

* **THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 4th October, 2010
% Judgment Pronounced on: 18th January, 2011

+ **LPA No. 334/2010**

SH. SATISH KUMAR Appellant
Through: Mr. Maninder Singh, Senior
Advocate with Mr. P.D.Gupta
with Mr. Kamal Gupta and
Mr. Abhishek Gupta, Advocates.

versus

SHRI VIKAS & ORS. Respondents
Through: Mr. M.N. Krishnamani, Senior
Advocate with Mr. Tariq,
Mr. Amit Kumar and Mr. V.M.
Srivastava, Advocates.

+ **LPA No. 430/2010**

SHRI VIKAS Appellant
Through: Mr. M.N. Krishnamani, Senior
Advocate with Mr. Tariq,
Mr. Amit Kumar and Mr. V.M.
Srivastava, Advocates.

versus

SH. SATISH KUMAR & ORS. Respondents
Through: Mr. Maninder Singh, Senior
Advocate with Mr. P.D.Gupta
with Mr. Kamal Gupta and
Mr. Abhishek Gupta, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

- | | |
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| 1. Whether reporters of the local papers 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 |

DIPAK MISRA, CJ

These two intra-Court appeals challenging the impugned order dated 13.4.2010 passed in WP(C) No.4603/2008 have been filed by the writ petitioner – Vikas [the appellant in LPA No.430/2010 and the respondent No.1 in LPA No.334/2010] and Satish Kumar [the appellant in LPA No.334/2010 and the respondent No.1 in LPA No.430/2010] from different spectrums. Regard being had to the composite nature of the order and their insegregable consequential impact on each other, they were heard analogously and are being disposed of by a singular order.

2. The facts, as unfurled, are that Vikas, the appellant in LPA No.430/2010, a candidate of the Indian National Congress (INC), had contested for the post of Councilor from ward No.78 i.e. Majnu-Ka-Tila of the Municipal Corporation of Delhi (MCD) and was declared as elected. His election was called in question before the learned Additional District Judge (ADJ) who, by order dated 4.6.2008, declared the election to be null and void and further held that in terms of Section 19(1)(c) of the Delhi Municipal Corporation Act, 1957 ('DMC Act'), the respondent – Satish Kumar, the appellant in LPA No.334/2010, of the Bharatiya Janata Party (BJP) should be declared elected as Councilor of the said ward No.78. As is discernible, the learned ADJ, on the basis of the pleadings brought on record, framed an issue whether the nomination papers of the elected candidate were filed in time along with Forms A and B being the duly authorized substitute candidate of the INC. It was claimed by the writ

petitioner – Vikas to be a substitute candidate for Sh. Charan Dass, the official candidate of INC for ward No.78 who had filed his nomination papers on 17.3.2007. His nomination papers were accompanied by Forms A and B. The said Form A was signed by Sh. Ashok Gehlot, the General Secretary of the INC and was dated 10.3.2007. Thereunder, Sh. Ram Babu Sharma, President of the Delhi Pradesh Congress Committee, New Delhi, was authorized to intimate the names of the candidates proposed to be set up by the party for ward No.78. The said Form A contained the specimen signatures of Sh. Ram Babu Sharma. In Form B, which was enclosed with the nomination Form of Sh. Charan Dass, the name of Sh. Charan Dass was shown in Column No. 2. Column No. 5, which is titled 'name of the substitute candidate' (who will step in the event of the official candidate's nomination paper being rejected on scrutiny), was left blank.

3. The issues that emerged for consideration before the election tribunal are whether the filing of nomination papers by the elected candidate was in order or defective; whether the Forms A and B had, in fact, been enclosed with the nomination papers of the said candidate or not; and in case the election of the said candidate is treated to be invalid; whether the election petitioner could be declared to be the elected candidate as the councilor for the ward in question.

4. The learned Additional District Judge analyzed and appreciated the evidence of K.R. Kishore, the Secretary of State Election Commission and perused the documents, namely, Exhibit CW.1/1 – the complaint made by

one Sohan Lal, Exhibit CW.1/2 – the acknowledgement dated 20th April, 2007, Exhibit CW.1/3 and CW.1/4 – Forms A and B, Exhibit CW.1/5 – the nomination papers of the returned candidate, Vikas, Exhibit CW.1/6, CW.1/7 and CW.1/8 – the nomination papers of other candidates and Exhibit CW.1/9 – the result of the election. The tribunal further adverted to the evidence of CW.2, Hira Lal Duggal, who was examined as a court witness and R.K. Sharma who was the Returning Officer of the ward in question and also scrutinized the evidence of the election petitioner, Satish Kumar, the testimony of RW.1, Vikas, RW.2, Prahlad Singh Sahney, and came to hold that Forms A and B given by the Delhi Pradesh Congress Committee in favour of Charan Dass whose forms are Exhibit CW.1/3 and CW.1/4 did not bear any authorisation in favour of the elected candidate Vikas; that the original nomination papers of the said candidate, Exhibit CW.1/5, did not contain Forms A and B issued by the political party in his favour; that there was nothing on record to show that Forms A and B authorising the elected candidate had been filed before the Returning Officer or before the State Election Commission, NCT of Delhi before 3:00PM on the last date of making the nomination as per the provisions contained in the Delhi Election Symbol (Reservation and Allotment) Order, 2007 (for short ‘the 2007, Order’); that the stand of the respondent, namely, the elected candidate, that he was a covering/substitute candidate was not borne out from the record and there is no corroborative evidence in that regard; that the said explanation has also not found corroboration from the testimony of RW.2, Prahlad Singh Sahney; that the issuance of Form B in favour of the

Respondent No.1 had not been proved; that the check list shows that Forms A and B were shown in favour of the main candidate whose nomination papers were rejected; that there is specific admission by the Secretary of the State Election Commission that Forms A and B issued by the India National Congress in favour of the Respondent No.1 were not available in the documents handed over to him by the Returning Officer; that the elected candidate had himself admitted that he had not seen Form B but was so told by the party workers; that when the Secretary to the State Election Commission had categorically deposed that the requisite Forms were not placed before him by the Returning Officer, the onus shifted on the respondent to prove the issuance/acceptance of the subsequent Forms A and B and no evidence has been adduced in that regard by the said respondent; and that the allegation that Forms A and B had been removed from the nomination papers was only a mere suggestion and did not deserve acceptance and more so in the absence of any complaint in that regard.

5. It is worth noting that the tribunal also dealt with the factum as regards the security deposit and took note of the testimony of CW.1, the Secretary to the State Election Commission, that Form 3 is the notice of the nomination which was required to be maintained in accordance with Rule 17 of the Delhi Municipal Corporation (Election of Councillors) Rules, 1970 (for short 'the 1970 Rules') showing the names of all the candidates who had filed their nominations. It is required to be filled up on day to day basis before the last date of nomination and as per the State records, except the nomination in respect of the candidates mentioned in Exhibit CW.1/12, no

other nominations were received till 3:00PM on 17.03.2007 and in the said five names, the name of Vikas did not feature. The tribunal came to hold that the plea that the nomination papers were filed before 3:00PM was not acceptable since Exhibit CW.1/P9, the original Form 4 which bears the signature of the Assistant Returning Officer and the Returning Officer, contains only one single page and there is no mention of any page number on the same and Exhibit CW.1/P8 is the second page of Form 4 where the name of Vikas has been mentioned. The said page reflects that two sets of Form 4 were prepared and one page was sent to the Secretary of the State Election Commission that was produced before the Court and another was retained by the Returning Officer which had been produced, but no explanation had been proffered for the reason why the name of the respondent No.1 - Vikas was not mentioned on the first page of Form 4 despite there being sufficient space for mentioning the names of as many as six candidates, as has been done in the case of other wards; that from the oral and documentary evidence, it can safely be concluded that the name of Vikas was added on a separate page which was apparently done in the late hours of the night as the same were placed for the first time at 10:00PM on the date of scrutiny by the Assistant Returning Officer before the Returning Officer on 19.3.2008 and further there was no intimation by the Returning Officer to the State Election Commission about placing of the nomination papers of the respondent No.1 before him for the first time at 10:00PM or the lapses committed by the Assistant Returning Officer.

6. Because of the aforesaid aspects, the tribunal concluded as follows:

“1. That the nomination of the respondent No.1 Vikas who was a covering candidate of Charan Dass of India National Congress is not accompanied by Form A and B issued in his favour as required under the Municipal Corporation of Delhi Election Symbol (Reservation and Allotment) Order, 2007.

2. That the receipt regarding deposit of security amount is the last receipt which does not bear the rubber stamp of the Assistant Returning Officer and the possibility of its being manufactured and created anti-datedly cannot be ruled out in view of the various discrepancies on the counterfoil as discussed above and also in view of the fact that both the Assistant Returning Officer and Returning Officer were in possession of the original receipt book on the last date of nomination and also on date of the scrutiny and had not deposited the same alongwith the security deposits received on day to day basis.

3. That the Form no.3 which is the list of the candidates and is required to be mandatorily maintained by the Returning Officer as per the provisions of Rule 17 of the DMC (Election of Councillors) Rules does not show the name of the respondent no. 1 Vikas who was a covering candidate of Charan Dass thereby depriving the electors of their right of effectively participating in the scrutiny of the present candidate and to raise objections. Had the nomination papers of Vikas been received on time on the last date of nomination the same would have been placed before the Returning Officer on the same date i.e. 17.3.2007 and the name of the respondent no.1 would have been mentioned in the said form.

4. That the Form no.4 as required to be maintained under Rule 18 of the DMC (Election of Councillors) Rules has been fabricated/manufactured by the Returning Officer in as much as page 1 of the original form no.4 which has been produced before this court by the Secretary to the State Election Commission does not bear the words page 1 whereas the certified copy supplied to the election petitioner by the Returning Officer and also the original produced by him bears the words ‘Page 1’. Again page 2 of the Form 4 has been fabricated where the name of Vikas has been added by the Returning

Officer and Assistant Returning Officer despite the fact that there was space of 6 names on page 1 and only three names have been written but instead of writing the name of Vikas at Sr. no.4 a separate page has been added where his name has been shown at the top which is not the practice/procedure adopted and followed by the same Returning Officer while maintaining of records pertaining ward nos. 77, 79 and 80.

5. That the scrutiny of the said documents of the respondent no.1 Vikas had taken place in the absence of other contesting candidates.

6. That the Returning Officer had never sent any information to the State Election Commission on the irregularities at any point of time.

7. That no formal complaint had ever been lodged by the respondent no.1 with regard to any theft of this Form A or B from the office of the Returning Officer and this defence has been taken by him in the court for the first time.”

7. In view of the aforesaid, the tribunal set aside the election of Vikas and thereafter proceeded to address the issue whether the election petitioner - Satish Kumar deserved to be declared as elected candidate and, relying on the provisions contained in Section 19(1)(c) of the DMC Act, declared Satish Kumar as the elected councilor to the ward in question.

8. The learned Single Judge, as is demonstrable, has referred to the evidence of CW-1, Kishore, who had categorically deposed that the Returning Officer had placed all the documents before the State Election Commission but not the Forms A and B in favour of Vikas and the said record of nomination of candidate Vikas has been exhibited as Ex.CW1/5. Nothing discrepant or contradictory was elucidated in the cross-examination of the said witness which has been reproduced in the order of the learned Single Judge. It was contended before the learned Single Judge that during

the subsequent inspection of the record, the respondent No.1 and one Sohan Lal had removed Forms A and B which were there on the file at that point of time, as is evident from the cross-examination of the respondent No.1, but the learned Single Judge, after referring to the cross-examination by the petitioner of the respondent No.1, came to hold that the candidate/petitioner had not been able to make out a case that the Forms A and B accompanying his nomination papers were surreptitiously removed by respondent No.1. It is further demonstrable that the learned Single Judge also perused the record and came to hold that there was no material to come to the conclusion that Forms A and B were removed.

9. The next aspect which the learned Single Judge has adverted to is whether there has been a manipulation of the receipt of the security deposit purportedly received from the elected candidate. He referred to Ex.RW1/1 (the original of which is Ex.CW1/P1) wherein the ward No.78 does not find mention whereas in the carbon copy / counterfoil, Ex.PW1/3, the figure 78 has been written. The said receipt was issued by CW2, Hira Lal Duggal, who, according to the learned Single Judge, gave an improbable explanation that “sometimes the pen does not flow on the main copy as a result of which only on the carbon copy the words occur”. Be it noted, the learned ADJ had observed that there is no imprint of Ex.RW1/1 showing that ward No.78 was ever written and therefore, the receipt for Vikas seems to have been hurriedly prepared which is evident from the fact that the security deposit receipt which is for a sum of Rs.1,500/- had the words written Rs.15/- at one place and Rs.1,500/- at another place. The learned Single Judge, on scrutiny

of the record and analysis of the evidence brought on record, gave the stamp of approval to the said finding of the learned ADJ. The other aspect that has been adverted to by the learned Single Judge is whether the returning officer maintained the Form 3 in terms of Rule 17 of the Rules. The said Form, as found by the learned Single Judge, neither contained the name of the petitioner and the cover candidate / substitute candidate for Charan Dass nor the name of Sukhdev who was the substitute candidate for Satish Kumar. Thereafter, the learned Single Judge adverted to Form 4 which required to reflect the names of the contesting candidates whose nomination papers were found to be in order after scrutiny. The names of the candidates had been filled on one singular page in respect of ward Nos. 77 and 79 by the returning officer but in case of ward No.78, he had mentioned only three names on the first page of Form 4 and in a separate appended sheet, the name of Vikas was mentioned. The learned Single Judge has noticed that the tribunal, upon perusal of the record, has observed that no explanation had come forth as to why two sets of Form 4 were prepared of which one was sent to the Secretary to the State Election Commission which he had produced in the court and another was retained by the Returning Officer which he had produced in the court. He has also observed that there was sufficient space for mentioning the names of as many as six candidates and therefore, the explanation offered did not deserve acceptance. Because of the aforesaid analysis, the learned Single Judge concurred with the finding returned by the learned ADJ – the election tribunal.

10. The second question that emerged before the learned Single Judge was whether the election of the elected candidate was liable to be declared null and void and set aside. The learned Single Judge, after scrutiny of the evidence of the Returning Officer and that of the ARO, expressed the view that the testimony of the said witnesses are unacceptable and untrustworthy. For the sake of completeness, it is necessary to reproduce the testimony of the returning officer:

“It was only at 10:00 pm that Mr. Duggal had come along with the nomination papers of Vikas and prior to that I had already rejected the nomination of Charan Dass. Since the nomination of Vikas was never placed before me prior to 19.3.2007 I orally asked my ARO Mr. Duggal to furnish an explanation in writing as to why this nomination form was not put before me earlier on which he furnished the said explanation by way of a written note Ex.CW1/11 and his remarks on Ex.CW1/5 at point mark X3. I was not convinced earlier but after seeing the security deposit receipt and acknowledgement I was convinced and I considered the nomination of Vikas. I did not convey in writing to the State Election Commission the fact that Mr. Duggal the ARO had not placed the nomination of Vikas before me on time nor he had made any entry in Form 3.”

11. It was contended before the learned Single Judge that these were mere irregularities and to set aside the election, a strong case has to be made out but the learned Single Judge did not treat them as irregularities and opined that lapses go to the very root of the matter and the mandatory requirement of the nomination papers of the returned candidate required them to be accompanied by Forms A & B and the same had not been complied with. Regard being had to the non-compliance of filing of Forms and the manner in which it was accepted, the learned Single Judge concurred with the view

expressed by the learned ADJ and came to hold that the election of the elected candidate had been rightly declared null and void.

12. Though the learned Single Judge affirmed the finding of the tribunal to the effect that the election of the elected candidate has been correctly declared null and void, yet he did not accept the conclusion arrived at by the tribunal that the election petitioner could be declared as the elected councilor. In the opinion of the learned Single Judge, the interpretation placed by the learned ADJ on Section 19(1)(c) of the DMC Act is not correct more so in the obtaining factual matrix of the case.

13. We have heard Mr. Maninder Singh, learned senior counsel for the Appellant in LPA No.334/2010 and for the Respondent No.1 in LPA No.430/2010 and Mr. M.N. Krishnamani, learned senior counsel for the Appellant in LPA No.430/2010 and the Respondent No.1 in LPA No.334/2010.

14. First, we shall advert to the legal sustainability of the finding of the tribunal and the concurrence thereof by the learned Single Judge that the election of the elected candidate was invalid.

15. The submission of Mr. Krishnamani, learned senior counsel appearing for the appellant Vikas in LPA No. 430/2010, is that the findings of the learned ADJ which have been concurred by the learned Single Judge as regards the rejection of nomination form are absolutely vulnerable. It is contended by him that the nomination form was in order and was not liable

to be rejected and the finding that the appellant's name was not mentioned in the list published in Form 3 is not correct. It is further urged by him that the finding that Forms A and B were not accompanied with the nomination form is totally unsustainable.

16. To appreciate the rival submissions raised at the bar, we will refer to Section 17 of the DMC Act which deals with 'Grounds for declaring elections to be void'. The relevant provision is sub-section (1) of Section 17 which reads as follows:

"17. Grounds for declaring elections to be void – (1)
Subject to the provisions of sub-section (2) if the court of the district judge is of opinion –

- (a) that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen as a councillor under this Act, or
- (b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent, or
- (c) that any nomination paper has been improperly rejected, or
- (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –
 - (i) by the improper acceptance of any nomination, or
 - (ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his agent or a person acting with the consent of such candidate or agent, or
 - (iii) by the improper acceptance or refusal of any vote or reception of any vote which is void, or

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

the court shall declare the election of the return candidate to be void.”

17. Keeping the said provision in view, we are required to advert to various rules of the 1970 Rules.

18. Part III of the Rules deals with ‘Nomination of Candidates’. Rule 11 deals with ‘Appointment of dates for nomination, etc.’. Rule 12 deals with ‘Public notice of election’. Rule 13, which deals with Symbols, reads as under:

“13. Symbols – (1) For the purpose of election to the Municipal Corporation of Delhi, the National Parties and State Parties as are recognised for the time being by the Election Commission of India in the National Capital Territory of Delhi, under Section 29A of the Representation of the People Act, 1951 and rules and procedure made thereunder, shall be recognised as such by the State Election Commission. The Commission shall also adopt free symbols as have been notified by the Election Commission of India for the time being in respect of elections to Lok Sabha/Legislative Assembly in the National Capital Territory of Delhi. The Commission shall recognize the parties and adopt symbols subject to the following conditions, namely :-

- (a) The National Parties and the State Parties recognised by the Election Commission of India shall be recognised under the very same name by the Commission.
- (b) The National Parties and the State Parties recognized by the Election Commission of India shall use only those very symbols which are reserved for them by the Election Commission of India and not any other symbol.
- (c) The facsimiles of the symbols thus allowed shall not be different from the facsimiles prescribed and recognized by the Election Commission of India.

(1A) The Election Commissioner shall specify by notification in the Official Gazette, the symbols that may be chosen by candidates and the restrictions to which their choice shall be subject.

(2) Where at any such election, more nomination papers than one are delivered by or on behalf of a candidate, the declaration as to symbols, made in the nomination paper first delivered, and no other declaration as to symbols, shall be taken into consideration under rule 20 even if that nomination paper has been rejected.

(3) A failure to complete, or a defect in completing the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-rule,(4) of rule 18.

19. Rule 15, which deals with ‘Presentation of nomination paper and requirements for a valid nomination’, reads as follows:

“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 the 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 Scheduled Caste of which he is a member.

[(2A) 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 issued by the Central Government that the disqualification has been removed or by a certificate issued by the Election Commissioner 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 to be corrected in order to bring them into 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.

20. Rule 17 stipulates ‘Notice of nominations and the time and place for their scrutiny’. It reads as follows:

“17. Notice of nominations and the time and place for their scrutiny – (1) The returning officer shall, on receiving the nomination paper under sub-rule (1) of rule 15, inform the person or persons delivering the same of

the date, time and place fixed, and the scrutinising officer appointed, for the scrutiny of nominations and shall enter on the nomination paper its serial number, and shall sign thereon a certificate stating the date on which and the hour at which the nomination paper has been delivered to him and shall as soon as may be, thereafter cause to be affixed in some conspicuous place in this office a notice in Form 3 of the nomination containing description similar to those contained in the nomination paper, both of the candidate and the proposer.

(2) The returning officer shall cause all the nomination papers to be delivered to the concerned scrutinising officer in sufficient time for being dealt with under rule 18.”

21. Rule 18 deals with ‘Scrutiny of nomination’. Sub-rules (3) and (4), being relevant, are reproduced below:

“(3) Nothing contained in clause (b) or clause (c) of sub-rule (2) shall be deemed to authorise the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The scrutinising officer shall not reject any nomination paper on the ground of any defect which is not a substantial character.”

22. Form 2 which has been framed under Rule 15(1) requires a candidate to say that “I am sponsored for this election by a particular party”. Form 3 which is under Rule 17(1) postulates notice to be given about the nomination forms which have been received after 3.00 P.M. on the last date of filing of the nomination forms and reads as follows:

Form 3

Notice of Nomination

[See Rule 17(1)]

Election of the Delhi Municipal Corporation from Ward No.....

Notice is hereby given that the following nominations in respect of the above election have been received upto 3 P.M. today:-

<i>Serial Number of nomination paper</i>	<i>Name of Candidate</i>	<i>Name of *father/ husband</i>	<i>Address</i>	<i>Particulars of case for candidates belonging to Scheduled Castes</i>	<i>Electoral roll number of candidate</i>	<i>Name of proposer</i>	<i>Electoral roll number of proposer</i>
1	2	3	4	5	6	7	8

Place

Date

*Strike off offence of the alternatives if necessary.”

23. The election tribunal as well as the learned Single Judge has adverted to the oral and documentary evidence in detail which we have referred to hereinbefore to show that there was manipulation as regards the security deposit; that there was delayed submission of forms and the name of Vikas was not reflected in Form 3 which has really not been explained by the authorities. In our considered opinion, the said conclusion has been rightly arrived at and, hence, there is no warrant to interfere with the said conclusion. An ancillary issue to the said principal issue is whether Forms A and B had accompanied his nomination papers to show that he was really a sponsored candidate of the Indian National Congress for the said election.

24. Clause 3 of the Delhi Municipal Corporation Election Symbols (Reservation & Allotment) Order, 1996 (for short ‘the 1996 Order’) stipulates recognition of National and State Parties. Clause 4 deals with choice of symbol by candidates of National and State parties and allotment

thereof. Clause 5, which deals with authorisation by National & State Parties for allotment of Symbols, reads as follows:

“5. Authorisation by National & State Parties for allotment of Symbols:

- (a) For the purpose of this order, a candidate shall be deemed to have been set up by a political party if and only if the candidate has made a declaration to that effect in the nomination paper first filed by them.
- (b) the candidate has chosen only the ‘reserved’ symbol of his party in his nomination paper first filed and no ‘other symbol’;
- (c) a notice in form ‘B’ of setting up the candidate been delivered not later than 5.00 P.M. on the last day of filing nomination in writing to the returning officer of the ward to which the candidate is contesting, by the party concerned.
- (d) the said notice is signed by a person authorised in form ‘A’ by the President or the Secretary of the party.
- (e) the name and specimen signature of such authorised person are communicated to the Returning Officer of the ward and to the Election Commission of NCT of Delhi not later than 5.00 P.M. on the last date for filing nomination.
- (f) Form ‘A’ & ‘B’ as applicable, are prescribed as in schedule II respectively with this ORDER.”

25. At this juncture, we may refer with profit to the relevant portion of Forms A and B. They are reproduced hereinbelow:

“FORM A

To,
1. The Election Commissioner,
Govt. of NCT of Delhi, Nigam Bhawan,
Kashmere Gate, Delhi – 110 006,
2. The Returning Officer for the
_____ Ward.

Sub:- General Elections to Delhi Municipal Corporation – Allotment of Symbols – Authorisation of person to intimate names of candidates

Sir,

In pursuance of Rule 13 Delhi Municipal Corporation, Election of Councillors Rules 1970 as amended up-to date, I hereby communicate that the following person(s) has/have been authorised by the party, which is a National Party/State Political Party to intimate the names of the candidates proposed to be set up by the party at the election cited above.”

FORM B

To,

- 1. The Election Commission, NCT of Delhi, Nigam Bhawan, Kashmere Gate, Delhi – 110 006,
- 2. The Returning Officer for the _____ Ward.

Sub:- General Elections to Delhi Municipal Corporation – Setting up of candidates

Sir,

In pursuance of Rule 13 Delhi Municipal Corporation, Election of Councillors Rules 1970 (as amended up-to date) I hereby give notice that the following persons have been set up by _____ Party as its candidates at the ensuing General Election to MCD from the Ward noted against each.

<i>Name of the Candidate</i>	<i>Name of the approved candidate</i>	<i>Father's/ Husband's Name of approved candidate</i>	<i>Postal address of approved candidate</i>	<i>Name of the Substitute candidate (who will step in the approved candidates) nomination being rejected on scrutiny or his withdrawing from the contest</i>	<i>Father's/ Husband's name of substitute candidate</i>	<i>Postal Address of substitute candidate</i>
1	2	3	4	5	6	7

Yours faithfully,

Place:

Date: (Name and signature of the authorised person of the party)

N.B. – This must be delivered to the Returning Officer by 5 P.M. on the last date for nomination.

(Seal of the Party)”

26. On a reading of the Rules, clauses of the 1996 Order and the Forms, there can be no shadow of doubt that unless somebody is sponsored for allocation of symbol as a substitute candidate in case nomination of original candidate is rejected on scrutiny or his withdrawing from the contest, the substitute cannot step into the shoes of the original candidate. As is evident from the material brought on record, there is no scintilla of doubt that the Forms A and B really did not accompany the nomination papers. We have referred to the evidence on record, the findings of the election tribunal and the reasonings of the learned Single Judge and we find that the factum that the Forms A and B accompanied the nomination papers has not been established from the documentary evidence as well as the cross-examination of the competent authority which we have reproduced hereinbefore. The submission of Mr.Krishnamani, learned senior counsel appearing for the appellant in LPA No.430/2010, is that the same might not have accompanied the nomination papers but if it is filed later on, it should be treated as a mere irregularity and on that ground, the election could not have been declared invalid. It is contended by him that it was curable in nature being in the realm of a technical defect and, therefore, the returning officer could have

afforded an opportunity to him to rectify the same or accept the same with defects.

27. To appreciate the said submission, we may refer with profit to certain citations in the field. Be it clarified, though they were delivered in the context of Representation of the People Act, 1951 (for short ‘the 1951 Act’), yet the principles laid down therein shall apply in full force to a case under the DMC Act and the 1970 Rules.

28. In ***Rattan Anmol Singh & Anr. v. Ch. Atma Ram & Ors.***, AIR 1954 SC 510, the Apex Court was dealing with the issue of compliance of Section 36(d) of Representation of the People Act (43 of 1951) (hereinafter referred to as ‘the 1951 Act’). The nominations of the candidate were treated to be invalid as they were not properly subscribed. The Returning Officer had held that without attestation, they were invalid and, hence, rejected the same. The Apex Court adverted to the correctness of the said conclusion and also to the issue whether omission to obtain the required attestation amounts to a technical defect of an unsubstantial character or whether the said defect is of a substantial character. In that backdrop, their Lordships have held thus:

“13. The four nomination papers we are concerned with were not “signed” by the proposers and seconders in the usual way by writing their names, and as their marks are not attested it is evident that they have not been “signed” in the special way which the Act requires in such cases. If they are not “signed” either in one way or the other, then it is clear that they have not been “subscribed” because “subscribing” imports a “signature” and as the Act sets out the only kinds of “signatures” which it will

recognise as “signing” for the purposes of the Act, we are left with the position that there are not valid signatures of either a proposer or a seconder in any one of the four nomination papers. The Returning Officer was, therefore, bound to reject them under Section 36(2)(d) of the Act because there was a failure to comply with Section 33, unless he could and should have had resort to Section 36(4).

29. After so stating, their Lordships held that the jurisdiction vested with the Returning Officer to see whether the nominations are in order and to hear and decide the objections but he cannot, at that stage, remedy essential defects or permit them to be remedied.

30. In *Brijendralal Gupta & Anr. v. Jwalaprasad and Ors.*, AIR 1960 SC 1049, a three-Judge Bench of the Apex Court was dealing with a case of omission where the age was not specified in the nomination form. Their Lordships adverted to the word ‘defect’ used in Section 36(4) of the 1951 Act and came to hold that the same is a defect within the ambit and sweep of Section 36(4) of the 1951 Act and proceeded to advert to the facet whether such a defect is substantial in character and if the same could be removed. In that context, their Lordships proceeded to state as follows:

“10. That takes us to the question as to whether the failure to specify the age in the nomination paper amounts to a defect of a substantial character under s.36(4) or not. There is little doubt that the age of the candidate is as important as his identity, and in requiring the candidate to specify his age the prescribed form has given a place of importance to the declaration about the candidate's age. Just as the nomination paper must show the full name of the candidate and his electoral roll number, and just as the nomination paper must be duly signed by the candidate, so must it contain the declaration by the candidate about his age. It is significant that the statement about the age of the

candidate is required to be made by the candidate above his signature and is substantially treated as his declaration in that behalf. That being the requirement of the prescribed nomination form it is difficult to hold that the failure to specify the age does not amount to a defect of a substantial character. The prima facie eligibility of the person to stand as a candidate which depends under Art. 173 of the Constitution, inter alia, on his having completed the age of 25 years is an important matter, and it is in respect of such an important matter that the prescribed form requires the candidate to make the declaration. It would, we think, be unreasonable to hold that the failure to make a declaration on such an important matter is a defect of an unsubstantial character. In this connection, it is relevant to refer to the fact that the declaration as to the symbols which the prescribed form of the nomination paper requires the candidate to make is by the proviso to rule 5 given a subsidiary place. The proviso to rule 5 shows that any non-compliance with the provisions of sub-rule (2) of rule 5 shall not be deemed to be a defect of a substantial character within the meaning of s.36, sub-sec.(4). In other words, this proviso seems to suggest that, according to the rule-making authority, failure to comply with the requirements as to the declaration of symbols as specified in rule 5, sub-rule (2), would have been treated as a defect of a substantial character; that is why the proviso expressly provides to the contrary. This would incidentally show that the failure to specify the age cannot be treated as a defect of an unsubstantial character.”

31. A Division Bench of the Punjab High Court in ***Baru Ram v. Sm.Parsanni & Anr.***, AIR 1958 Punjab 452, while dealing with an appeal under Section 116A of the 1951 Act, has held thus:

“A nomination cannot be rejected merely because of a defect which is not substantial in character as is clearly indicated by S.36(4). But in respect of certain matters form and form alone can be, and is, of vital importance, and, in case Parliament has in the Act attached particular importance to form any failure to comply with that form would be fatal. Thus the requirement of S.33(5) of the Act is extremely important at the stage of scrutiny and failure of produce the electoral roll must be deemed a

failure to comply with a substantial provision of the statute. The requirement of S.33(5) is therefore mandatory and failure to comply with it is fatal to a candidate's claim to stand for election.”

32. As is perceivable from the analysis made by the Election Tribunal and that of the learned Single Judge, the name of the elected candidate did not feature in the said publication and it was not accompanied by Forms A and B. It was contended before the learned Single Judge that it was an irregularity which can be condoned but the learned Single Judge has held that the same is not a mere formality as it is required to be put up on the notice board for being made known to other candidates as well as to the electorates and other contesting candidates who can then scrutinize the forms and raise objections. Thus, the said non-reflection of the name is a substantial defect and is not curable. We are inclined to think that the learned Single Judge is absolutely correct in holding that the name of the elected candidate did not find place and hence, the nomination paper was invalid in law.

33. The next issue that had arisen before the learned Single Judge as well as in these appeals is that when the nomination of the returned candidate was rejected, whether it was obligatory on the part of the tribunal as well as the learned Single Judge to declare the next candidate to be the elected candidate. Mr. Maninder Singh, learned senior counsel, has placed heavy reliance on Section 19 of the DMC Act. The said provision reads as follows:

“Section 19 - Decision of the district judge

(1) At the conclusion of the trial of an election petition, the court of the district judge shall make an order--

(a) dismissing the election petition; or

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

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

(2) If any person who has filed an election petition has, in addition to calling in question the election of the returned candidate, claimed declaration that he himself or any other candidate has been duly elected and the court or the district judge is of opinion--

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

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

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

34. It is contended by Mr. Singh that if the language employed in Section 19(2)(b) is properly appreciated, it is quite vivid that the votes obtained by the returned candidate are to be excluded and on such exclusion, if such other candidate would obtain a majority of valid votes, it is the duty of the court to declare the election petitioner as the elected candidate. It is worth noting that the elected candidate had secured 6399 votes and the election petitioner had obtained 6123 votes while the respondent No.2 and the respondent No.3 had polled 286 and 229 votes respectively. It is urged by Mr. Singh that the valid votes are 13037 and when the votes of the

respondent No.1 would stand excluded, he would get the majority of valid votes. The learned counsel would submit that the learned Single Judge has fallen into grave error by interpreting the said provision on the anvil of the analogy of Section 101 of the 1951 Act which is couched in a different language, for the emphasis therein is on the votes obtained by the returned candidate by “corrupt practice” but under the present statute, it is per se exclusion. The learned counsel has commended us to the decision in *Shri Banwari Dass v. Shri Sumer Chand and others*, (1974) 4 SCC 817.

35. On a perusal of the order of the learned Single Judge, it is perceptible that he has held that in a multi-cornered contest like the present one, the application of Section 19(2)(b) is not a simple exercise. It has been opined by him that there has to be evidence on record to show that if the elected candidate is out of the fray as on the date of the poll, then the challenger would have obtained majority of the votes. He has drawn an analogy between Section 19(2) and Section 101 and arrived at such a conclusion.

36. In *Shri Banwari Dass* (supra), a two-Judge Bench of the Apex Court was dealing with the issue whether in an election petition under the DMC Act for getting an election declared void and for a further declaration that the petitioner has been duly elected, the returned candidate is entitled to plead and prove that the election petitioner was guilty of corrupt practice in the election in question, and was, therefore, not entitled to be declared as duly elected. Their Lordships scanned the anatomy of Sections 9, 15(1), 16(1), 17(1), 19(1) and 19(2) of the DMC Act and various provisions of the 1951

Act and expressed the view that the right to recriminate cannot be legitimately spelled out of Section 9(1)(d) without doing violence to its language or unduly stretching it. After so stating, their Lordships have held as follows:

“17. The above interpretation fits better in the general scheme of the Corporation Act. As will be apparent from Section 19, quoted earlier, the tribunal i.e. the District Judge can pass only three kinds of final orders indicated in Clauses (a), (b) and (c) of sub-section (1) of that section. The District Judge's inquiry at the trial of an election petition is, therefore, limited to the investigation of those matters only which will enable him to make the orders specified in Section 19(1). But, where in a composite petition, like the one in the present case, relief is claimed that the petitioner be declared elected in place of the returned candidate, the District Judge is to investigate if either of the two conditions for the grant of a further declaration, specified in Section 19(2) is made out. That is to say, he has to confine his enquiry to the determination of either of these two questions namely: (a) whether in fact the petitioner received a majority of the valid votes, or (b) whether the petitioner would have but for the votes obtained by the returned candidate, obtained a majority of the valid votes. Rule 68(1) of the Rules framed under the Corporation Act, defines “valid vote” as “every ballot paper which is not rejected under Rule 67 shall be counted as one valid vote”. The concept of “validity” of votes is different from that of “corrupt practices” defined in Section 22 on the basis of which an election petition can be instituted. In such a composite petition, apart from rebutting the allegations made against him in the petition, all that the returned candidate can further show is that the petitioner did not in fact receive the majority of valid votes and is therefore, not entitled to the further declaration of his due election. In the absence of a provision specifically conferring such a right, the returned candidate cannot allege and prove further that even if the petitioner had obtained a majority of valid votes, he could not be granted the declaration of his due election because he had committed corrupt practices. Such plea and proof will, in reality, be in the nature of a counter-attack, not necessary for legitimate defence.”

37. Though this decision was rendered in a different context, yet the same throws some light on the interpretation to be placed on Section 19(2) of the DMC Act. As has been held by the Lordships, the District Judge can only pass three kinds of final orders as indicated in clauses (a), (b) and (c) of subsection (1) of Section 19. In a composite petition, when there is a declaration made for declaring the election petitioner elected, it is obligatory on the part of the District Judge, the election tribunal, to ascertain whether in fact the election petitioner has received a majority of the valid votes, or whether he would have, but for the votes obtained by the returned candidate, obtained a majority of the valid votes. Their Lordships have made a distinction between the concept of valid votes and that of corrupt practice. What is of signification is that it is obligatory on the part of the District Judge to enquire to determine the questions. Be it noted, it has been held that in the absence of the provisions specifically conferring a right of recrimination, the returned candidate cannot allege and prove further that even if the petitioner had obtained a majority of valid votes, he could not be granted the declaration of his due election because he had committed corrupt practices. It was stated to be counter attack but not a legitimate defence. It is noticeable that the whole case also related to the plea raised by a returned candidate but the submission of Mr. Singh is that the enquiry is limited and he is only required to do the arithmetical exercise. Per-contra, the contention of Mr. Krishnamani is that the analogy drawn by the learned Single Judge between Section 101 of the 1951 Act and Section 19(2)(b) of the DMC Act is fundamentally correct and cannot be flawed.

38. To appreciate the said submission, we may reproduce Section 101 of the Representation of the People Act (43 of 1951):

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

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

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

[the High Court shall after declaring the election of the returned candidate, as the case may be, to have been duly elected.]”

39. Mr. Singh has made an endeavour to draw a distinction between corrupt practice and valid votes. There can be no doubt that there are certain distinctions but the question that emerges for consideration is whether the tribunal can straight away exclude the votes of the elected candidate and declare the election petitioner to be elected.

40. In this context, we may refer with profit to the Constitution Bench decision in *Vishwanatha Reddy v. Konappa Rudrappa Nadgouda and another*, AIR 1969 SC 604, wherein the Apex Court has held as follows:

“.....When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. This is not to say that where there are

more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate.

13. The view that we are taking is consistent with the implication of Cl. (b) of Section 101. When in an election petition which complies with Section 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under Clause (b) of Section 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt practice: it does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in Clause (b) notice to the voters is not a condition precedent, we see no reason why it should be insisted upon in all cases under Clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when at an election there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filling of the nomination paper.”

[Emphasis supplied]

41. In *Thiru John v. The Returning Officer and others*, (1977) 3 SCC 540, the Apex Court referred to the dictum in *Vishwanatha Reddy* (supra) and opined thus:

“59. The dictum of this Court in *Viswanatha v. Konappa* (supra) does not advance the case of the

appellant, Shri Subramanyam. In that case, the election in question was not held according to the system of a single transferable vote. There were only two candidates in the field for a single seat, and one of them was under a statutory disqualification. Shah, J. (as he then was) speaking for the Court, held that the votes cast in favour of the disqualified candidate may be regarded as thrown away, even if the voters who had voted for him were unaware of the disqualification, and the candidate securing the next highest number of votes was declared elected. The learned Judge was however careful enough to add:

This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification, have voted for the disqualified candidate.

60. The *ratio decidendi* of *Viswanatha v. Konappa* is applicable only where (a) there are two contesting candidates and one of them is disqualified, (b) and the election is on the basis of single non-transferable vote. Both these conditions do not exist in the present case. As already discussed, Shri Subramanyam appellant was not the sole surviving continuing candidate left in the field, after exclusion of the disqualified candidate, Shri John. The election in question was not held by mode of single transferable vote, according to which a simple majority of votes secured ensures the success of a candidate, but by proportional representation with single transferable vote, under which system the success of a candidate normally depends on his securing the requisite quota.

61. However, the principle underlying the obiter in *Viswanatha v. Konappa*, which we have extracted, is applicable to the instant case because here, after the exclusion of the disqualified candidate, two continuing candidates were left in the field.”

[Emphasis added]

42. In *Prakash Khandre v. Dr. Vijay Kumar Khandre and others*, (2002)

5 SCC 568, the Apex Court posed the question No. (1) as follows:

(1) In an election petition under the RP Act when contest for election to the post of MLA is by more than two candidates for one seat and a candidate, who was disqualified to contest the election – whether the Court can declare a candidate who has secured next higher votes as elected?

After posing the aforesaid question and referring to various decisions, their Lordships have expressed thus:

“In view of the aforesaid settled legal position, in our view, the impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of the elected candidate (appellant) are thrown away was totally erroneous and cannot be justified. As held by the Constitution Bench in *Konappa* case that some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be regarded as “thrown away” only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. We would observe that the question of sending such notice to all voters appears to us alien to the Act and the Rules. But that question is not required to be dealt with in this matter. As stated earlier, in the present case for one seat, there were five candidates and it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern. Therefore, order passed by the High Court declaring the election petitioner - Dr. Vijay Kumar Khandre as elected requires to be set aside.”

[Underlining is ours]

43. Testing the present factual matrix on the anvil of the aforesaid enunciation of law, it is difficult to accept how the voting pattern would have been because there is a multi-cornered contest and it is very difficult, in the absence of any kind of pleading or evidence, to arrive at the conclusion that the election petitioner should have been declared elected. The principle that has been enunciated by the Constitution Bench in *Vishwanatha Reddy* (supra) is squarely applicable to the case at hand.

44. Consequently, both the appeals, being sans substance, stand dismissed without any order as to costs.

CHIEF JUSTICE

MANMOHAN, J

January 18, 2011
dk/pk