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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No. 25 of 2015**

Sushil Chaturvedi, S/o Late Akshay Vhat Chaturvedi, Aged about 51 years,
Resident of Bramhroad, P.S. City Kotwali, Ambikapur, Civil and Revenue District
- Surguja, Chhattisgarh

---- Appellant**Versus**

1. Bar Council of Chhattisgarh, Through the Chairman, High Court premises, Bilaspur, Chhattisgarh
2. Smt. Mallika Bal, OSD, Legal Council Extension Office, Bilaspur, District Bilaspur, Chhattisgarh
3. The Superintendent of Police, Bilaspur, P.S. Civil Lines, Tahsil & District Bilaspur, Chhattisgarh
4. Officer On Special Duty, Legal Council Extension Office, Bilaspur, District - Bilaspur, Chhattisgarh

---- Respondents**And****Writ Appeal No. 34 of 2015**

Abhishek Pandey, S/o Shri Rambilash Pandey, Aged about 35 years, R/o New Sarkanda, Bangalipara, Street No.3, House No.4, P.S. and Tahsil, Sarkanda, District - Bilaspur, Chhattisgarh

---- Appellant**Versus**

1. The State Bar Council of Chhattisgarh, Through the Officiating Chairman, Shri Jugal Kishor Gilda, Advocate General of Chhattisgarh Government, High Court premises Bilaspur, Tahsil & District Bilaspur, Chhattisgarh
2. The State of Chhattisgarh, Through the Secretary, Home Department, Mahanadi Bhawan, New Raipur, P.S. Rakhi, Tahsil & District - Raipur, Chhattisgarh
3. The Superintendent of Police, Bilaspur, P.S. Civil Lines, Tahsil & District Bilaspur, Chhattisgarh
4. The Station House Officer, Police Station Civil Lines, Bilaspur, Tahsil & District Bilaspur, Chhattisgarh
5. Awadh Tripathi, S/o Shri Rampyare Tripathi, Aged about 53 years, R/o Green Park Colony, Bilaspur, Tahsil and District - Bilaspur, Chhattisgarh
6. Chandra Prakash Jangde, S/o Shri F.R. Jangde, Aged about 47 years, R/o Nehru Nagar, P.S. Civil Line, Bilaspur, Tahsil and District - Bilaspur,

Chhattisgarh

7. Badshah Prasad Singh, S/o Shri J.N. Singh, Aged about 50 years, Near Dhamdha Naka, Mohan Nagar, Durg, P.S. Mohan Nagar, Tahsil and District - Durg, Chhattisgarh
8. Sanjay Agrawal, S/o Late N.L. Agrawal, Aged about 52 years, R/o Ajit Sadan Polsai Para, Durg, P.S. - Durg, Tahsil and District - Durg, Chhattisgarh
9. Dr. Shailesh Ahuja, S/o Late Shri D.D. Ahuja, Aged about 50 years, Tikrapara, P.S. City Kotwali, Tahsil & District, Bilaspur, Chhattisgarh
10. Arun Kochar, S/o Dr.S.C. Kochar, Aged about 48 years, R/o Imlipara, P.S. - Civil Lines Bilaspur, Tahsil & District, Bilaspur, Chhattisgarh

---- Respondents

And

Writ Appeal No. 459 of 2014

1. Dr. Shailesh Ahuja, S/o Late Shri D.D. Ahuja, Aged about 50 years, Tikrapara, P.S. City Kotwali, Tahsil & District, Bilaspur, Chhattisgarh
2. Arun Kochar, S/o Dr.S.C. Kochar, Aged about 48 years, R/o Imlipara, P.S. - Civil Lines Bilaspur, Tahsil & District, Bilaspur, Chhattisgarh

---- Appellants

Versus

1. The State Bar Council of Chhattisgarh, Through the Officiating Chairman, Shri Jugal Kishor Gilda, Presently working as Advocate General of Chhattisgarh, Bilaspur, High Court premises, Bilaspur, Tahsil & District Bilaspur, Chhattisgarh
2. The State Bar Council of Chhattisgarh, Through the Officiating O.S.D., Smt. Mallika Bal, presently working as Deputy Secretary, State Bar Council of Chhattisgarh, Bilaspur, High Court premises, Bilaspur, Tahsil & District Bilaspur, Chhattisgarh
3. The Superintendent of Police, Bilaspur, P.S. Civil Lines, Tahsil & District Bilaspur, Chhattisgarh
4. The Station House Officer, Police Station Civil Lines, Bilaspur, Tahsil & District Bilaspur, Chhattisgarh
5. Awadh Tripathi, S/o Shri Rampyare Tripathi, Aged about 53 years, R/o Green Park Colony, Bilaspur, Tahsil and District - Bilaspur, Chhattisgarh
6. Chandra Prakash Jangde, S/o Shri F.R. Jangde, Aged about 47 years, R/o Nehru Nagar, P.S. Civil Line, Bilaspur, Tahsil and District - Bilaspur, Chhattisgarh
7. Badshah Prasad Singh, S/o Shri J.N. Singh, Aged about 50 years, Near

Dhamdha Naka, Mohan Nagar, Durg, P.S. Mohan Nagar, Tahsil and District - Durg, Chhattisgarh

8. Sanjay Agrawal, S/o Late L.N. Agrawal, Aged about 52 years, R/o Ajit Sadan Polsai Para, Durg, P.S. - Durg, Tahsil and District - Durg, Chhattisgarh
9. Abhishek Pandey, S/o Shri Ramvilas Pandey, Aged about 34 years, R/o New Sarkanda, Bangalipara, Street No. 03, P.S. Sarkanda, Tahsil and District - Bilaspur, Chhattisgarh

---- Respondents

For Appellants	:	Shri S.P. Singh, Senior Advocate with Shri Pushpendra Singh Baghel and Shri R.K. Bhagat, Shri Arun Kochar, Shri S.C. Verma, Shri Anurag Khatri and Shri Abhishek Pandey.
For Respondents and Interveners	:	Shri J.K. Gilda, Advocate General, Shri Prafull N. Bharat, Additional Advocate General, Shri P.K.C. Tiwari, Senior Advocate with Shri R.S. Baghel, Shri Kishore Bhaduri and Shri Sanjay Patel,

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

C A V Judgment

Per Navin Sinha, Chief Justice

11/12/2015

1. These appeals arise from a common order dated 5.12.2014. The facts and questions for consideration being common, they shall be taken from Writ Appeal No.459 of 2014, in which the lead arguments have been made. The Learned Single Judge declined to interfere with the election process mid way during counting. Directions were issued to complete the process of counting, leaving it open for the aggrieved to pursue remedies in an election petition under Rule 31 of the State Bar Council of Chhattisgarh Election Rules, 2013 (hereinafter referred to as 'the Rules')

2. The extended term of the previous State Bar Council under proviso to Section 8 of the Advocates Act, 1961 (hereinafter referred to as 'the Act') expired on 15.5.2013. The notification on 10.7.2013 for elections, by the Special Committee constituted by the Bar Council of India under Section 8A of the Act,

having been struck down fresh elections were notified by the Special Committee and held on 14.8.2014. The results have been published in the Gazette on 9.1.2015 and the State Bar Council constituted after a long time gap.

3. There is no challenge to the constitution of the Special Committee by the Bar Council of India for holding elections. There is no dispute regarding notification for elections, filing of nominations, holding of polls and counting of first preference votes on 24.9.2014. The Rules provide for casting of votes on basis of first preference, second preference and third preference. Counting of second preference votes commenced on 26.9.2014. Allegations were made of tampering with some preference votes by prefixing or suffixing of numbers, altering the preference position. The Advocate General, Chairman of the Special Committee, opined on 8.10.2014 that the allegations did not appear correct, and in any event could not be decided in a summary manner, but had to be the subject matter of challenge in an election petition only. The writ petitions were filed on 8.10.2014. By interim order dated 14.10.2014 a team of 'Observers' consisting of three Advocates was constituted to supervise the process of counting for taking the elections to its logical conclusion. The 'Observers' were permitted to inspect the ballots, form their opinion and submit report to the Special Committee of the State Bar Council for further action. On 16.10.2014, due to intervening diwali recess and certain dispute regarding nominated 'Observers', further counting was stayed. Special Leave Petitions (Civil) No. 17516-17517 of 2014 against the interim orders was dismissed on 28.10.2014. The writ petition was finally disposed on 5.12.2014 with directions to conclude counting, leaving it open for the aggrieved to approach the Election Tribunal under Rule 31. The 'Observers' supervised the remainder counting of second and third preference votes without controversy and submitted report dated 19.12.2014 to the Special Committee of the Bar Council with an inconclusive opinion of tampering. The Special Committee on 23.12.2014 directed the results to be published.

4. Appellant No.1 and Respondents 5,6,7 and 8 in Writ Appeal 459 of 2014, were original writ petitioners. They have subsequently been declared elected and are functioning as members of the State Bar Council. An Election Petition has been filed by one of the defeated candidates. Notices have been issued to all the contesting candidates including the parties in the present appeals. Only three of them have entered appearance in the election petition. The rest have not entered appearance despite service of notice, even while they pursue the present appeals. A counter claim has also been raised by one. Ex-parte proceedings have been directed by the Tribunal against those who have not appeared despite valid service.

5. Learned Counsel for the Appellants submitted that Appellant No.1 in Writ Appeal No.459 of 2014 despite having been elected during the pendency of the appeal, pursues the matter for purity of elections in the larger interests of the Bar. Tampering of preferences during counting of second preference votes by prefixing and suffixing numbers changing the preference position vote was noticed regarding four candidates at commencement of the second round of counting. Affidavits were also filed by some Advocates of Malkharodha stating that Candidate No.19 was not known to their Bar, had never met them during campaigning and therefore it was not understandable how the candidate had secured preference votes from Malkharodha.

6. The Chairman Special Committee wrongly rejected the complaint on 8.10.2014. A team of 'Observers' was constituted by the Court during counting of second preference votes. The 'Observers' by their report dated 19.12.2014, had prima facie opined tampering of ballots in the second round of counting. The Supreme Court on 28.10.2014 declined to interfere with the interim orders constituting the team of 'Observers'. The writ petition ought not to have been disposed on 5.12.2014 without awaiting the report of the team of 'Observers' thus frustrating the interim directions. The Special Committee of the Bar Council

has accepted the report of the 'Observers' and directed lodging of F.I.R. The Special Committee in the circumstances should not have directed publication of the election results.

7. The Learned Single Judge erred in holding that the writ petition was not maintainable and the remedy lay before the Election Tribunal under Rule 31 (6). There is no provision in the Rules for setting aside the election or directing fresh elections. As votes were cast on preference basis, the remedy of an election petition was not efficacious. It would lead to gross injustice if recounting was done after removing doubtful votes given to a candidate. A person declared elected without any allegations of tampering will stand to be prejudiced in a recount if he is ousted for no fault of his. The fact that someone who may have lost despite no tampering of his votes may now be declared elected is an irrelevant consideration. The Appellants seek to raise larger issues of probity and fairness in the Bar Council elections.

8. The Election Tribunal cannot identify who actually did the tampering. It cannot direct the police to investigate and submit report. The election process should have been cancelled after the report of the team of 'Observers' and fresh elections ought to have been directed. The writ petition was maintainable for setting aside the entire election. It was fairly acknowledged that the interim orders directing further counting in supervision of 'Observers' to take the elections to its logical conclusion was never challenged. It was also acknowledged that of the four contesting candidates with regard to whom allegations for tampering of second preference vote was made, three of them have lost and only one has won.

9. The Learned Single Judge erred in holding that the writ petition was not maintainable in absence of all contesting candidates impleaded as party Respondents under Rule 31 (3). The writ petition was filed at a stage when counting was still not complete. An amendment application had been filed in the

appeal to implead the elected members after publication of the results. The requirement to implead all contesting candidates as necessary parties in an election petition cannot be read into as a compulsory requirement in a writ petition challenging the entire election. The nature and jurisdiction of the two proceedings are different. The order of the Single Judge has rendered the interim directions for constitution of the team of 'Observers' and their report infructuous. The Election Tribunal is not competent to examine the extent, purport and scope of the interim orders, relevance of the 'Observers' report, as it cannot sit in judgment over the interim orders of the Court. An election petition was thus not the appropriate remedy in the facts of the present case.

10. There was no occasion for the Appellants to move the Tribunal as no relief for quashing the entire election process had been sought in the writ petition. The Appellants never intended by the writ petition to halt the election process. The writ petition was filed only for maintaining purity in elections by ensuring that counting of ballots is done properly and fairly and that interpolations in the same are prevented.

11. The availability of a remedy before the Election Tribunal was not a complete bar to a writ petition and much would depend on the facts and circumstances of each case. In exceptional and special circumstances a writ petition would lie to set aside an election even after the results had been declared. Reliance in support of the submission was placed on (1980) 4 SCC 211 (*Bar Council of Delhi v. Surjeet Singh*), (1993) 4 SCC 216 (*Ramchandra Ganpat Shinde v. State of Maharashtra*) followed in (1993) 4 SCC 317 (*M.V. Venkataramana Bhat v. Returning Officer & Tahsildar*), (1999) 4 SCC 526 (*K. Venkatachalam v. A. Swamickan*), (2007) 9 SCC 593 (*Popcorn Entertainment v. City Industrial Development Corporation*).

12. Learned Senior Counsel for the Appellant in Writ Appeal No.25 of 2015 submitted that a writ petition would be maintainable if the process of elections is

misused, as it is the heart and soul of democracy. Once the Court exercised its discretionary powers by passing interim orders, appointment of 'Observers' to supervise counting, the question for maintainability of the writ petition in view of any alternate remedy before the Election Tribunal had become redundant. The validity of the elections now simply depends on the 'Observers' report which has confirmed tampering of second preference votes. There is nothing left to be decided in an election petition. The election has to be set aside and the Court should direct fresh elections. Reliance was placed on (2014) 10 SCC 1 (Madras Bar Association v Union of India).

13. Sri Abhishek Pandey, Advocate, appearing in person in Writ Appeal No. 34 of 2015 adopted the arguments.

14. Learned Counsel on behalf of Respondents No. 5, 7 and 8, originally writ petitioners, subsequently elected, submitted that the extent of irregularity in an election would be a relevant consideration to decide if a writ petition would be maintainable or not. It cannot be said as an absolute proposition that a writ petition was not maintainable in election matters. A writ petition will lie for course correction during election process and the aggrieved need not necessarily wait till completion of the same and then only approach the Election Tribunal. The writ petition was filed by them only to ensure that counting was done fairly and honestly. The writ petition was not filed to question the election process. Reliance was placed on (2000) 8 SCC 216 (Election Commission of India v. Ashok Kumar). No other submission was made on their behalf.

15. Learned Additional Advocate General submitted that the order under appeal called for no interference. An election petition had already been filed on 21.2.2015 by a candidate who had lost. The parties before this Court are all impleaded therein. Except for three of them the others were deliberately not appearing despite valid service of notice even while pursuing matters presently. The Tribunal has directed ex-parte proceedings against them on 11.4.2015.

Fifteen persons have already entered appearance in the election petition. The appeal has become infructuous with regard to Appellant No.1 in Writ Appeal No.459 of 2014 due to subsequent developments as he has been declared elected and had also entered appearance in the election petition raising a counter claim that the person at Serial 26 be declared Serial 0 and the person at Serial 27 be moved to Serial 26.

16. The twin relief's sought in the writ petition were for directions to register an FIR, submission of a preliminary report and to ensure fairness in counting. Crime No. 235 of 2015 has been registered. The second relief also stood granted by constitution of the team of 'Observers' under whose supervision further counting was done without any complaints. The writ petitions had become infructuous thereafter. The 'Observers' report cannot be a ground to set aside an election mid way. The report itself stated it was inconclusive with regard to allegations for tampering. It therefore cannot be said with certainty at this stage that tampering had taken place. The report, according to the interim order, was to be submitted to the Special Committee of the Bar Council and which after perusing it had opined that the allegations for defacement of preferences had to be the subject matter of an election petition. The 'Observers' report was of no relevance to the adjudication of the writ petition.

17. The interim orders have merged in the final order dated 5.12.2014. No independent cause of action can be founded on an interim order which has worked itself out and ceased to exist after the final order. As on the date of the interim order counting was virtually at an end and only 15 more candidates were required to be eliminated before final results could be declared from amongst 106 contesting candidates. The argument that a recount may lead to an innocent winner being ousted is fallacious. If the election process is set aside as vitiated, the result would be same. The contention that the Election Tribunal cannot examine the effect and relevance of the interim orders or scrutinize the report of

the 'Observers' submitted pursuant to the directions of the Court, is fallacious. The report was binding on the returning officer and not the Election Tribunal.

18. If the Appellants were of the opinion that the counting at the commencement of the second stage was vitiated for any reason, the appropriate remedy for them was to have moved the Tribunal under Rule 31(6)(ii) which could even have directed re-poll at that stage. Rule 31(6)(ii) was disjunctive in nature separated by the words "OR". The Tribunal could order a re-poll at a place where no polling had taken place, and also where poll may have taken place, but was vitiated due to substantial irregularity. If discretionary writ jurisdiction had been exercised to aid the process of election by ensuring fairness in counting only it cannot be contended that the Court should now set aside the entire election on that ground especially when no relief to that effect had been sought.

19. The allegations with regard to tampering of certain second preference votes had to be the subject matter of an election petition only under Rule 31(6). Reliance was placed on AIR 1952 SC 64 (N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency), (1977) 2 SCC 494 (K.K. Shrivastava v. Bhupendra Kumar) and AIR 2004 Rajasthan 259 (Ram Avtar Khandelwal v. bar Council of Rajasthan).

20. No submissions were made on behalf of Respondent No.6, originally one of the writ petitioners, subsequently elected, despite having entered appearance through Counsel.

21. Learned Senior Counsel for the elected Interveners submitted that there are no allegations at any stage of the election process from the date of notification, filing of nominations, polls and first stage of counting. The allegations for tampering during commencement of counting for second preference votes has been adequately addressed when further counting was done under supervision of 'Observers' appointed by the Court. There has infact been no

tampering whatsoever. An election result cannot be set aside in a writ petition. The Learned Single Judge rightly held that the writ petition also suffered from non-joinder of necessary parties as all the contesting candidates have not been made party-respondents. It was lastly submitted that directions given by the Learned Single Judge in the larger public and institutional interest have all been complied with. The State Bar Council has been constituted after a long time gap. Any interference at this stage will make the remedy worse than the disease.

22. We have considered the submissions made on behalf of the parties.

23. Appellant No.1 in Writ Appeal No. 459 of 2014 was one of the writ petitioners. He has subsequently been elected a Member of the State Bar Council during the pendency of the appeal and is presently exercising all powers and privileges as Member. The subsequent event has made the appeal infructuous with regard to him. If he desired to contest the appeal, it was obligatory for him to have first resigned from his elected post. The Appellant cannot retain the benefit of the elected post and simultaneously challenge the election itself, taking mutually destructive pleas, blowing hot and cold. It is impermissible for a person to retain the benefit of an order and yet challenge another part of the same order. The principle was considered in (1992) 4 SCC 683 (R.N. Gosain v. Yashpal Dhir) observing as follows :-

“10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage”.

Moreover, Appellant No. 1 has also entered appearance in the election petition and filed a counter-claim that person at serial No. 26 be declared as serial No. 0 and person at serial No. 27 be declared at serial No. 26.

24. The writ petitions were filed when counting of second preference votes was in process. Election process is a wide ranging term and as explained in N.P. Ponnuswami (supra) it is used to connote the entire process culminating in the candidate being declared elected and returned. In the writ petition relief was sought for registration of an FIR with regard to tampering of second preference votes and to hand over the election process to an independent agency from the stage where the allegations started. By interim orders the counting was directed to be taken to its logical conclusion under supervision of the team of 'Observers'. This order attained finality with the dismissal of the Special Leave Petition on 28.10.2014. An amendment application was then filed on 17.11.2014 seeking additional relief for setting aside the entire election process. The amendment application simply stated that the additional relief was considered necessary for a just and proper decision of the case. No other ground whatsoever was pleaded. The order sheet does not reflect that the amendment application was pressed and allowed. It is incomprehensible how the amended relief could be granted unless and until the interim order affirmed by the Supreme Court was vacated, modified or set aside in appeal. Once the election process had commenced, polls were over and counting was under way, the writ Court cannot annul the elections mid way. The earlier interim orders had been passed conscious of the limitations of the writ Court in the matter. The amended relief sought was therefore clearly impermissible in law.

25. The impermissibility of the writ Court stalling the election process mid way was considered in (1996) 3 SCC 416 (Boddula Krishnaiah v. State Election Commissioner, A.P.) observing as follows :-

“11. Thus, it would be clear that once an election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with the election process giving direction to the election officer to stall the proceedings or to conduct the election process afresh, in particular when election has already been held in which the voters were allegedly prevented from exercising their franchise. As seen, that dispute is covered by an election dispute and remedy is thus available at law for redressal.”

26. In Ashok Kumar (supra) the High Court had stayed the directions of the Election Commission for the manner of counting of votes and given directions in respect of the same. Referring to N.P. Ponnuswami (supra), setting aside the order of the High Court it was observed :-

“34.....Thus, we find that the two petitioners before the High Court had failed to make out a case for intervention by the High Court amidst the progress of election proceedings and hence the High Court ought not to have made the interim order under appeal though the impugned order did not have the effect of retarding, protracting, delaying or stalling the counting of votes or the progress of the election proceedings.....”

27. The writ petitions had substantially become infructuous after further counting was directed under supervision of the “Observers”. Crime No. 235 of 2015 has also been registered. The police investigation will concern who may have physically done the tampering of preferences. Prosecution of the concerned may follow, including any elected candidate, but it cannot result in setting aside of the election which can be done in an Election Petition only. The factual finding of tampering or defacement of ballots after examination of the votes and taking of evidence to vitiate the elections can only be done in an Election Petition by a Election Tribunal after the ballot box is opened pursuant to orders of the Election Tribunal and not as an outcome of investigation in an FIR. Appropriately, the FIR will have to await the outcome of the election petition and based on its findings, the police investigation may proceed and not vice versa. The law stands well settled that secrecy of ballots and the ballot box, cannot be interfered with by any person or authority nor the ballot box can be opened by any person or authority whatsoever except under the authority of the orders of the competent Court of law hearing an Election Petition.

28. In appeal before us, the plea in the amendment application for setting aside the entire election was completely given up by submitting that no relief for setting aside the entire election had been sought in the writ petition. The remedy under Rule 31(6) was not efficacious as the writ petition had been filed only for

maintaining purity of elections. There is no challenge in the appeal to the subsequent order dated 23.12.2014 of the Special Committee for declaration of results after considering the report dated 19.12.2014 of the “Observers’ and the publication of the results in the gazette on 9.1.2015. Out of the seven writ petitioners giving rise to Writ Appeal No.459 of 2014, five of them have been elected belying their own apprehensions of the polls not being fair.

29. Analogy regarding the role of ‘Observers’ can be drawn from Section 20B of the Representation of the People Act, 1951 providing for appointment of “Observers’. They are appointed to watch the conduct of the election and report irregularities. They can give directions to the Returning Officer for stopping counting of votes or declaration of results and report to the Commission which then takes a final decision. The directions of the ‘Observers’ binds the Returning Officer only till a final decision is taken. The reliance by the Appellants on the ‘Observers’ report dated 19.12.2014 as final and complete justification to set aside the elections as defacement of votes had been established beyond doubt is therefore completely misconceived. The Special Committee, after considering the report of the ‘Observers’ has directed declaration of election results on 23.12.2014 in exercise of powers under Rule 20(2). In any event the report of the ‘Observers’ is ambivalent and non-committal, mentioning a prima facie opinion of tampering, with internal differences of opinion amongst the ‘Observers’ themselves on the issue, and concludes that they were not experts in the field and that the report was based on their limited knowledge and it would be for the Special committee to take a final decision on their report. The interim orders for supervision of counting in presence of the team of ‘Observers’ having worked itself out, the question of the Election Tribunal having to interpret any orders of the Court or lacking jurisdiction to scrutinize the ‘Observers’ report are irrelevant issues. Any order of the Special Committee under Rule 20(2) also shall not bind the Election tribunal. The Election Tribunal will have to arrive at its own independent conclusion based on the nature of the materials and evidence

placed before it.

30. Votes cast in an election by secret ballot represent the will of the voters. The will of the voters has to be respected. But purity of election has also to be maintained. If there are allegations affecting the purity of an election there has to be a cautious scrutiny by examination of facts and evidence to arrive at a conclusion that purity of election stood substantially affected. This cannot be done in a summary manner on basis of any prima facie report of 'Observers' which itself is inconclusive. The jurisdiction vests in the Election Tribunal alone to be exercised in accordance with law. The opening of a ballot box or ordering recount cannot be in the manner of a fishing and roving enquiry. In A I R 1966 SC 773 (Jagjit Singh v. Giani Kartar Singh) it was observed :-

“37....Unless an application for inspection of ballot papers makes out a proper case for such inspection, it would not be right for the Tribunal to open the ballot boxes and allow a party to inspect the ballot papers, and examine the validity or invalidity of the ballot papers contained in it. If such a course is adopted, it would inevitably lead to the opening of the ballot boxes almost in every case, and that would plainly be inconsistent with the scheme of the statutory rules and with the object of keeping the ballot papers secret.....”

This was reiterated in (1975) 4 SCC 393 (Chanda Singh v. Shiv Ram Verma) as follows :-

“6.....A democracy runs smooth on the wheels of periodic and pure elections. The verdict at the polls announced by the Returning Officers leads to the formation of Governments. A certain amount of stability in the electoral process is essential. If the counting of the ballots are interfered with by too frequent and flippant recounts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying if recount of votes is made easy. The general reaction, if there is judicial relaxation on this issue, may well be a fresh pressure on luckless candidates, particularly when the winning margin is only of a few hundred votes as here, to ask for a recount Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous disorientation which invades the democratic order by injecting widespread scope for reopening of declared returns, unless the Court restricts recourse to recount to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step. The best surmise, if it be

nothing more than surmise, cannot and should not induce the Judge to break open ballot boxes.....”

31. In the facts of the present case it is not considered necessary to decide if the Appellants could have approached the Election Tribunal under Rule 31(6) (ii) instead of approaching the writ Court. The question is left open for consideration in another appropriate case. There are no special or extraordinary circumstances warranting invocation of the writ jurisdiction in what is otherwise a pure and simple election dispute with regard to who may have won and lost.

32. Rule 31(6) as discussed by the Learned Single Judge vests adequate powers in the Election Tribunal in the event that it arrives at a conclusion for tampering or defacement of preference votes including directing recount. The order under appeal contains adequate discussion based on precedents with regard to non maintainability of the writ petition in the facts of the case and the availability of appropriate remedy before the Election Tribunal. It is nonetheless considered desirable to briefly recapitulate the discussion in K. K. Srivastava (supra) arising from A I R 1976 Madhya Pradesh 110 (Bhupendra Kumar Jain v. Y. S. Dharmadhikari). The High Court in Bhupendra Kumar Jain (supra) held that where the entire election was challenged as distinct from the election of certain candidates, an election petition was not an appropriate and efficacious remedy. It was further held that the list of candidates elected could be prepared only after completion of the count and since a number of valid votes were wrongly rejected it necessarily follows that there was no completion of the count for publication of valid results with further directions to declare the results afresh after taking into account ballot papers wrongly rejected because the number 1 in the manner written resembled Roman I and was contrary to the Rules for a valid vote even though the 2nd and 3rd preferences had been written in numbers as per Rules. The order was set aside by the Supreme Court, adequately discussed in paragraph 31 of the order of the Learned Single judge and we need not reiterate the same. In Ram Avtar Khandelwal (supra) also adequately discussed by the

Learned Single Judge, it was observed that the words “recount” occurring in the Rules could not be hedged in by any limitations and wherever there was a mistake in physical counting of votes or invalid votes were counted the Election Tribunal was competent to order a recount. Otherwise the similarity on facts with the present case regarding Rule 20(2) has also been adequately discussed by the Learned Single Judge. K. K. Srivastava (supra) has also been relied upon in 1987 Suppl.SCC512 (Gujarat University v. N.U. Rajguru) observing as follows :-

“6. It is well settled that where a statute provides for election to an office, or an authority or institution and if it further provides a machinery or forum for determination of dispute arising out of election, the aggrieved person should pursue his remedy before the forum provided by the statute. While considering an election dispute it must be kept in mind that the right to vote, contest or dispute election is neither a fundamental nor a common law right, instead it is a statutory right regulated by the statutory provisions. It is not permissible to invoke the jurisdiction of the High Court under Article 226 of the Constitution bypassing the machinery designated by the Act for determination of the election dispute. Ordinarily the remedy provided by the statute must be followed before the authority designated therein. But there may be cases where exceptional or extraordinary circumstances may exist to justify bypassing the alternative remedies....”

33. There was no challenge to the vires of any provision of the Rules. The re-constitution of the Special Committee of the Bar Council to conduct the Elections was also not under challenge. There is no other challenge of any nature to the purity of elections except for at the commencement of the second round of counting. The secrecy of ballots cannot lightly be interfered with and the ballot box can only be opened only by an order of the Election Tribunal. Whether the purity of the elections has been affected or not is for the Election Tribunal to consider and not the jurisdiction of the Writ Court. The Learned Single Judge has more than adequately discussed the law in this regard. There is no challenge to the decision of the Special Committee dated 23.12.2014 under Rule 20(2) for publication of results and neither is there any challenge to the notification of results dated 9.1.2015. The order of the Learned Single Judge, in our considered opinion, lays down the correct view with regard to the non-maintainability of the writ petition and calls for no interference.

34. Reliance by the Appellants on Surjeet Singh (*supra*) is misplaced. The challenge in it related to validity of Rule 3(J) added to the Bar Council of Delhi Election Rules, 1968 in the year 1978 on the ground that approximately 2000 Advocates stood excluded from the electoral rolls holding that preparation of the electoral roll under Rule 3(J) was illegal and therefore election itself was invalid and amenable to challenge in a writ petition. It is therefore distinguishable on its own facts.

35. Ramchandra Ganpat Shinde (*supra*) related to an election of Pradhan under the Panchayat Act. Two nominated members were prevented from voting. It was the case of the Appellant that though both intended to vote for him, they were prevented from voting in a collusive manner. It was held that the writ petition was not filed bonafide by the rival candidate and interim orders obtained to prevent the two from voting. The orders were collusive. There was no procedure prescribed under the Act or Rules to challenge the validity of the election. In any event, no Election Tribunal could go into the correctness of the interim orders passed by the Court depriving the two from voting which could be remedied only under Article 226 of the Constitution to conclude that the results of the election were materially affected setting the same aside. The case is completely distinguishable on its own facts.

36. In K. Venkatachalam (*supra*), the issue related to general elections to the Legislative Assembly in Tamil Nadu. The undisputed facts were that the candidate who had won was not an elector in the electoral roll for the constituency and that he in a blatant and fraudulent manner represented to be an elector of that constituency by impersonating himself for another. It was in those admitted facts that the writ Court had interfered and the appeal against which was dismissed. The case is again distinguishable on its own facts.

37. Popcorn Entertainment (*supra*) relates to the broad proposition that in contractual matters availability of an alternative remedy was not a complete bar

to a writ petition relying on (1998) 8 SCC 1 (Whirlpool Corporation v. Registrar, Trade Marks) holding that alternative remedy was not a bar in three contingencies, where it had been filed for enforcement of fundamental right, there has been violation of natural justice or proceedings were without jurisdiction or vires of an Act was challenged. The principles therefore have no application to the facts of the present case.

38. The State Bar Council has been constituted after a long time gap and is functioning. An Election Petition has also been filed in which some of the Appellants and the Respondents have already entered appearance apart from others. Notices have been served on the others notwithstanding which they have not appeared and the Tribunal has directed to proceed ex-parte against them. Considering that the contestants are all Learned Members of the Bar, from whom higher standards of probity and conduct is expected, the Court hopes and trusts that the others will expeditiously enter appearance to facilitate early decision by the Election Tribunal. Learned Members of the Bar are the *sentinels on the qui vive* for enforcement of rule of law. The responsibility to uphold the law becomes more onerous when they assume the role of litigants themselves to be a role model to other litigants.

39. Rule 31 of the Rules provides for filing of an election petition within 15 days from the date of publication of the results. The writ petitions from which the present appeals arise were filed before the election results were declared. There is no provision for condoning delay under Rule 31 in filing of the election petitions. It is therefore considered appropriate relying on (1996) 6 SCC 199 (Danda Rajeshwari v. Bodavula Hunamayamma) to observe that if an election petition is filed within 15 days from the date of the present order by any one of the Appellants, the Tribunal shall decide the same on its own merits without going into the question of limitation under Rule 31 of the Rules. It is expected that election petitions, if any filed by the parties, shall be dealt with expeditiously

and disposed at the earliest subject to cooperation by the parties.

40. Writ Appeal No. 459 of 2014 is dismissed as infructuous with regard to Appellant No.1. The other appeals are dismissed on merits.

Sd/-

(Navin Sinha)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE