

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No. 8770 of 2007 & CMs 16533/07, 42/08

Reserved on: February 19, 2010

Decision on: April 13, 2010

BINA SHARMA Petitioner

Through: Mr. Alok Kumar, Advocate.

versus

ANITA & ORS. Respondents

Through: Mr. K.C. Mittal with Ms. Ruchika Mittal, Mr. Sujeet Kumar Singh and Mr. Love Dixit, Advocates for R-1.

Mr. Mr. Suresh Tripathy with
Mr. Ghanshyam Yadav, Advocate
for Returning Officer.

AND

W.P.(C) No. 7914 of 2007 & CM 14946/2007

RETURNING OFFICER Petitioner

Through: Mr. Suresh Tripathy with
Mr. Ghanshyam Yadav, Advocate.

versus

BINA SHARMA & ORS. Respondents

Through: Mr. Alok Kumar, Advocate for
Respondent No.1.

Mr. K.C. Mittal with Ms. Ruchika Mittal,
Mr. Sujeet Kumar Singh and Mr. Love
Dixit, Advocates for R-8.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed
to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the digest? Yes

J U D G M E N T

**W.P.(C) Nos. 8770 & 7914 of 2007 & CM Nos. 16533 & 14946 of
2007 (for stay) & 42 of 2008**

1. These two petitions are directed against the judgment dated 6th
October 2007 passed by the learned Additional District Judge

(‘ADJ’), Delhi in Election Petition No. 52 of 2007. By the said impugned judgment the election petition of the Respondent No.1 Smt. Anita under Sections 15, 17 and 19 of the Delhi Municipal Corporation Act, 1957 (‘DMC Act’) read with Municipal Corporation of Delhi Election of Councillors Rules, 1958 (‘EC Rules’) was allowed declaring the Petitioner Bina Sharma, the returned candidate in respect of Ward No. 220 (Patparganj) as not qualified to be chosen as Councillor under the DMC Act in view of the fact that she was not registered as an elector in the electoral rolls for the Ward and that the acceptance of her nomination paper by the Returning Officer (‘RO’) was improper.

2. Writ Petition (Civil) No. 8770 of 2007 was filed by the returned candidate Bina Sharma. Writ Petition (Civil) No. 7914 of 2007 was filed by the RO, aggrieved by the adverse comments made against him in the impugned judgment.

3. The facts are that the Notification announcing elections to the different Wards of the Municipal Corporation of Delhi (‘MCD’) was issued on 10th March 2007. The Petitioner Bina Sharma, who resides at 51, Sahyog Apartments, Mayur Vihar Phase I, Delhi-110091 filed her nomination paper on 17th March 2007 in which she gave her address as 140 D, Pocket 4, Mayur Vihar I, Delhi. She furnished the certified copy of the electoral roll for the Patparganj MCD Ward in which her name was entered at Serial No. 798 in Part 84. Along with a certified copy of the electoral roll (as certified on 12th March 2007)

she filed an affidavit dated 15th March 2007 again disclosing her address as 140D, Pocket 4, Mayur Vihar I, New Delhi. She filed a copy of her voter identity card also indicating the same address.

4. It appears that one day prior to 17th March 2007 (the last date for filing nominations), on 16th March 2007 an order was passed by the Electoral Registration Officer ('ERO') deleting the name of the Petitioner from the electoral roll. However, the supplementary electoral roll showing the deleted names was published only on 4th April 2007. Therefore on 19th March 2007 the date on which nomination papers of the Petitioner were taken up for scrutiny by the RO, the supplementary electoral roll was not available. Consequently the RO proceeded on the basis that the Petitioner's name figured in the electoral roll going by the certified copy thereof issued by the ERO on 12th March 2007. The date of polling was 5th April 2007. When the petitioner reached the polling booth on that date she was informed that her name did not figure in the electoral roll. She was accordingly not permitted to cast her vote.

5. The Petitioner won the election by margin of 1639 votes and was declared elected from Ward No. 220 Patparganj. The Respondent No.1 who also contested the election was the losing candidate.

6. The Respondent No.1 applied to the District Election Officer (East) under the Right to Information Act, 2005 ('RTI Act') seeking information whether the name of the Petitioner figured in the electoral

roll of Ward No. 220 Patparganj on 15th March, 16th March & 17th March 2007. In response to the said application, the ERO replied on 25th June 2007 that the Petitioner was an elector on 15th March 2007 as her name figured in the electoral roll. However, on 16th March 2007 her name was deleted from the voters' list as she was not found residing at the given address. On 17th March 2007, a supplementary list was issued deleting her name from the electoral roll.

7. On 23rd April 2007, Respondent No.1 filed the Election Petition No. 52 of 2007 seeking a declaration that the election of the Petitioner was void and that the Respondent No.1 should be declared as having been duly elected. The principal ground on which the election was challenged was that on the day she filed her nomination papers, the Petitioner's name did not figure in the electoral roll of Ward No.220 and this was a mandatory requirement under Section 8 of the DMC Act. Further it is pointed out that on the polling day, since the Petitioner's name was not in the voters' list, she was not allowed to cast her vote. Therefore, she was aware by that date that her name stood deleted from the voter's list and yet she did not challenge the said decision of the ERO.

8. In the written statement filed by the Petitioner, it was contended that it was the electoral roll as of 17th March 2007 which had to be looked into for the purposes of deciding on the validity of the petitioner's the election. Any change made illegally in the electoral roll after 17th March 2007 and before 5th April 2007 had to be ignored.

It was further pleaded that “the mere wrong acceptance of the nomination papers is itself no ground for setting aside the election if the same has not materially affected the result of the election.”

9. A written statement was filed by the RO who was arraigned as Respondent No.8 to the Election Petition. In it, it was stated that the Petitioner was issued a certificate by the ERO on 13th March 2007 to the effect that she was a voter of the Ward. It was maintained that the candidature of the Petitioner was valid notwithstanding the fact that her name is found in the deletion list that was published subsequently. It was pointed out that the deletion list was not received by the RO at the time of scrutiny of the nomination papers and no objection was raised by the Respondent No.1 herein at the time of scrutiny.

10. On 1st October 2007, an order was passed by the learned ADJ for production of the relevant record regarding the electoral roll of Ward No. 220 Patparganj. On the next date i.e. 4th October 2007, the RO was present along with the relevant records and he was examined under Order X CPC. On the same date the documents obtained by the Respondent No.1 under the RTI Act were placed on record and copies were supplied to the Petitioner herein. On 5th October 2007 the following issues were framed:

“1. Whether the respondent no. 1 was qualified to be elected and was a registered elector as per Section 8 of the DMC Act in the electoral roll for the ward on the date of nomination i.e. 17.3.2007. (OPP)

2. Whether the petitioner is entitled to be declared as the returned/elected candidate? (OPP)

3. Relief.”

11. The impugned order notes that after the issues were framed, Respondent No.1 herein gave up Issue No.2. Therefore, only two issues remained for decision i.e. Issues 1 and 3. The learned ADJ concluded that on the basis of the statement made by the RO under Order X CPC, that the Petitioner was not an elector on 17th March 2007 i.e. the date of filing her nomination papers in view of the special supplementary list issued to reflect the position as on that date. It was further held that since the certified copy of the election roll was a public document in terms of Section 76 of the Evidence Act, 1872 ('EA'), no formal proof was required of the said document under Section 77 EA. Under Section 17(a) of the DMC Act, if on the date of election of the returned candidate such candidate is not qualified to be chosen as a Councilor then the Court has to declare the election of such candidate to be void. It was concluded that the nomination paper of Petitioner had been improperly accepted. In this connection, the learned ADJ passed certain adverse remarks against the RO. The election of the Petitioner was declared to be void on account of the improper acceptance of the nomination papers. It was left open to the State Election Commission ('SEC') to proceed in accordance with law as regards the rights of the remaining contesting candidates.

12. This Court has heard the submissions of Mr. Alok Kumar, learned counsel appearing for the Petitioner and Mr. K.C. Mittal, learned counsel appearing for the Respondents.

13. Referring to the relevant provisions of the DMC Act, Mr. Alok Kumar submits that the copy of the voters' list produced by Respondent No.1 to show that the name of the Petitioner had been deleted was in fact not a certified copy. It is pointed out that the MCD did not prepare the electoral roll. In terms of Section 7E of the DMC Act, the MCD adopted the electoral roll of the Assembly Constituency prepared by the Election Commission of India. It was pointed out that in terms of Rule 32 read with Rule 2(d) of the Delhi Municipal Corporation (Preparation of Electoral Rolls) Rules, 1960 that the custody of the voters list is with the ERO of a constituency. Therefore, the RO was only provided with a copy of the voters list by the ERO. Section 76 of the EA requires that a public officer having the custody of a public document shall provide a certified copy of it on demand. Accordingly, it is submitted that the copy of the voters' list placed on record in the present case was signed by the RO and thus was not a certified copy. It is further pointed out that the certificate of the RO did not contain a statement that it was true copy. In this connection, reliance was placed on the decision of this Court in *Srichand P. Hinduja v. State* 121 (2005) DLT 15.

14. It is next submitted by Mr.Alok Kumar that the Petitioner had denied the copy of the voters' list during the admission/denial of documents. The Petitioner had suggested an issue whether the said voters' list could be considered to be a certified copy. The voters' list, therefore, had not been proved in accordance with law. It is further

pointed out that some of the electoral rolls which were not in force at the time of filing of the nomination papers had been produced; 16 pages were missing from the original electoral roll and some loose papers were tagged together. Thus factually also it could not be considered to be the actual voters' list. The evidence of the RO showed that the electoral roll which had been prepared by the SDM, Vivek Vihar was in fact the same as was prepared by the SEC. It was on that basis that the RO had accepted the electoral roll. The supplementary electoral roll was published only on 3rd April 2007 one day prior to the date of polling by which time the scrutiny of nomination papers had concluded. It was submitted that there was no evidence to show that the name of the Petitioner was deleted after 12th March 2007 and before 3 pm on 17th March 2007. A reply to the RTI query which indicated that the Petitioner's name was deleted on 16th March 2007 was not put to the Petitioner during admission/denial of documents and no statement on oath was recorded. It is stated that the RTI reply cannot by itself form the basis of the impugned judgment.

15. It is submitted that the onus of proof in an election petition is always upon the Petitioner. The standard of proof is rigorous. In support of this submission the counsel for the Petitioner relied upon the judgment in *Mullapudi Venkata Krishna Rao v. Vedula Suryanarayana AIR 1994 SC 1627*. It is submitted that after 3 pm on 17th March 2007, the voters' list could not be touched till the declaration of the results. Reliance is placed on the judgment in *Baidyanath Panjira v. Sita Ram Mahto AIR 1970 SC 314* and

16. Referring to Rule 15(4) of the DMC EC Rules it is submitted that as on the date of scrutiny of the nomination papers, the RO had to only satisfy himself that the Petitioner's name was in the voters list. Under Rule 18(2) (a) he has to satisfy himself that the Petitioner was a voter as per the electoral roll available with him. The written statement clearly mentioned that as on that date he did not have a certified copy of the supplementary list. Therefore no error was committed in accepting the nomination papers of the Petitioners. It is further submitted that even if it were assumed that the name of the Petitioner stood deleted before 3 pm on 17th March 2007, the minimum that could be expected was that the decision had to be conveyed to the RO and the political parties. However, there was no publication as such of the supplementary list prior to 3 pm on 17th March 2007. It is submitted that on the basis of the evidence adduced in the petition, the election Petitioner i.e. the Respondent No.1 herein has failed to prove her case.

17. Mr. K.C. Mittal, learned counsel appearing for the Respondent No.1 states that in terms of Section 8 DMC Act all that had to be examined was whether on the last date for filing of nomination papers i.e. 17th March 2007 up to 3 pm whether the name of the Petitioner figured in the electoral roll. If it did not, then no amount of interpretation can save the election of the Petitioner. It had clearly come in evidence that as up to 3 pm on 17th March 2007, the

Petitioner's name did not figure in the electoral roll. The Petitioner is unable to show any document to the contrary. There was a separate procedure for adding and deleting entries in the electoral roll. If the Petitioner was unhappy with such procedure, the Petitioner should have appealed. She had not done so till date. Considerable reliance was placed in *Baidyanath Panjira, Narendra Madivalapa Kheni v. Manikrao Patil AIR 1977 SC 2171* and *P.T. Rajan v. T.P.M.Sahir AIR 2003 SC 4603*. It is further submitted that it was perfectly possible for the RO's statement to be recorded under Order X CPC by the learned ADJ and that evidence remained unrebutted. No objection was raised to the said evidence being recorded and also the Petitioner did not lead any evidence. Therefore despite having an opportunity to object to the statement of the RO and to lead evidence to show that her name figured in the electoral roll as at 3 pm on 17th March 2007, the Petitioner did not avail of that opportunity. It is finally submitted that this Court under Article 226 of the Constitution is not exercising powers of an Appellate Court and, therefore, the above factual finding that the Petitioner's name did not figure in the electoral roll as on 17th March 2007 did not call for any interference. Mr. Mittal added that as far as the petition of the RO was concerned, he was leaving it entirely to the Court to decide whether the remarks made against the RO by the learned ADJ was justified or not.

18. In light of the above submissions, this Court is required to first determine if the findings of the learned ADJ on Issue No.1 were correct. Although it has been argued that the scope of the proceedings

under Article 226 of the Constitution is narrow, this Court would like to observe that unlike Section 116-A of the Representation of People's Act, 1951 ('RP Act 1951') which provides a statutory appeal against the decision of the learned Single Judge of a High Court deciding an election petition, there is no appeal provided under the DMC Act against the decision of a learned ADJ in an election petition. Although Article 226 of the Constitution permits the Court only to interfere when the appreciation of the evidence by the subordinate judicial authority is perverse or there is violation of the principles of natural justice or on account of malafides, in a petition challenging the order of a District Judge in an election petition, the High Court will have to examine if the evidence led before the District Court was correctly appreciated by the learned ADJ. This is what this Court proposes to do in this petition.

19. First, this Court would like to refer to Section 7E of the DMC Act which reads as under:

“7E. Preparation and revision of electoral rolls

(1) The Electoral roll for each ward shall be prepared before each general election in such manner as may be prescribed by rules by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made for the purpose:

Provided that if the [Election Commission] is satisfied that, instead of preparing a fresh electoral roll of a ward before a general election, it would be sufficient to adopt the electoral roll of [the

assembly constituency] for the time being in force as relates to the ward, it may, by order, for reasons to be specified therein, direct that the electoral roll of [the assembly constituency] for the time being in force as relates to the ward shall, subject to any rules made for the purpose, be the electoral roll of the ward for the general election.

(2) The electoral roll prepared or adopted, as the case may be, under subsection (1) shall—

(a) unless otherwise directed by the [Election Commission], for reasons to be recorded in writing, be revised in the manner prescribed by rules by reference to the qualifying date before each bye-election to fill a casual vacancy in a seat allotted to the ward; and

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

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.

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

Provided that the electoral roll for the ward 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.

Explanation:--In this section, the expression "qualifying date" means such date as the Election Commission may, by order, specify in this behalf.

20. Section 7G of the DMC Act reads as under:

7G - Inclusion of names in electoral roll

(1) Any person whose name is not included in the electoral roll of a ward may apply to the electoral registration officer for the inclusion of his name in that roll.

(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 ward, the electoral registration officer shall inform the electoral registration officer of that other ward and that Officer shall, on receipt of the information, strike off the applicant's name from that roll.

(3) No amendment, transposition or deletion of any entry shall be made under section 7F and no direction for the inclusion of a name in the electoral roll of a ward shall be given under this section after the last date for making nominations for an election in that ward and before the completion of that election.

21. Section 8 of the DMC Act reads as under:

8 - Qualifications for councillorship

A person shall not be qualified to be chosen as a councilor unless he has attained the age of twenty one years and his name is registered as an elector in the electoral roll for a ward:

Provided that in the case of a seat reserved for the Scheduled Castes, a person shall not be so qualified unless he is also a member of any of the said castes:

Provided further that in the case of a seat reserved for woman, no person other than a woman shall be qualified to be chosen as a councillor.”

22. Rules 15 and 18(7) of the Delhi Municipal Corporation (Election of Councillors) Rules, 1958 read as under:

“15.Presentation of nomination paper and requirements for a valid nomination- (1) On or before the date appointed under Clause (a) of Rule 11 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 afternoon. Deliver to the returning officer at the place specified in this behalf in the notice issued under Rule 12, a nomination paper completed in Form 2 and signed by the candidate and by an elector of the ward as proposer.

“Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a ward unless the nomination paper is subscribed by ten proposers being electors of the ward”.

(2) In a ward where any seat is reserved, a candidate shall not be deemed to be qualified to be

chosen to fill that seat unless his nomination paper contains a declaration made by him specifying the particular caste of which he is a member.

2(A) In a ward where any seat is reserved for woman, a candidate shall not be deemed to be qualified to be chosen to fill that seat unless her nomination paper contains a declaration made by her that she is a woman.

(3) Where the candidate is a person who having held any office referred to in Clause (K) of Sub-section (1) of Section 9 has been dismissed and a period of four years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate Certificate issued by the Central government that the disqualification has been removed or by a certificate issued by The Election Commissioner, Election Commission of the National Capital Territory of Delhi to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall, satisfy himself that **the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral roll:**

Provided that the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers and other particulars to be corrected in order to bring them in conformity with the corresponding entries in the electoral roll and where necessary, direct that any clerical or printing error in the said entries shall be overlooked.

(5) Where the candidate is an elector of a different ward, a copy of the electoral roll of that ward or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the scrutinising officer at the time of scrutiny.

(6) Nothing in this rule shall prevent any candidate from being nominated by more than one nomination paper.

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same ward.

18. Scrutiny of nomination:

(7) For the purposes of this rule, a certified copy of any entry in the electoral roll for the time being in force of a ward shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that ward unless it is provided that he is subject to any disqualification mentioned in Section 16 of the *Representation of the People Act, 1950* (43 of 1950).” (emphasis supplied)

23. In terms of Section 7E DMC Act, the electoral roll has to be prepared with reference to the qualifying date and such electoral roll comes into force immediately upon its final publication in accordance with Rules. In terms of the proviso to Section 7E, the SEC need not prepare a fresh electoral roll if it is of the opinion that it is safe to adopt the electoral roll of the Assembly Constituency for the time being in force as relates to the Ward in question. That is what has happened in the present case where the ERO has adopted the electoral

roll of the Patparganj Assembly Constituency. Under Section 7E (2) DMC Act the electoral roll can be revised and till its revision its validity continues. Under Section 7F(c) DMC Act where the ERO, on an application made to it or on his own motion, is satisfied after such enquiry as he thinks fit, that an elector should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident within such Ward, then the ERO subject to such general or special directions that may be given by the Election Commission, amend, transpose or delete the entry. The proviso to Section 7F requires the ERO to comply with the rules of natural justice i.e. giving the person a reasonable opportunity of being heard.

24. In the present case, it appears that the powers under Section 7F DMC Act were exercised by the ERO to delete the name of the Petitioner from the electoral roll. It was argued that this was done without any notice to the Petitioner and that order was per se unsustainable in law. However, it is further pointed out by learned counsel for the Respondent No.1 that the procedure for challenging an order passed under Section 7F is prescribed under the DMC Act itself. Section 7H states that an appeal will lie to the SEC from an order passed by the ERO under Section 7F. For the reasons best known to her, the Petitioner has not challenged the order deleting her name from the electoral roll till date. It is not as if the Petitioner was unaware of the deletion of her name from the electoral roll. On 4th April 2007, when she went to cast her vote in the poll, she was prevented from doing so by the Polling Officer. She was told that her name did not

figure in the electoral roll on that date. By then the supplementary electoral roll had been published, i.e on 3rd April 2007.

25. It was conceded by the learned counsel for the Petitioner that this Court is not required to examine the correctness of the action of the ERO in deleting the Petitioner's name from the electoral roll on 16th March 2007. His arguments were confined to the manner of leading evidence to prove this and he only questioned whether the copies of the supplementary electoral roll produced by Respondent No.1 before the trial court was a certified copy in the manner known to law.

26. Section 8 of the DMC Act makes it clear that no person shall be qualified to be chosen as a Councillor unless registered as an elector in an electoral roll for a ward. Thereafter under Section 10 it is made clear that a person whose name is entered in the electoral roll for a ward is allowed to vote on the date of election of a Councillor from that ward. There was no dispute that the crucial date and hour for determining whether a candidate is qualified to contest the election is 3 pm on the last date for filing of nomination papers, when the candidate in question was supposed to be registered as an elector in the electoral roll for the Ward. If, as at 3 pm on 17th March 2007, the Petitioner was not an elector, then the question of the Petitioner getting elected simply does not arise.

27. In order to prove that the Petitioner was not an elector as at 3 pm on 17th March 2007, the Respondent No.1 relied on the statement of

the RO recorded by the learned ADJ under Order X CPC. The said statement reads as under:

“I have brought the record regarding the electoral roll for the ward no. 220 i.e. Patparganj (constituency reserved for woman). I submit on the basis of the records that the record of Mr. Beena Sharma W/O Shri J.P. Sharma was initially at serial no. 798 of part no. 84 of electoral roll which electoral roll was prepared by Sub Divisional Magistrate, Vivek Vihar and has been adopted by the State Election Commission on the basis of which I as the Returning Officer had accepted the nomination. The same is Ex.C-1 (original seen and returned). A revision of the electoral roll based upon the addition/deletion of the voters was also carried out in 2007 by SDM, Vivek Vihar on the basis of which the name of Mrs. Beena Sharma W/O Shri J.P. Sharma has been deleted in the supplementary list vide serial no. 798 which was supplied to the under signed after the nominations, scrutiny was over on 03.4.07 i.e. one day prior of election which deletion list which certified copy is Ex.C-2 (original seen and returned) showing that the year of revision as 2007 and the qualifying date of the special supplementary revision is 01.1.2007. The supplementary process year is 2007 and there is a continuous updation from 02.1.2007 to 17.3.2007. Hence it appears from the aforesaid document that on the date of the filing of the nomination, scrutiny, election and declaration of result Beena Sharma was not a voter in ward no. 220 and hence her nomination has been wrongly accepted only because the deletion list was not before me and in view of the provision of section 8 of the DMC Act the contesting candidate has to be registered as an elector in the electoral roll for a ward.”

28. In the above deposition, the RO very categorically states that “on the date of filing of the name, the scrutiny, election and declaration of results, Bina Sharma was not a voter in Ward No. 220 and hence her name has been wrongly accepted.” The only reason why the RO accepted the nomination papers was that the deletion of her name from the electoral roll was not brought to his notice on 19th March 2009 when he took up the petitioner’s nomination papers for scrutiny. From the evidence that has come on record, it is plain that the supplementary electoral roll, the certified copy of which was marked as C-2, was made available only on 3rd April 2007. Once the RO himself clarified the position of the electoral roll as on the last date for filing of nomination papers, it mattered little whether the copy of the supplementary roll as produced in the court was a duly certified copy. The only way by which the petitioner herein could have overcome the above evidence was to show that in fact as on the last date for filing of nomination papers, her name was included in the electoral roll. Far from doing so, the petitioner has not even challenged the order dated 16th March 2007 deleting her name from the electoral roll.

29. The law in regard to electoral rolls has been comprehensively explained in the judgment of the Supreme Court in ***P.T. Rajan***. There the Supreme Court was dealing with the validity of the election to an assembly constituency in the State of Kerala. The final electoral roll had been published on 23rd April 2001 at 8 pm although the last date for acceptance of nominations was 3 pm on the same date. The result of the election was declared on 13th May 2001. The second

Respondent lost the election by 787 votes. It was alleged by him that after 3 pm on 23rd April 2001 names of 19,045 voters were deleted from the voters' list whereas 6,828 new names were added therein. It was contended that the deletion of the 19,045 voters was without issuance of notice and, therefore, bad in law. Genuine voters who turned up at the polling station were turned back. Those were supporters to the losing candidate.

30. It must be recalled here that Section 22 of the RP Act, 1950 corresponds to Section 7F of the DMC Act. Further, Rule 21 of the DMC Rules corresponds to Rule 22 of the Registration of Electors Rules, 1960 ('ROE Rules'). Section 23(3) of the RP Act corresponds to Section 7G(3) of the DMC Act in terms of which no amendment, transposition or deletion of the entry can be made under Section 7F "after the last date for making the nominations for an election in that ward and before the completion of that election."

31. In the above background, the following observations of the Supreme Court in para 35 of ***P.T.Rajan*** are relevant:

"35.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 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 16.3.2001 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 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 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 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 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), 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 thereafter.**” (emphasis supplied)

32. Thereafter it was held in para 36 as under:

“36. 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. Whenever publication of electoral roll is made in Form 16, necessary corrections have to be carried out in the mother roll. These 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.” (emphasis supplied)

33. In view of the aforesaid clear exposition of the law, what requires to be seen in the present case is the position of the electoral roll as it stood at 3 pm on the date of filing of the nominations.

34. The mere fact that the supplementary electoral roll showing the deletion was published later will not make a difference to the legal position. This has further been explained by the Supreme Court in para 40 of the judgment in *P.T. Rajan’s* case as under:

“40. 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 not mandatory. (See *Shiveshwar Prasad Sinha v. The District Magistrate of Monghyr and Anr.* MANU/BH/0030/1966 : AIR1966Pat144, *Nomita Chowdhury v. The State of West Bengal and Ors.* 1999 (2) CLJ 21 and *Garbari Union Co-operative Agricultural Credit Society Limited v. Swapan Kumar Jana and Ors.* 1997 (1) CHN

189.)”

35. In view of the above settled position, this Court finds that the conclusion arrived at by the learned ADJ as regards Issue No.1 is unassailable in law.

36. Much reliance was placed by learned counsel for the petitioner on the decision in *Srichand P. Hinduja v. State 121 (2005) DLT 1* by the Petitioner to contend that the copy of the supplementary electoral roll that was produced was in fact not a certified copy as recognised by law. This decision does not help the Petitioner. It is not her contention that her name did not stand deleted from the electoral roll as at 3 pm on 17th March 2007. The statement made by the RO under Order X CPC on solemn affirmation affirming the certified copy of the supplementary electoral roll has not been countered by the Petitioner. If in fact that was not the supplementary electoral roll, then nothing prevented the Petitioner from either cross-examining the RO on that basis. On perusing his evidence, it is seen that as at 3 pm on 17th March 2007 the petitioner's name in fact stood deleted from the electoral roll.

37. In *Mullapudi Venkata Krishna Rao*, the Supreme Court was concerned with the degree of proof in a case involving a corrupt practice and held that the proceedings being quasi criminal, the standard is rigorous. The said decision really does not apply in the instant case since in the considered view of this Court, the Respondent No.1 herein has been able to prove that as on the date of filing of the

nomination papers, the Petitioner herein did not figure in the electoral roll of the Ward in question. Reliance is placed on *Shyamdeo Prasad Singh* to contend that the acceptance of the Petitioner's nomination papers by the RO in the present case was a mere irregularity. In the said case it was held in para 24 as under:

“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, 1950.”

38. The above observations do not help the Petitioner. They only go to show that the status of the electoral roll on the date of the poll is the determining factor as far as being permitted to cast a vote. In the present case, as long as the petitioner's name did not figure in the electoral roll as on the date of her filing her nomination papers, the question of her being qualified to contest the elections did not arise.

The acceptance of the petitioner's nomination paper was not a mere irregularity. It is, in fact, a material defect.

39. In *Baidyanath Panjira* the Supreme Court held that the power to include names in an electoral roll cannot be exercised after the last date of making the nomination and before the completion of election. This decision, in fact, helps the Respondent No.1 since she has been able to show that the deletion of the Petitioner's name took place prior to the last date for filing nomination papers.

40. For the aforementioned reasons, this Court finds no error having been committed by the learned ADJ in concluding that the election of the Petitioner was void on the ground of improper acceptance of the petitioner's nomination paper since her name did not figure in the electoral roll as on the last date for filing of nomination papers.

41. Turning to the writ petition filed by the RO, this Court holds that the adverse remarks made against him by the learned ADJ were uncalled for. In particular, this Court finds no justification in the remarks made against the RO in internal page 13 of the judgment beginning with the sentence "It is outrageous as to how mockery has been made of this democratic process..." and for two paragraphs thereafter ending with the words "...he should have withheld the results particularly when this fact came to his knowledge before the date of polling." The second set of observations have been made in internal page 14 in the para beginning "Before parting, it must be

observed....” and ending with the words “...this could have been done.”

42. The learned ADJ overlooked the legal position that it is not within the powers of the RO to withhold the results. Once the polling process has commenced, an RO cannot put the clock back. In other words he cannot revert to an anterior stage in the election process i.e. the scrutiny of the nomination papers. That was already complete on 19th March 2007 and whether right or wrong, the RO would have had to proceed on that basis till of course there is an order by a court in an election petition filed subsequently. This Court fails to understand how after realising on 4th April 2007 that the Petitioner’s name stood deleted from the electoral roll, the RO could have withheld the result as suggested by the learned ADJ. The RO does not have any power to halt the election process once it has commenced except when specifically empowered to do so in terms of an express provision of a statute. In the facts of the present case, given that as on the date of scrutiny of the nomination papers, the RO was not provided with a certified copy of the supplementary list showing the deletion of the name of the petitioner, he could not be faulted for having proceeded on the basis that there was no such deletion. It is another matter that in law the name of the Petitioner already stood deleted by that time and, therefore, she stood disqualified. However, this fact was not known to the RO at that stage and, therefore, he proceeded in the manner that he did. He could certainly not have withheld the results as suggested by the learned ADJ.

43. For the aforementioned reasons this court directs that both portions of the impugned judgment in internal pages 13 and 14 as extracted hereinbefore which contain adverse remarks against the RO will stand expunged. To that extent, Writ Petition (Civil) No. 7914 of 2007 is allowed.

44. Resultantly, Writ Petition (Civil) No. 8770 of 2007 is dismissed. Writ Petition (Civil) No. 7914 of 2007 is allowed to the extent indicated in paras 42 and 43 hereinbefore. The interim order is vacated, and the pending applications are disposed of. A certified copy of this order be sent forthwith to the Secretary, State Election Commission for consequential orders to be issued.

S. MURALIDHAR, J

APRIL 13, 2010
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