuance of the election process even though there may be some alleged irregularity or breach of rules while preparing the electoral rolls”. These observations, however, stand subsequently clarified by their Lordships in *Pundik -vs- State of Maharashtra*, AIR 2005 SC 3746, the facts of which case were that the Managing Committee had decided to send the name of the Appellant instead of Respondent as the delegate to the election

of the apex Society, strictly in conformity with the Rules and Regulations. The Collector, however, refused to recognise the change of the delegate. The High Court took the view that the preparation of the electoral rolls or voters' list, being an integral process of election, precluded the Court from interfering at that stage. After advertng to ***Sant Sadguru*** their Lordships in ***Pundik*** noted that "normally the High Court would not interfere in exercise of powers under Article 226 of the Constitution at the stage of preparation of list of voters but such action must be in accordance with law". ***Sant Sadguru*** was distinguished and the decision of the High Court declining to exercise jurisdiction under Article 226 of the Constitution of India was set aside. So far as the election of cooperative societies in Delhi are concerned, Schedule-II of the repealed legislation as well as the extant statute and Rules, postulates the preparation of the electoral rolls or voters' list together with the defaulters' list are required to be forwarded to the Registrar, thirty days prior to the elections. This is obviously so ordained in order that remedial action that can be taken by any aggrieved party. This hiatus or interregnum is not a meaningless one. The position in Maharashtra and Delhi is different in essential respects. Since none of the learned counsel for the parties have argued that an infraction of Schedule-II has occurred in that the List(s) had not

been forwarded to the Registrar within the stipulated period, we do not think it proper to apply these observations to the case in hand.

15. *Manda Jagnath* was also delivered by the Apex Court in the context of Article 329 of the Constitution of India and the Representation of the People Act, 1951 in a factual matrix where the Returning Officer had declined to permit the use of an election symbol to one of the candidates who had to stand as an independent and not as the official party candidate. Their Lordships opined that the Returning Officer had exercised the discretion vested in him in a proper and sound manner, and accordingly the High Court was not justified in interfering with his decision. The Court's analysis was that both ***Ponnuswami*** and ***Gill*** had not totally prohibited any intervention by the High Court under Article 226 of the Constitution. Their Lordships thereafter succinctly enunciated the law in these words:-

18. Of course, what is stated by this Court hereinabove is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains that such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Article

226 of the Constitution should not interfere with the orders of the Returning Officers, remedy for which lies in an election petition only.

What is significant is that if the Supreme Court proscribed all and every interference by the Writ Court in the election process *a fortiori*, where there is no statutory embargo prescribed against the conduct of elections jural interference as a consequence of an intercession by a candidate in any other election should not be rejected or repulsed by the Court especially where it appears that the election would eventually be nullified. Large scale irregularities in the Electoral Rolls would certainly call for injunctory relief.

16. Shutting out of interference by a Writ Court at an intermediate stage of elections to Parliament or the Legislatures is predicated on pragmatism and therefore the Court should be circumspect in impeding the conclusion or culmination of the election process even to other bodies. The Court must constantly be vigilant not to entertain frivolous or malafide litigation. There is no gainsaying that the endeavour of persons in power is to perpetuate their tenures by idle and disguised jural challenges to the conduct of the elections. In *L. Chandra Kumar -vs- Union of India*, AIR 1997 SC 1125, a Seven-Judge Bench, the Supreme Court has struck down statutory restraints

to writ petitions reiterating that the extraordinary jurisdiction of the High Courts under Article 226 of the Constitution of India is the repository of judicial conscience and therefore brooks no suppression. However, this extraordinary jurisdiction should not be trivialized or made mundane. So far as elections to bodies, other than Parliament and the Legislatures are concerned, it would be salutary and in public interest to ignore trivial infractions and concentrate on serious violations which have the effect of completely frustrating the object of the elections. Run of the mill complaints can completely and comprehensively be considered by the Court after the conclusion of the elections. However, if it is patently clear that the process adhered to by the Returning Officer is likely to prevent and not promote an election, judicial review would facilitate the flow rather than stopping the stream. Refusing to intervene may, in such cases, result in there effectively being no elections at all. We are really making no departure or deviation from the law declared by the Supreme Court in directing that in the context of election of societies or bodies other than Parliament and the Legislatures, the electoral process should be seen to commence only after the finalisation of the electoral rolls. There must be a hiatus between this exercise and declaration or notification of the schedule of elections. At the second stage the Writ Court or the

Civil Court would interfere with the election process in very rare or extraordinary situations. Since there are no statutory constraints in the exercise of jurisdiction of the Writ or Civil Courts so far as elections to societies and other bodies are concerned and keeping in perspective the fact that post the declaration of the result of election the aggrieved party must show that the act complained of has materially affected the outcome of the election, curial concern is not completely curtailed. A challenge to the electoral rolls should properly be brought within the hiatus between the completion of the electoral rolls and the declaration of the schedule of elections. There may still be circumstances in which Courts may interdict the elections, for example, where the Returning Officer has erroneously permitted a voter to cast more than one vote since this erroneous decision or practice may not have manifested itself only after the schedule of elections has been publicised. However, this would be one of the extreme, extraordinary or rare instances where the Court would be competent to redress the grievance, even though it may have the consequence of delaying the election for a short period. After all, there is no purpose in punctiliously conducting or going through the motions of an election, if it is ultimately found that a legally proper, sustainable and meaningful election has not been held.

A reading of DCS Act, 2003, as well as its precursor, shows that a hiatus between the preparation of the electoral rolls and the Notification of the elections has been preserved. Section 35 of the DCS Act, 2003 clarifies that the superintendence, direction and control of the preparation of the electoral rolls vests in the Committee. For the present purposes, Schedule-II which prescribes the procedure for the conduct of elections of the Committee, *inter alia* envisages that it is the Committee that shall prepare a List of Members as it stood on thirty days before the date fixed for the inviting of nominations and shall publish this List not less than ten days prior to the date fixed for inviting nominations. The repealed Rules are substantially similar except that the time allotted earlier was forty-five days for publishing the List. It is our opinion that the repealed as well as extant statutes and rules consciously place a bifurcation between the preparation of the Lists and the commencement of the electoral process. The electoral process starts with the invitation of nominations, appointment of a Returning Officer and the notifying of the schedule of elections. Although this is not one of the points raised before us in these proceedings, we direct that the above analysed provisions of the Act and the Rules must be meticulously maintained in all elections of cooperative societies to which the DCS Act applies.

17. We would like to emphasise that an aggrieved party must record its objections to any perceived irregularities in the elections; nay it must reduce its remonstrations into writing before the Returning Officer as a pre-condition for challenging the elections after their culmination. This is what has not happened in the case in hand obviously because the persons who were in control of or responsible for the management of the Society were themselves in default. Indeed, the erstwhile office-bearers are now on either side of the watershed of the array of parties because some have succeeded whilst others have failed.

18. There are two other factors which have weighed heavily on our minds. The first of them is that none of the parties before us have even faintly touched upon the aspect of whether the persons on the Defaulters' List had or had not paid their dues in response to the opportunity afforded for this purpose by the Returning Officer and thereafter had exercised their right of franchise. It is not in controversy that the Returning Officer, in the Agenda Notice dated 17.10.2006, had informed all concerned that if the defaulter members "make the payment of their amount in default before the date of the filing of nomination to the bank and produce the proof thereof before the Returning Officer, they will not be treated as defaulters and shall be allowed to contest the election and/or cast their vote. It

is notified that the Bank has supplied a list of defaulter members which is available with the Returning Officer and displayed at Notice Board of Bank and/or of the Returning Officer and can be inspected by members before filing of nominations". In writ proceedings it would not be proper for us to go into this question on our own initiative and especially so, since it has not been dealt with in the pleadings. The other aspect is that there are hundreds of members on the Defaulters' List against whom arbitration proceedings are not pending, or an Award had not been pronounced, or execution proceedings had not been initiated, or complaints under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act' for short) were not pending, or any other civil action had been initiated. The interpretation of Explanation I, which commends itself to us, is that these persons would have been eligible to participate in the elections in any capacity. The number of members falling in this category are indeterminate and, therefore, we ought not to walk down this avenue in writ proceedings.

19. Mr. Mittal has drawn our attention to a Single Bench decision of Punjab & Haryana High Court in *The Batala, Wood Works Co-operative Industrial Society Limited -vs- The Registrar Co-operative Societies, Punjab, Chandigarh*, 1978 P.L.J. 344. It does not advance the case of the Petitioners even a

whit for the simple reason that none of the contesting Respondents had recorded their objections to the preparation of the electoral rolls or to the factum of defaulting members being allowed to cast their votes. Although the decision in *Election Commission of India -vs- Ashok Kumar*, AIR 2000 SC 2977 is included in the cases cited on behalf of the contesting Respondents, Mr. Mittal has obviously not adverted to it since the ratio militates against the interests of the Respondents. Their Lordships had reiterated that it was improper for the High Court to direct suspension of the Notification amidst progress of election proceedings. The same opinion has been expressed in *Madhukar Ganpatrao Somvanshi -vs- Sheshrao Narayanrao Biradar*, [(3) Co-op. Cases 293] where it has been observed by the Division Bench that it is “very vital for the public administration that elections are held in time according to the schedule notified and that they are not delayed on account of individual grievances of a candidate”.

20. Although *Bar Council of Delhi -vs- Surjeet Singh*, AIR 1980 1612 has been relied upon by Mr. Mittal, Mr. Bhushan, in Rejoinder, has justifiably contended that it is actually in favour of the contentions of the Petitioners. Mr. Mittal had argued that principles of estoppel cannot be applied against the Respondents on the strength of this decision since it was held

that merely because the petitioner had stood as a candidate or had exercised his franchise, he would not automatically be precluded from challenging the election which had been held on the basis of what was found to be an illegally prepared electoral rolls. The distinguishing feature of the ***Bar Council of Delhi*** is that that case was not one “of challenging the preparation of the electoral rolls on the factual basis of wrong exclusion of a few names.....The illegal preparation of the electoral rolls by the Delhi Bar Council on the basis of the invalid proviso to Rule 3(j) goes to the very root of the matter and no election held on the basis of such an infirmity can be upheld.....The contesting respondents could not be defeated in their writ petitions on the ground of estoppel or the principle that one cannot approbate or reprobate or that they were guilty of laches”. So far as the present case is concerned, none of the Respondents had objected to the preparation of the electoral rolls or to the Returning Officer allowing so-called Defaulters to cast their votes. Entertaining this plea, post the declaration of the Elections at the instance of the defeated candidates, would amount to approbation or reprobation which Courts have always looked at askance. We, therefore, find no merit in the arguments raised by the Respondents. The grievance of Respondent No.7, who lost by two votes, is, therefore, devoid of merit.

21. We think it important to clarify Explanation I to Section 25(d) of the DCS Act. Reference to the existence of an Award poses no problem. The rather nebulous phrase “due notice of payment”, however, leads legitimately to debate. The necessity for issuing a notice to the affected member for payment of dues, being an incidence of the *audi alteram partem* rule, brooks no dissent. The format of legal notices, however, is amorphous. In the present case, learned counsel for the Respondents have contended that several members were issued notices under Section 138 of the NI Act and legal proceedings had also been initiated thereafter, much before the present elections. Wherever this is so, or if litigation of any nature has commenced, we think that the *audi alteram partem* rule stands satiated and satisfied since the member defending such legal action would be fully aware that so far as he is concerned, the Society considers him to be a Defaulter. We clarify that these observations have been made as a general clarification of the said Explanation even though it could not be applied to the present controversy since this is not one of the principal or original grounds on which the election had been challenged before the Tribunal. The question of failure to issue notices to the Defaulters was raked up only in the Rejoinder filed before the Tribunal, thereby frustrating, if not foreclosing any

opportunity that the Petitioners may have had to completely controvert the accusations. *Jeet Mohinder Singh -vs- Harminder Singh Jassi*, 1999(9) SCC 386 is an authority deprecating the introduction of fresh grounds at the Rejoinder stage. In any event, it would be speculative and presumptuous for any person to contend that the whole or the majority of persons erroneously included in the electoral rolls would have voted in a particular manner or for a particular candidate. In *Paokai Haokip -vs- Rishang*, AIR 1969 SC 663 there was not merely a change of the venue but also disturbance and firing in the Constituency. The Court repulsed and rejected the argument that the voters who could not exercise their franchises would have voted for a particular candidate. It was opined that – “it is not possible for anyone to predicate how many or which proportion of votes will go to one or the other of the candidates”. Similar views have been expressed in *Shyamdeo Pd. Singh -vs- Nawal Kishore Yadav*, AIR 2000 SC 3000 in these words:

24. To sum up we are of the opinion that inclusion of person or persons in the electoral roll by an authority empowered in law to prepare the electoral rolls though they were not qualified to be so enrolled cannot be a ground for setting aside an election of a returned candidate under sub-clause (iii) or (iv) of clause (d) of sub-section (1) of Section 100 of the Representation of the People Act, 1951.

A person enrolled in the electoral list by an authority empowered by law to prepare an electoral roll or to include a name therein is entitled to cast a vote unless disqualified under sub-sections (2) to (5) of Section 62 of the Representation of the People Act, 1951. A person enrolled in the electoral roll cannot be excluded from exercising his right to cast vote on the ground that he did not satisfy the eligibility requirement as laid down in Section 19 or 27(5) of the Representation of the People Act, 1951.

22. There is no inflexible rule that a recount must be ordered in every case where the margin of success or defeat is slender and extremely narrow. The discretion to do so is vested in the Returning Officer. A Writ Court, or even an appellate forum for that matter, would be justified in entertaining such a plea only if malafides or nepotism or favouritism or bias has been attributed to the Returning Officer. This is absent in the case in hand. No further discussion is necessary in the light of *R. Narayanan -vs- S. Semmalai*, (1980) 2 SCC 537. Their Lordships opined first that “recount should be ordered not on possibility of error but when the matter is proved with absolute certainty” and second that a narrow margin “would not by itself vitiate the counting of votes or justify recounting of the votes”.

23. Reliance has also been placed on the decision of the Constitution Bench in *Kirpal Singh -vs- Uttam Singh*, (1985) 4 SCC 621 where it has been opined that an election may be set aside if the fault is ascribable to the winning candidate and no contributory fault can be laid at the door of the losing candidate. As we have repeatedly noted, Respondent No.4 was the Chairman of the Society and it was his responsibility to ensure that a true electoral roll was prepared. This was also the responsibility of half the Petitioners (who have again succeeded in the election). So far as these parties are concerned, they were equally blameworthy and cannot be heard to complain against each other. Half the Petitioners, however, have legitimately succeeded in the elections and if these are countermanded, newly elected members would suffer for no fault of their own. This is also an important factor which has persuaded us in allowing the Writ Petitions. So far as the Tribunal is concerned, it has returned a finding which is not entirely correct to the effect that both sides were well aware of the irregularities but had chosen not to object in the hope that they would win the elections.

24. Finally, we must consider the complaint of misconduct in the manner in which the Ballot Boxes were handled and

the counting of ballots was completed. As has already been noted above, pleadings must be precise and should unambiguously articulate and spell out the grounds that are sufficiently significant to countermand the elections. These writ proceedings have been actively and properly contested by Respondents Nos. 5 and 7 only. We may reiterate that Respondent No.7 was essentially aggrieved by the fact that a recount had not been allowed by the Returning Officer. The legal regime governing a demand for a recount has already been dealt with by us above. We also think it necessary to reiterate the fact that Respondent No.4 has not contested these proceedings after filing his Counter Affidavit. Respondent No.6 chose the same course of conduct as Respondent No.4. That leaves us with Respondent No.5 who pleaded before the Tribunal that "no proper account of the ballot paper used and found in the boxes was kept by the Ld. Presiding Officer when the counting was over, one of the agents of the appellants observed that number of used and stamped ballot papers were lying in a corner.....This material irregularity has vitiated the election and there is reason to believe that other papers may have not been accounted for similarly.....That the Ld. Presiding Officer postponed the counting of the votes which was resented by the

appellants and other contestants for the reason that the same left scope for manipulations.....It was observed that the identification slips were issued in bulk by the interested elements and the same were misused for casting bogus votes in connivance with certain employees of the bank". These pleadings are far too vague to persuade us to set aside the elections. For example, the name of the agent should surely have been mentioned. Furthermore, it is not that the mishappenings had not been taken heed of by the Returning Officer. He has himself mentioned that these disturbances had occurred when counting had commenced on 3.12.2006. He has stated that it was for this reason that he postponed counting, even in the face of the opposition of some of the Petitioners and Respondents No.4-7. The Returning Officer has been vehemently and categorically assertive in stating that after the counting had resumed on the following day, that is, 4.12.2006, it was concluded to his satisfaction. There is no material before us which would have us hold that the certification of the Returning Officer is flawed. On the contrary, the manner in which he has conducted the elections has been found fault with only by the defeated candidates who obviously have not been able to swallow their defeat.

25. The opinion of the Supreme Court that the results of an election should be interfered with only on a firm foundation should not be overlooked. That there is insufficient material available before us is fortified by the simple fact that those who were responsible for the conduct of the elections, had the responsibility of drawing up the Defaulters' List; and that those who had recorded objections before the said Returning Officer are no longer fellow travellers. Support and opposition to the legitimacy of the impugned elections hangs in balance. It underscores the reality that the manner in which a voter casts his franchise is always uncertain and unpredictable. Half the Petitioners themselves had complained against the conduct of the elections, possibly on their prognosis of the result. The result has surprised them and now they predicate that no error, whatsoever, had occurred. The erstwhile Chairman, having lost the elections, has joined the bandwagon of other defeated candidates to cry that elections were foul. In these nebulous circumstances, we are of the opinion that the Tribunal erred in coming to a conclusion that the elections were void *ab initio*. The Tribunal obviously did not have the benefit of the wisdom of the Supreme Court.

26. In these circumstances, the Writ Petitions are allowed. The Order of the Tribunal is set aside. The appointment of the Administrator is set aside. The interim arrangement made by the previous Division Bench vide Orders dated 21.9.2007 is made absolute. We uphold the declaration of the results of the elections held on 3.12.2006. These results must be given effect to.

27. Writ Petitions are allowed in the above terms, leaving the parties to bear their individual costs.

(VIKRAMAJIT SEN)
JUDGE

October 21, 2008
tp

(S. L. BHAYANA)
JUDGE