

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
ORDINARY ORIGINAL CIVIL JURISDICTION
ELECTION PETITION NO.1 OF 2012

Shivaji Laxman Sahane
residing at Sahane Mala,
Jai Bhavani Road, Nashik Road,
Nashik

... Petitioner

Vs.

Jaywantrao Pundalikrao Jadhav
residing at Shivneri,
Ramdas Swami Nagar,
behind Gandhinagar,
Nashik 422 006

... Respondent

Mr. Mahesh Jethmalani, Senior Advocate i/b. Mr. S. S. Deshmukh, Mr. Pravin Gole and Ms Chaitra Pawar for Petitioner.

Mr. C.M. Korde, Senior Advocate a/w. Mr. Bhushan V. Mahadik, Ms Priyanka Patil and Mr. T. C. Sasikumar for Respondent.

CORAM : R. G. KETKAR, J.
Reserved on : OCTOBER 14, 2014
Pronounced on: JANUARY 13, 2015

JUDGMENT:

Heard Mr. Jethmalani, learned Senior Counsel for the petitioner and Mr. Korde, learned Senior Counsel for the respondent at length.

2. Shivaji Laxman Sahane, hereinafter referred to as the petitioner, has instituted this Petition under Section 81 read with Section 100(1)(d) (iii) and (iv) of the Representation of the People Act, 1951 (for short 'Act') calling in question the election of Jaywantrao Pundalikrao Jadhav, hereinafter referred to as the respondent held in the Biennial Election for the year 2012 from the Nashik Local Authorities Members Constituency for Maharashtra State Legislative Council (for short 'Election'). The facts leading to filing of this Petition, briefly stated, are as under:

3. By issuing a press note on 23.04.2012, Election Commission of India declared the Election Programme for the 6 Local Authorities Constituencies for the Maharashtra Legislative Council for the Biennial Election for the year 2012. The last date of filing nominations was 07.05.2012. The scrutiny of the nomination papers was fixed on 08.05.2012. The last date for withdrawal of nominations was 10.05.2012. The date of voting / polling was 25.05.2012 and the date of counting of votes was 28.05.2012. It was also directed that the process of election shall be completed before 30.05.2012. The petitioner being the authorized candidate from the Shiv Sena Party, which is a recognized and registered political party in the State of Maharashtra, submitted his nomination form on 07.05.2012. The same was accepted as a valid nomination form. The respondent also submitted his nomination form being the official candidate from the Nationalist Congress Party (N.C.P.), which is a registered and recognized political party in the State of Maharashtra. Apart from the petitioner and respondent, four other candidates submitted nomination forms, which were either withdrawn or invalidated by the Returning Officer. Thus, the petitioner and respondent were the only contesting candidates after the last date of withdrawal of nomination forms.

4. Total 475 voters were eligible to vote in the election. Out of that, 467 voters actually exercised their right to vote on 25.05.2012. There were 15 polling stations / centres all over the Nashik District. Out of 467 votes, 23 ballot papers were invalidated till last round of counting and scrutiny on different grounds. It is the case of the petitioner that at the end of the first round of counting, the valid votes found in favour of the petitioner were 225 and respondent secured much less votes. The Returning Officer ought to have declared petitioner as the returned candidate but without there being any demand, the Returning Officer suo-motu and for no valid reason again scrutinized the ballot papers and

invalidated one ballot paper by which vote was cast in favour of the petitioner. The petitioner objected immediately and questioned the legality of re-scrutiny of ballot papers whereupon the Returning Officer fumbled and could not satisfactorily deal with the objections raised by the petitioner. According to the Returning Officer, the mark which was put by the concerned voter on the said ballot paper in favour of the petitioner was not clearly visible. The petitioner pointed out that the concerned voter had put up his preference against the name of the petitioner by using Roman Numerical (I), which is also allowed as per the guidelines issued by the Returning Officer along with letter dated 23.05.2012. After invalidating one ballot paper, the votes in favour of the petitioner were 224. At that stage, the Returning Officer again started scrutiny of all the ballot papers and during the scrutiny, 6 ballot papers were again invalidated. Out of the 6 ballot papers, 3 voters had voted in favour of the petitioner and remaining 3 voters had voted in favour of the respondent. The objections raised by the petitioners were rejected by the Returning Officer.

5. It is the case of the petitioner that there was equality of votes between the petitioner and respondent, both securing 221 votes. The Returning Officer reported the matter to the Election Commission of India seeking guidance. On 28.05.2012, the Returning Officer issued a letter addressed to the petitioner and respondent inter alia informing that election will be conducted by drawing of lots under Rule 75(4) of the Conduct of Election Rules, 1961 (for short 'Rules').

6. It is the case of the petitioner that during the process of drawing of lots, two chits containing the names of petitioner and respondent were prepared. They were folded and mixed in a bowl. Thereafter, a young boy was called upon for drawing the lots. In the draw of lots, the chit containing name of the petitioner was taken out from the bowl. The

Returning Officer declared respondent as a Returned Candidate under Rule 84(1)(a) in Form 23 and issued the result of poll and transfer of votes under his signature under Rule 84(1)(b) in Form 23-B. It is the case of the petitioner that the process of drawing lots was conducted in an illegal manner. The objections taken by the petitioner were rejected by the Returning Officer on 30.05.2012.

7. It is the case of the petitioner that four ballot papers through which votes were cast in his favour were rejected by the Returning Officer on erroneous grounds and contrary to the provisions of Rule 73(2) of the Rules. The petitioner has set out these facts in paragraphs 6(a) to (d) of the Petition. The case of the petitioner is that the entire process of counting of votes and drawing of lots was conducted in an illegal manner disregarding the provisions of election laws and the rules and procedure. The petitioner contends that assuming for the sake of argument without conceding that there was equality of votes between petitioner and respondent, the Returning Officer ought to have followed Section 65 of the Act and should not have taken recourse to Rule 75 of the Rules. The petitioner has, therefore, challenged the election of the respondent firstly, on the ground that 4 preference votes cast in favour of the petitioner were wrongly rejected by the Returning Officer under Section 100(1)(d)(iii) of the Act. Secondly, the Returning Officer ought to have followed the procedure under Section 65 of the Act rather than invoking Rule 75 of the Rules. The petitioner instituted this Petition on 19.06.2012.

8. The respondent resisted the Petition by filing written statement dated 16.02.2013, which was amended on 23.10.2013. The respondent contended that the Election Petition is misconceived and not maintainable and is abuse and misuse of the process of law and on this ground alone, Petition is liable to be dismissed. The respondent

contended that on 24.10.2013, a copy of the affidavit of evidence in lieu of examination-in-chief dated 23.02.2013 made by the petitioner was served on the Advocate of the respondent. The said affidavit is in English language and was interpreted in Marathi for the petitioner by the sworn interpreter of this Hon'ble High Court in the presence of Ms N.S. Chitnivas, Assistant Chief Translator as interpreter, High Court Bombay before the same was signed by the petitioner. The affidavit was interpreted to the petitioner as he was not able to read and understand the contents of the affidavit, which are in English. The original Petition, which is also in English language, was signed by the petitioner on 19.06.2012. The said Petition was verified by the petitioner on 19.06.2012. The Petition was signed and verified by the petitioner without the same being interpreted in Marathi. The respondent, therefore, submitted that the Petition is liable to be dismissed on the ground of non-compliance of Section 83(1)(c) of the Act. The respondent dealt with paragraph 6 of the Election Petition in paragraph 11 of the written statement. It was contended that the four votes were rightly rejected and on the contrary, 7 votes of the respondent were wrongly invalidated. In any event, the petitioner has to file the Election Petition not on the basis of invalidated votes but by improper reception, refusal or rejection of any vote or the reception of any vote, which is void as far as it concerns Returned Candidate and not on the contrary. It was further submitted that in case of only two candidates standing for elections, the question of second preference of vote is merely stated to be rejected as there is only one vote from elector. Rest of the paragraphs of the Petition were dealt by the respondent. The respondent ultimately submitted that the Petition ought to be dismissed with compensatory costs.

9. On the basis of the pleadings of the parties, following issues were framed:

1 (1-A) Whether the Election Petition is liable to be dismissed for non-compliance of provisions of Sections 82 and 86 of the Representation of the People Act, 1951?

2 (1-B) Whether the petitioner proves that 4 votes casted in favour of the petitioner out of the total 23 invalidated votes were improperly rejected by the Returning Officer in violation of the provisions of Representation of People Act, 1951 and Rules? (This, however, subject to the objection of respondent No.6, in Election Petition and the petitioner in Recrimination Petition.)

3 (2) Whether respondent No.6 proves that 7 votes casted in favour of respondent No.6 out of the total 23 invalidated votes were improperly rejected by the Returning Officer in violation of the provisions of Representation of People Act, 1951 and Rules? (Subject to objection of petitioner in Election Petition.)

4. Whether the petitioner proves that the Returning Officer ought to have considered the second preferential vote cast in favour of the petitioner in an election which has only two contestants?

5. Whether the petitioner has acquiescenced and consented to the draw of lots subsequently therefore, he cannot challenge the invalidation of 4 votes?

6. Whether as per the provisions of the Representation of People Act, 1951 and Rules, the draw of lot falls in favour of the petitioner or respondent No.6? Or the same is based on the exclusion principle?

7. Whether the petitioner proves that he ought to be declared as a successful candidate in the biennial election held for Nashik Local Authorities Members Constituency?

10. In support of this Petition, the petitioner filed his affidavit in lieu of examination-in-chief dated 23.10.2013 as P.W.2. He also examined P. Velrasu, Collector, Thane as P.W.1. Both these witnesses were cross-examined by the respondent. The respondent examined Mahesh Arun Sawant, his Counting Agent, who was cross-examined by the petitioner.

11. After conclusion of evidence, Mr. Korde made elaborate submissions for dismissal of the Petition. Mr. Jethmalani countered his submissions by advancing elaborate submissions. He submitted that the election of the respondent is liable to be set aside and further, petitioner should be declared as a Returned Candidate. The learned Counsel for the parties have taken me through the pleadings and the oral and documentary evidence minutely. They have also relied upon the case laws, which will be referred at appropriate place. After considering the pleadings and the evidence of the parties, in my opinion, following are the main questions, which are required to be answered while deciding this Petition:

1. Whether the four first preference votes (P-17) to (P-20) cast in favour of the petitioner were wrongly rejected by the Returning Officer under Section 100(1)(d)(iii) of the Act?
2. Whether in the event of equality of votes, the Returning Officer ought to have followed the procedure under Section 65 of the Act rather than invoking Rule 75 of the Rules?
3. Whether the second preference votes cast in favour of the petitioner ought to have been credited to the petitioner by the Returning Officer?

12. While deciding question No.1, if this Court comes to the conclusion that out of four votes, even one vote was wrongly rejected by the Returning Officer under Section 100(1)(d)(iii) of the Act, it will not

be necessary to deal with questions No.2 and 3. If, however, answer to question No.1 is against the petitioner then the question whether in the event of equality of votes, the Returning Officer ought to have followed the procedure under Section 65 of the Act or Rule 75(4) of the Rules will have to be decided.

13. Before answering these questions, it is necessary to deal with the submission advanced by Mr. Korde about the effect of petitioner not pressing prayer clause (e) of the Petition. Prayers (e) and (f) of the Petition read as under:

“(e) that this Hon'ble Court be pleased to Order for recount and re-verification / scrutiny of the 23 invalidated ballot papers in the Election to the Legislative Council of the State of Maharashtra in the Biennial Election from the Nashik Local Authority Constituency for the year 2012;

(f) that this Hon'ble Court be pleased to hold and declare that Returning Officer has wrongly invalidated 4 ballot papers through which the votes were casted in favour of the petitioner and hold and declare that the Petitioner had secured the highest number of votes in the Election to the Legislative Council of the State of Maharashtra in the Biennial Election from the Nashik Local Authority Constituency for the year 2012;”

14. He submitted that prayer (e) is the basis of prayer (f). Prayer (f) cannot be granted unless prayer (e) is granted. Prayer (f) would become infructuous without prayer clause (e) as unless the 23 invalidated ballot papers, which have been kept in a separate sealed cover are scrutinized, it would be impossible even to identify the four ballot papers referred to in prayer (f) and that unless the four ballot papers (which are part of 23 invalidated votes) are scrutinized and re-verified and recounted by this Court, it is impossible to consider whether prayer (f) could be granted.

15. He submitted that respondent filed Application No.3 of 2013 for amending the written statement. The said application was substantially based on prayer (e) of the Petition. The application was rejected mainly

on the ground that petitioner did not press prayer (e) of the Petition. In the order dated 06.09.2013, this Court recorded that prayer (e) is not pressed by the petitioner at his risk. After recording the statement, this Court rejected the application for amendment. He submitted that the petitioner must take all the consequences which flow from not pressing prayer (e). In view of the statement of the petitioner not pressing prayer (e), he is not entitled to scrutiny, re-verification or recount of any of the 23 invalidated votes. The petitioner cannot be permitted to reintroduce prayer (e) either in respect of the 23 invalidated votes or in respect of four votes in prayer clause (f) as claimed by the petitioner. The said four votes are part of 23 invalidated votes. He further submitted that all the invalidated votes were kept in a separate sealed cover and the four ballot papers mentioned in prayer (f) could not be identified unless and until all the 23 invalidated ballot papers were scrutinized. He, therefore, submitted that identification of the four ballot papers and further scrutiny, re-verification and recount of the said four votes was absolutely necessary before prayer clause (f) could be considered. He invited my attention to question No.44 in the cross-examination of the petitioner and the answer given to that question, which is to the following effect:

“Q.44 Do you agree that you could not identify the four ballot papers Exhibits P-17, P-18, P-19 and P-20, unless you examined each and every one of the 23 ballot papers?

Ans. Yes. [Witness volunteered, I knew the details of those four ballot papers, how the preference was given in my favour and those ballot papers were wrongly rejected by the Returning Officer.]”

16. Mr. Korde submitted that if exhibits P-17 to P-20 are scrutinized, re-verified and recounted for the purpose of considering prayer (f), it would amount to considering prayer (e) of the Petition in respect of the said four votes though petitioner had given up prayer (e) at his risk.

17. Mr. Korde submitted that this Court will decline to examine,

scrutinize or re-verify or re-count the said four ballot papers, exhibits P-17 to P-20. He relied upon the decision of the Apex Court in the case of ***Arikala Narsa Reddy Vs. Venkata Ram Reddy Reddygari***¹, and in particular paragraph 15 thereof. He further submitted that by order dated 25.09.2013, this Court allowed the Application (St.) No.6 of 2013 taken out by the petitioner. The respondent challenged that order by filing Special Leave Petition. The Special Leave Petition was dismissed on 07.10.2013. He submitted that since the S.L.P is simply dismissed, the respondent is not precluded from agitating the effect of the petitioner not pressing prayer (e) of the petition.

18. In support of this submission, he relied upon the following decisions:

- a. ***Union of India Vs. Jaipal Singh***², and in particular paragraph 4 thereof;
- b. ***Jalpat Rai Vs. State of Haryana***³, and in particular paragraph 18 thereof;
- c. ***Jitender Kumar Vs. State of Haryana***⁴, and in particular paragraph 75 thereof; and
- d. ***Sri Ram Builders Vs. State of Madhya Pradesh***⁵, and in particular paragraphs 47 to 49 thereof.

19. On the other hand Mr. Jethmalani submitted that aggrieved by the order dated 06.09.2013 passed by this Court, respondent preferred S.L.P. before the Apex Court. After hearing the parties, the Apex Court dismissed the S.L.P. on 07.10.2013. He invited my attention to the grounds (d), (f-1) to (f-3) in the S.L.P. wherein the contentions as regards not pressing of prayer clause (e) were specifically raised. He, therefore, submitted that the respondent is precluded from agitating this contention.

¹ (2014) 5 SCC 312

² 2004 (3) Mh.L.J.793

³ AIR 2011 SC 2719

⁴ (2012) 6 SCC 204

⁵ JT 2014 (6) SC 134

20. Mr. Jethmalani further submitted that as per Rule 93 of the Rules, the packets of used ballot papers whether valid, tendered or rejected are required to be kept separately in a sealed envelope and they cannot be opened and their contents cannot be inspected by, or produced before any person or authority except under the order of a competent Court. In order to pull out four wrongly rejected votes, which the petitioner wanted this Court to scrutinize, it was necessary that all the invalidated votes are brought before the Court. He submitted that prayer (e) was for a general recount while prayer (f) was specific in respect of the four wrongly rejected votes. There are specific pleadings and evidence as regards four wrongly rejected votes. Prayers (e) and (f) are independent of each other. He submitted that respondent neither objected to the inspection of 23 invalidated ballot papers, which are rejected by the Returning Officer including exhibits P-17 to P-20 nor he objected to tendering exhibits P-17 to P-20 in evidence and marking thereof as exhibits. By prayer (e), petitioner sought for recounting of all the 23 rejected ballot papers. By prayer clause (f), the petitioner prayed for scrutiny of four invalidated ballot papers, which are at exhibits P-17 to P-20 cast in favour of the petitioner which according to him were wrongly rejected by the Returning Officer. He, therefore, submitted that the petitioner is not precluded from pressing prayer clause (f) even after deletion of prayer clause (e).

21. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. By prayer clause (e) extracted hereinabove, the petitioner prayed **for order of recount and re-verification / scrutiny of the 23 invalidated ballot papers in the election.** By prayer (f), the petitioner prayed for declaration that **the Returning Officer has wrongly invalidated four ballot papers through which the votes were cast in his favour and for further declaration that the**

petitioner had secured the highest number of votes in the election.

Whereas in terms of prayer clause (e), petitioner claimed larger relief in respect of recount / re-verification / scrutiny of 23 invalidated ballot papers, in terms of prayer clause (f), the petitioner has restricted his claim in respect of four invalidated ballot papers. In the first place, perusal of the Petition clearly shows that no foundation is laid in the entire Petition in respect of prayer (e). Secondly, the respondent filed Application No.3 of 2013 for amending the written statement in terms of the Schedule annexed thereto. The respondent intended to add paragraphs 17-A, 17-B and 17-C after paragraph 17. By the proposed amendment, respondent gave no objection for granting prayer (e) of the Petition. In other words, respondent wanted recount, re-verification / scrutiny of the 23 invalidated ballot paper in the election as according to him, 7 ballot papers, which were in favour of the respondent were wrongly invalidated by the Returning Officer without assigning any reasons. The only ground stated by the Returning Officer in his order dated 28.05.2012 was that the decision was taken as per Rule 73(2) of the Rules. *(emphasis supplied)*

22. At the time of hearing of this application, petitioner did not press prayer (e). This Court recorded in paragraph 5 of the order dated 06.09.2013 that the proposed amendment revolved around prayer clause (e) of the Petition. Since the respondent did not file Recrimination Petition, the Court will not be in a position to pass any order as prayed for in the application. Earlier, the Court had dismissed the Recrimination Petition on 16.08.2013. The Apex Court dismissed the S.L.P. challenging that order on 27.08.2013. Thirdly, Rule 93(1)(b) lays down that while in the custody of the District Election Officer or, as the case may be, the Returning Officer, the packets of used ballot papers whether valid, tendered, rejected shall not be opened and their contents

shall not be inspected by, or produced before, any person or authority except under the order of a competent Court. Fourthly, as per the order passed by this Court on 09.10.2013, respondent took inspection of 23 invalidated votes among other record. Fifthly, after inspection of the record, four ballot papers were marked as exhibits P-17 to P-20. The respondent never objected to admitting these documents in evidence as also marking them as exhibits. Finally, the respondent has not challenged the jurisdiction of this Court while ordering inspection of the ballot papers. In fact, the respondent has taken active part in the inspection of ballot papers and obtained certified copies. In the case of *N.E. Horo Vs. Leander Tiru*⁶, the Apex Court has held in paragraph 14 that once the Court has embarked upon its jurisdiction to inspect the ballot papers then the absence of specific pleadings / allegations is no bar to inspect the ballot papers on the illegality which is noticed on such inspection. When an illegality is noticed on inspection, it must be corrected. That is precisely the purpose of inspection of ballot papers. For all these reasons, I do not find any merit in the submissions of Mr. Korde.

Question No.1

Whether the four first preference votes (P-17) to (P-20) cast in favour of the petitioner were wrongly rejected by the Returning Officer under Section 100(1)(d)(iii) of the Act?

23. The petitioner has contended that the Returning Officer has wrongly rejected the four ballot papers through which the votes were cast in his favour on erroneous grounds and contrary to provisions of Rule 73(2) of the Rules. The said assertions are in paragraphs 6-a to 6-d of the Petition. The respondent has dealt with these assertions in paragraph 11 of the written statement.

⁶ AIR 1989 SC 2023

P-17

24. The petitioner has dealt with this ballot paper in paragraph 6-a of the Petition, which reads as under:

“a. In one ballot paper the preference was clearly given in favour of the petitioner but on the top of the said ballot paper there was a single dot. The petitioner states that on such ground the ballot paper cannot be invalidated because the said mark cannot identify the Voter and therefore, the rejection of the said ballot paper is clearly wrong and illegal.”

25. The respondent has dealt with these assertions in paragraph 11 of the written statement, which reads as under:

“11. With reference to paragraph 6 of the Election Petition, this respondent submits that the petitioner is challenging the election of this respondent, more particularly on the basis of 4 ballot papers being cast in the petitioner's favour being rejected. This respondent submits that it has been validly rejected and on the contrary, 7 votes of this respondent have also been invalidated. In any event, this respondent submits that the petitioner has to file an Election Petition not on the basis of invalid votes which are invalidated but by improper reception, refusal or rejection of any vote or the reception of any vote which is void as far as it concerns a returned candidate and not on the contrary. It is submitted that in cases of only 2 candidates standing for elections, the question of second preference of vote has merely stated to be rejected as there is only vote per elector.”

26. The petitioner has filed affidavit of evidence in lieu of examination in chief and has dealt with P-17 in paragraph 12, which reads as under:

“12. I say that during the said recounting / re-verification by the Returning Officer over ruling my objection, one ballot paper whereby the first preference was clearly given in my favour but the said ballot paper was declared as invalid as on the said ballot paper against the name of the respondent there is a single 'dot' (.). I say that the reason given for the rejection of the said ballot paper is “Voter Identifiable”. I say that on such ground, the ballot paper cannot be invalidated because the said mark cannot identify the Voter and therefore the rejection of the said ballot paper is clearly wrong and illegal. I say that the ballot paper invalidated on the ground of having (.) (dot) is contrary to the provisions of Rule 73(2) of the Conduct of Election Rules, 1961. I say that said vote can be identified by me and on the backside of the said ballot paper, there is a number 7/15. I say that the original ballot papers valid and invalid

are produced by Mrs. Geetanjali Bawiskar, District Deputy Election Officer, Nashik and I can identify the said ballot paper where there is (.) (dot) against the name of the respondent and the same can be marked as Exhibit.”

27. The relevant cross-examination is to be found in questions No.44 to 47, 84 to 91, 137, 145 to 153 and 158.

P-18

28. The petitioner has dealt with this ballot paper in paragraph 6-b of the Petition, which reads as under:

“b. In one ballot paper the preference was clearly given in favour of the petitioner but after giving preference to the petitioner there is a slight stroke of pen by the side of the preference. The petitioner states that on such ground the ballot paper cannot be invalidated because the said mark cannot identify the Voter and therefore, the rejection of the said ballot paper is clearly wrong and illegal.”

29. The respondent has dealt with these assertions in paragraph 11 of the written statement, extracted hereinabove.

30. The petitioner has filed affidavit of evidence in lieu of examination in chief and has dealt with P-18 in paragraph 13, which reads as under:

“13. I say that in another ballot paper the first preference was clearly given in my favour but the said ballot paper was wrongly invalidated by the Returning Officer as after giving the first preference to me there is a slight stroke of pen by the side of the preference. I say that the reason for invalidation of the said ballot paper mentioned on the backside of the ballot paper is “Voter Identifiable”. I say that on such ground the ballot paper cannot be invalidated because the said mark cannot identify the voter and therefore the rejection of the said ballot paper is clearly wrong and illegal and is contrary to the provisions of Rule 73(2) of the Conduct of Election Rules, 1961. I say that the original ballot papers valid and invalid are produced by Mrs. Geetanjali Bawiskar, District Deputy Election Officer, Nashik and I can identify the said ballot paper where after giving clear first preference against my name there is slight stroke which looks like (.) (dot) after the said preference and on the backside of the said ballot paper there is No. written as 1/15

and this ballot paper can be marked as Exhibit.”

31. The relevant cross-examination is to be found in questions No.84 to 86, 92 to 94, 138, 147 to 153, 158 and 186.

P-19

32. The petitioner has dealt with this ballot paper in paragraph 6-c of the Petition, which reads as under:

“c. In another ballot paper the preference was clearly given in favour of the petitioner but there is a dot against the name of the respondent. The petitioner states that on such ground the ballot paper cannot be invalidated because the intention of the voter is quite clear that he wanted to vote in favour of the petitioner. Further said mark cannot identify the voter and therefore, the rejection of the said ballot paper is clearly wrong and illegal.”

33. The respondent has dealt with these assertions in paragraph 11 of the written statement, extracted hereinabove.

34. The petitioner has filed affidavit of evidence in lieu of examination in chief and has dealt with P-19 in paragraph 14, which reads as under:

“14. I say that in another ballot paper the first preference was clearly given in my favour but there is a dot against the name of the respondent. I say that on such ground the ballot paper cannot be invalidated because the intention of the voter is quite clear that he wanted to cast his first preference vote in my favour. I further say that the said mark / dot cannot identify the voter and therefore, the rejection of the said ballot paper is clearly wrong and illegal and is contrary to the provisions of Rule 73(2) of the Conduct of Election Rules, 1961. I say that I can identify the said ballot paper which is produced on record by Mrs. Geetanjali Bawiskar, District Deputy Election officer, Nashik and on the back side of the said ballot paper there is a number 7/15 and the reason for rejection is mentioned as “voter identifiable”. I say that this ballot paper can be marked as Exhibit.”

35. The relevant cross-examination is to be found in questions No.84 89, 112 to 115, 139, 151 to 153, 158 and 184 to 188.

P-20

36. The petitioner has dealt with this ballot paper in paragraph 6-d of the Petition, which reads as under:

“d. In another ballot paper which according to the petitioner the 225th vote in his favour was wrongly rejected on the ground that even though there is mark only against the name of the petitioner but the said mark looks like the alphabet “j”. In this case it is clear that the preference was clearly given in favour of the petitioner but due to various reasons the preference given by the voter in fact Roman Numerical “I”. The petitioner states that on such grounds the ballot paper cannot be invalidated because the intention of the voter is quite clear that he wanted to vote in favour of the petitioner. Further said mark cannot identify the Voter and therefore, the rejection of the said ballot paper is clearly wrong and illegal.”

37. The respondent has dealt with these assertions in paragraph 11 of the written statement, extracted hereinabove.

38. The petitioner has filed affidavit of evidence in lieu of examination in chief and has dealt with P-20 in paragraph 10, relevant portion of which reads as under:

“10. ... I say that in that process the said re-scrutinizing one ballot paper by which the vote was clearly casted in my favour was declared as invalid by the Returning Officer which is contrary to the provisions of Rule 73(2) of the Conduct of Election Rules, 1961. I say that at this point of time, I pointed out that the concerned voter has put up his first preference against my name by using Roman Numerical (I). It can also be seen that the voters in this election are from rural areas and therefore there may be some variance in writing roman numerical. I say that marking the preference by using Roman Numerical is allowed as per the guidelines clause no.(7) issued by the Returning Officer in the enclosure to the letter dated 23.05.2012 the method of casting of vote by using Roman numerical is also allowed.

I say that as per the settled law, the intention of the voter is important and if the preference is clearly given in favour of petitioner, then such vote cannot be declared invalid merely because the style of the preference has some variance.

But the Returning Officer did not pay any heed. I say that I raised an oral objection to the Returning Officer invalidating the said one ballot paper. But the Returning Officer overruled the said objection orally. I say that the original ballot papers valid and invalid are produced by Mrs. Geetanjali Bawiskar, District Deputy

Election Officer, Nashik and the said ballot paper where the preference is put in Roman Numerical (I) and the same can be identified by me. I say that behind the said ballot paper there is a number 10/15 and the reason for invalidation of the said ballot paper is mentioned as “Rejected” “No Not Clear”. I say that this ballot paper can be marked as Exhibit.”

39. The relevant cross-examination is to be found in questions No.84, 85, 88, 90, 95, 140, 152, 158 and 186.

40. Mr. Korde made general submissions as regards exhibits P-17 to P-20 and also made submissions with regard to these exhibits individually. He submitted that explanation contained in Rule 73 is extremely important. Explanation makes it clear that the figures referred to in clauses (a), (b) and (c) of sub-Rule (2) of Rule 73 may be marked in the international form of Indian Numerals or in the Roman form or in the form used in any Indian language but shall not be indicated in words. He invited my attention to exhibit P-3 containing instructions regarding voting annexed to letter dated 23.05.2012. He also invited my attention to the languages enumerated in Schedule VIII of the Constitution and submitted that the voter is given a very wide choice with regard to the manner in which he can mark his vote. He has a choice of a large number of scripts in which he can mark his vote. The Returning Officer cannot make any assumption with regard to the script which the voter may have used. He should look at each ballot paper with an open mind. By looking at the list of voters, it is not possible to predict in which language / script, the voter is going to write his preference. This will depend upon the residence of the voter as also the place where he has studied. Out of 475 voters, 239 voters were women as is evident from exhibits R-8 to R-22. Looking at their age, it would be safe to assume that most of the women voters are married. By looking at the surname of a married woman, it is not possible to predict the language which she may use to write her preference. He further submitted that there are

certain names which belong to more than one community. Instances are not uncommon wherein for instance a Maharashtrian who may have been born and brought up in Gujarat may use the Gujarati script. He, therefore, submitted that by looking at the voters list, it is not possible to predict with a certainty as to which linguistic group a voter belongs to or which language a voter is going to use while giving his vote. He submitted that exhibit P-17 can be read in the following ways:

- (i) A figure of '1' in the Devnagari script accompanied by a dot;
or
- (ii) A figure of '9' in the English script accompanied by a dot; or
- (iii) A figure of '1' in the Devnagari script accompanied by '0' in the Urdu script; or
- (iv) A figure of '9' in the English script accompanied by a figure of '0' in the Urdu script;

41. Exhibit P-18 can be read in the following ways:

- (i) '1' written in the Devnagri script accompanied by a figure of '8' in the Telugu script; or
- (ii) '1' written in the Devnagri script accompanied by '8' written in the Kannada script; or
- (iii) '1' written in the Devnagri script accompanied by a “mark”; or
- (iv) '1' in the Devnagri script accompanied by the English alphabet 'u'; or
- (v) '1' written in the Devnagri script accompanied by the English alphabet 'U'; or
- (vi) A “mark” accompanied by a figure of '8' in the Telugu script;
or
- (vii) A “mark” accompanied by a figure of '8' in the Kannada script; or a 'mark' accompanied by the alphabet 'v' or 'u'.
- (viii) The petitioner is reading ballot paper Exhibit P-18 as a figure of '1' in the Devnagri script accompanied by “a stroke of the pen”. By no stretch of imagination, can ballot paper Exhibit P-18 be read as the figure of '1' accompanied by a stroke of the pen.

42. Exhibit P-19 can be read in the following ways:

- (i) A figure of '1' in the Devnagri script against the name of the petitioner and a dot against the name of the respondent; or
- (ii) A figure of '1' in the Devnagri script against the name of the petitioner and a figure of '0' in the Urdu script against the name of the respondent; or
- (iii) A figure of '9' in the English script against the name of the petitioner and a dot against the name of the respondent; or
- (iv) A figure of '9' in the English script against the name of the petitioner and the figure of '0' in the Urdu script against the name of the respondent.

43. Exhibit P-20 can be read in the following ways:

- (i) As the alphabet 'J'; or
- (ii) As a mirror image of the alphabet 'C'; or
- (iii) As the numerical '7' in the Gurumukhi script; (Punjabi is a language in the 8th Schedule) or
- (iv) The petitioner is suggesting that it should be read as Roman I. It is submitted that by no stretch of imagination, it can be read as Roman I.

44. He submitted that if different interpretations are possible with regard to the preference shown by voter in respect of any candidate then the concerned ballot paper is required to be rejected. It is not permissible to prefer one interpretation over other/s. Without prejudice to these submissions, he submitted that exhibits P-17 and P-19 are also hit by clause (c) of Rule 73(2).

45. Mr. Korde further submitted that the Returning Officer had rejected exhibits P-17, P-18 and P-19 on the basis of clause (d) of Rule 73(2) namely, “there is any mark or writing by which the elector can be identified;”. The respondent is however not precluded from making a submission with regard to the three ballot papers on the basis of clause

(a) of Rule 73(2) also namely, “the figure 1 is not marked”. Assuming for the sake of argument that this Court finds that the reason given by the Returning Officer for rejecting the said three ballot papers is not correct and finds that another ground provided by Rule 73(2) for rejecting the said ballot papers is applicable, this Court will hold that these ballot papers were invalid on that ground. He submitted that applicability of clause (a) of Rule 73(2) is apparent from the scrutiny of the three ballot papers. In support of this submission, he relied upon the decisions of the Apex Court in the cases of (i) **N.E. Horo**⁶ and in particular, paragraph 14 thereof, and (ii) **Dr. Anup Singh Vs. Abdul Ghani**⁷, and in particular paragraphs 12, 13 and 14 thereof. He submitted that **Dr. Anup Singh's case**⁷ was decided almost 50 years ago.

46. He submitted that whether the cross will amount to a mark by which an elector can be identified is a question which is a question of fact and this question of fact is required to be answered with reference to the conditions prevailing at the time and the place with reference to which the question is considered. It is not as if the Apex Court has laid down for all time and as a sacrosanct and rigid principle that if there is a mere cross on a ballot paper, it can never be regarded as a mark by which the elector can be identified. If the judgment is read in this manner then it would amount to giving a licence to candidates to enter into an understanding with the voters to put a cross at an agreed place on the ballot paper, which would enable the candidate to identify the concerned voter and verify that the concerned voter has voted in his favour and then rely on **Dr. Anup Singh's case**⁷, if any objection is raised with regard to the cross. In practice, it is virtually impossible to affirmatively prove that there was an arrangement between the candidate and the voter. The question, therefore, has to be answered on the basis of probabilities and the probabilities have significantly changed since

⁷ AIR 1965 SC 815

Dr. Anup Singh's case⁷ was decided. He submitted that the voters as well as the candidates have become far smarter and are devising new and ingenious ways of putting marks by which the voters can convey or disclose their identity to the concerned candidate. In other words, he submitted that the rigour or the force of the expression “by which the elector can be identified” is far less today than in the days when **Dr. Anup Singh's case⁷** was decided by the Apex Court. Today, if there is a mark on the ballot paper, the Court should presume that the same was put by the voter for identifying himself to the candidate. In that behalf, he invited my attention to the answers given to questions No.107 to 111 of the cross-examination of the petitioner to substantiate that out of 475 voters, many of them were personally known to the petitioner.

47. Mr. Korde submitted that BJP, Shivsena and Republic Party had an alliance. The voters belonging to BJP were 32, Shivsena 81 and Republic Party 4. Thus, there were a total of 117 voters from these parties. As against this, the petitioner secured 221 votes. In other words, more than 100 voters belonging to the other party had voted for the petitioner. He further submitted that assuming for the sake of argument that the dots on exhibits P-17 and P-19 are to be read as dots and not as '0' in the Urdu script and the mark on exhibit P-18 is to be considered as a mark and not as a figure of '8' in the Kannada or Telgu script, it will be seen that each of the three voters had followed a unique method of conveying their identity. In other words, no two voters out of the said three voters have followed the same method to convey their identity. The voter of exhibit P-19 has put a dot against the name of the respondent. The voter of exhibit P-17 has put a dot at a different place i.e. he has put it after the marking against the name of the petitioner. The voter at exhibit P-18 has used a mark which no other voter has used. This circumstance also strengthens the allegation that the three voters

have deliberately put the dots / marks for the purpose of conveying and disclosing their identity to the petitioner.

48. As far as exhibit P-18 is concerned, the manner in which the petitioner has tried to distort the description of the 'mark' by describing it as a 'stroke of the pen' also shows petitioner's guilty mind. This is one more circumstance which strengthens the case for applying clause (d) of Rule 73(2) to exhibit P-18. As far as exhibit P-19 is concerned, there are other circumstances, which further strengthen the case for applying clause (d) of Rule 73(2). They are as under:

- (i) The voter of exhibit P-19 was from Sinnar as admitted by the petitioner in answer to question 188.
- (ii) In the normal course, the petitioner was not expected to get a single vote from the polling centre at Sinnar.
- (iii) This is evident from-
 - (a) questions No.168 to 180 and the answers to these questions in the cross-examination of the petitioner.
 - (b) paragraphs 13 to 15 of the affidavit of Mahesh Savant.
 - (c) questions No.14 to 22 and the answers to these questions in the cross-examination of Mahesh Savant.
- (iv) The fact that the 'dot' on exhibit P-19 is in a different ink further strengthens the case for applying clause (d) of Rule 73(2).

49. He submitted that the three votes exhibits P-17, P-18 and P-19 were rightly rejected by the Returning Officer under clause (d) of Rule 73(2).

50. Mr. Korde also made submissions with regard to exhibits P-17 to

P-20 individually. As far as exhibit P-17 is concerned, he submitted that paragraph 6(a) or for that matter any other paragraphs of the petition do not cover exhibit P-17. He invited my attention to questions No.46 to 52. He submitted that the inspection of the ballot papers was taken on 10.10.2013. The petitioner made affidavit of evidence in lieu of examination-in-chief on 23.10.2013, that is to say, after taking inspection of the ballot papers. The petitioner admitted while answering question No.50 that on 10.10.2013, he became aware that there was error in sub-paragraph (a) of paragraph 6 of the petition. Despite that, he did amend the petition. He did not state in the affidavit that there was an error of description in sub-paragraph (a) of paragraph 6 of the petition and he could not explain this fact. He submitted that the petitioner was asked question No.47 as to whether he agreed that not a single ballot paper out of exhibits P-17 to P-20 corresponds or answers to the description given in sub-paragraph (a) of paragraph 6 of the petition. The petitioner answered in the affirmative. He however, tried to explain by stating that during the counting process with the big chaos that time, he thought that the dot was given at the top of the ballot paper, but on inspection, it was found against his preference. In question No.48, the petitioner was asked as to whether he realized after taking inspection of the 23 ballot papers that there was an error of description given by him at sub-paragraph (a) of paragraph 6 of the petition and he answered in the affirmative.

51. Mr. Korde also invited my attention to questions No.84 to 92 and the answers given by the petitioner and submitted that exhibit P-17 is not covered by the petition at all. It is also not covered by the affidavit of evidence in lieu of examination-in-chief of the petitioner. For all these reasons, he submitted that exhibit P-17 cannot be taken into consideration at all. Without prejudice to these submissions, he

submitted that in any case, exhibit P-17 is hit by clause (a) of Rule 73(2) and clause (c) of Rule 73(2). It is also hit by clause (d) of Rule 73(2). In support of this submission, he relied upon **Arikala's case**¹ and in particular paragraph 15 thereof.

52. As far as exhibit P-18 is concerned, he submitted that it cannot be taken into consideration as it is neither covered by the pleadings nor by the affidavit of evidence. There is nothing in exhibit P-18 which can be described as a 'stroke of the pen'. Without prejudice to these submissions, he submitted that exhibit P-18 is hit by clause (a) of Rule 73(2) and also by clause (c) of Rule 73(2).

53. As far exhibit P-19 is concerned, Mr. Korde submitted that exhibit P-19 is hit by clause (a) of Rule 73(2). It is also hit by clause (d) of Rule 73(2). The applicability of clause (d) of Rule 73(2) to exhibit P-19 is further strengthened by reason of the fact that the mark against the name of the respondent is in a different ink with a different pen. He further submitted that exhibit P-19 is also hit by clause (e) of Rule 73(2) as there is a "dot" or Urdu "0" against the name of the respondent in a different ink and with a different pen. The same is evident from perusal of exhibit P-19 with a naked eye or through a magnifying glass. He also invited my attention to questions No.184 to 188 in the cross-examination of the petitioner. He relied upon the decision in the case of **Era Sezhiyan Vs. T. R. Balu**⁸, and in particular paragraphs 13 and 14 thereof. Mr. Korde submitted that exhibit P-20 is hit by clause (a) of Rule 73(2).

54. Per contra, Mr. Jethmalani submitted that the Returning Officer rejected ballot papers at exhibits P-17 to P-19 on the ground that voter is identifiable as per Rule 73(2)(d) of the Rules. He submitted that the legal position as to under which circumstances, the mark makes the

ballot paper invalid is set out in the case of **Dr. Anup Singh**⁷. The said decision followed certain judgments of English Courts and found that the position in England and India is same. He invited my attention to paragraphs 10 to 14 and 22 of that decision. He submitted that the ratio of **Dr. Anup Singh's case**⁷ is that existence of a mark on the ballot paper does not render the vote as invalid as the same does not disclose the identity of the voter, however, in the case of a writing on ballot paper would make the same invalid as there is a possibility to establish the identity of the voter. In the present case, exhibits P-17 and P-19 do not bear any writing but only a dot. In the case of exhibit P-18, there is a mark against the figure '1' that appears to be a stroke of the pen. The marks like 'dot' in respect of exhibit P-17 and P-19 or stroke of pen in respect of P-18 cannot be said to lead to the possibility to establish or reveal the identity of the voter and hence the said votes should have been accepted in favour of the petitioner. Exhibits P-17 to P-19 are squarely covered by the decision of **Dr. Anup Singh**⁷ and, therefore, the Returning Officer committed serious error apparent on the face of the record while rejecting the said ballot papers. Rule 73(2)(a) lays down that the ballot paper shall be invalid on which the figure '1' is not marked.

55. He submitted that all the four votes (exhibits P-17 to P-19) bore figure "1" in Marathi. He submitted that the main contention of the respondent is that these four ballot papers are liable to be rejected on the ground that there is ambiguity with regard to the marking of figure '1' for any of the two candidates and for that reason, the said four ballot papers are liable to be rejected under Rule 73(2)(a). He submitted that in case of P-17 and P-18, the figure '1' and some other figures are marked against the name of the petitioner. On plain reading of Rule 73, it is clear that there is a clear distinction between three words namely, **figure**,

mark and writing. The Rule contemplates that figure '1' in addition to any other figure. The respondent contended that the 'dot' on the said ballot papers can be read as figure “0” in Urdu which is clearly speculative and ascribing lack of responsibility to the educated voters. In respect of the 'dot' on the ballot papers, it is covered by **Dr. Anup Singh's case**⁷ and that Rule 73(2)(c) requires a figure and not a mark. A 'dot' under no circumstances can be called as a figure. A figure means a digit or a numeral and not a mark.

56. Mr. Jethmalani submitted that the respondent contended that the decision in **Dr. Anup Singh's case**⁷ requires reconsideration. The said contention is stated to be rejected. The said decision is of a constitution Bench and the same is binding on every one and the view taken therein is not departed so far. On the contrary, the said view is followed throughout. He submitted that in the case of **N. E. Horo**⁶, it is laid down that the Court can enquire into and correct the illegality which is apparent / noticed on the inspection of the ballot paper in question and correct the same. It is not the case of the respondent herein that there is an illegality on the face of it or even latent for that matter. It is the case of the respondent that the wrongly rejected votes can be read in a certain manner. For instance, P-17 can be read in two ways and the respondent has asked the Court to read it in the manner convenient to him leading to Reduction ab absurdum. If the submission of the respondent is accepted then the consequence would be that the voters are of a hybrid variety, they write one figure in English and one in other language. As laid down in **Dr. Anup Singh's case**⁷, law is to identify the voter's intention and not what voter's intention could be.

57. He submitted that as far as exhibit P-17 is concerned, the respondent contended that there is variance in the pleadings and

evidence and hence P-17 should not be looked into by this Court. He submitted that the discrepancy or mis-description of exhibit P-17 is not a material one such as to render it liable for rejection. Moreover, the said vote was invalidated on the basis of the presence of a 'dot' on the ground of voter being identifiable. The petitioner has explained the variance in his cross-examination while answering question No.47. The respondent has not challenged the jurisdiction of this Court whether to grant inspection, scrutiny of the ballot papers. In fact, the respondent has taken active part in the inspection of the ballot papers and obtained certified copies. In the case of **N. E. Horo**⁶, the Apex Court laid down in paragraph 14 that once the Court has embarked upon its jurisdiction to inspect the ballot papers then the absence of specific pleadings / allegations is no bar to inspect the ballot papers on the illegality which is noticed on such inspection. When an illegality is noticed on inspection, it must be corrected. That is precisely the purpose of inspection of ballot papers. Applying the said ratio of **Horo's case**⁶ to the facts of the present case, he submitted that there are pleadings in respect of exhibit P-17.

58. In the case of **T. A. Ahamed Kabeer Vs. A. A. Azeez**⁹, it is held that the pleadings and the proof in the matter of recount have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to. He submitted that where Section 100 (1) (d) (iii) is invoked, the pleadings only give foundation to inspection, scrutiny and recount. Hence, the conclusion is that once the inspection is granted, there is no bar on looking at the ballot papers even though there is variance in the pleadings or even in absence of the pleadings. He submitted that respondent is precluded to

9 (2003) 5 SCC 650

raise contentions in respect of exhibit P-17.

59. He submitted that the respondent contended that there is variance in the pleadings and evidence in respect of exhibit P-17. He submitted that as far as the variance in pleadings is concerned, the same is not material. Moreover, the legal position as regards the issue of variance in pleadings is settled by the decision of the Apex Court in the case of **N. E. Horo**⁶ and in particular paragraphs 29 and 30. The Returning Officer has rejected exhibit P-17 on the ground that voter is identifiable. In fact, the said issue is covered by **Dr. Anup Singh's case**⁷. The argument of the respondent that the ballot paper at exhibit P-17 contains '0' is also misconceived as figure '1' is clearly marked against the name of the petitioner. The presence of 'dot' cannot be read as Urdu 'zero' as the said interpretation would be erroneous as only two candidates were contesting the election. Exhibit P-17 cannot be invalidated on any of the grounds mentioned in Rule 73(2)(a) to (e).

60. As far as exhibit P-18 is concerned, the Returning Officer rejected the same on the ground that the voter is identifiable. The said ground is covered by **Dr. Anup Singh's case**⁷. In respect of the issue of mark not being a stroke of the pen as contended by the petitioner, the respondent has not led any evidence to substantiate his contention. It is also not covered by any grounds under Rule 73(2) (a) to (e).

61. As far as exhibit P-19 is concerned, the respondent contended that the said vote be invalidated on the ground that 'dot' is 'zero' in Urdu and the same is also in different ink. Mr. Jethmalani submitted that **Dr. Anup Singh's case**⁷ clearly covers the present vote as there is no writing and that the intention of the voter is clearly in favour of the petitioner. As far as the mark is in a different ink is concerned, he submitted that no evidence is led to show the difference of ink. The said contention should

have been established on preponderance of probability. Further clause (e) of Rule 73(2) cannot be attracted as the **mark** and not the **figure** which denotes the preference of the voter is in different ink. He submitted that exhibit P-19 cannot be invalidated on any of the grounds set out in Rule 73(2)(a) to (e).

62. As far as exhibit P-20 is concerned, the respondent contended that the said vote should be invalidated on the ground of figure '1' is not marked. He submitted that exhibit P-20 clearly displays the intention of the voter and there is no ambiguity in that respect at all. The figure '1' is clearly marked against the name of the petitioner. The legal position on the issue of voter's intention is clearly laid down in **Arikala's case**¹. He invited my attention to paragraph 33 of that decision. He submitted that the correct approach would be to try and ascertain the intention of the voter as laid down by the Apex Court in the cases of **Dr. Anup Singh**⁷ and **Arikala**¹.

63. Before I consider the rival submissions advanced by the learned Counsel appearing for the parties, it is necessary to consider the law laid down by the Apex Court in various decisions. Sequentially, the first being the case of **Dr. Anup Singh's case**⁷. In that case, election to the Council of States by the Punjab Legislative Assembly was held in March 1962. The election was conducted on proportional representation. Appellant secured 36 first preference votes and respondent No.1 Abdul Ghani secured 35 votes. Thereafter preferences were transferred and the appellant got 36.3 votes and respondent No.1 got 35 votes. In consequence, appellant was declared elected. The election of the appellant was challenged only on one ground namely that certain votes cast in favour of the respondent had been wrongly rejected and certain votes cast in favour of the appellant were wrongly accepted. Appellant resisted the challenge by contending that there was no improper

rejection of the votes of the respondent and no improper acceptance of votes of the appellant. The main question that was argued before the Apex Court was whether the Tribunal and the High Court were right in rejecting one of the ballot papers which was marked exhibit P-76. The Tribunal's judgment showed that it was inclined to hold that this ballot paper was not invalid, but following the judgment of the High Court in ***Pala Singh Vs. Natha Singh***¹⁰, it held that the said ballot paper was invalid. In the High Court, the case was placed before a Full Bench of three learned Judges to consider the correctness of the judgment in ***Pala Singh's case***¹⁰. ***Pala Singh's case***¹⁰ was concerned with a mark on the ballot paper and not with any writing thereon and the High Court in ***Pala Singh's case***¹⁰ took a view that making of any mark would make the ballot paper invalid in view of Rule 73(2)(d). ***Pala Singh's case***¹⁰ was reconsidered by the High Court and it was held that on the whole, ***Pala Singh's case***¹⁰ could not be held to have been correctly decided in the matter of a mark on the ballot paper in view of certain decisions of the English Courts in that behalf. As far as exhibit P-76 is concerned, the High Court took a view that that was a case of **writing** and relying on the decision of ***Woodward Vs. Sarsons***¹¹, the High Court held, by majority, the ballot paper to be invalid.

64. Before the Apex Court, the appellant contended that the words 'by which the elector can be identified' mean that the mark or writing should be such that the elector is actually identified because of them. On the other hand, respondents contended that it is not necessary that the elector is actually identified by the presence of the mark or writing. It was urged that it is enough if the elector might possibly be identified by such mark or writing, or at any rate the mark or writing should be such as would make it reasonable and probable that the elector can be identified

¹⁰ 64 Pun LR 1110

¹¹ (1875) LR 10 CP 733

thereby. Thus there are three possible interpretations of the words 'by which the elector can be identified' appearing in Rule 73 (2)(d) were placed for consideration before the Apex Court namely, (i) any mark or writing which might possibly lead to the identification of the elector, (ii) such mark or writing as can reasonably and probably lead to the identification of the elector, and (iii) the mark or writing should be connected by evidence aliunde with an elector and it should be shown that the elector is actually identified by such mark or writing. The appellant pressed for the third of these alternative constructions both in respect of the mark and the writing while the respondents pressed the first construction, and in any case, it was urged that the words do not go beyond the second construction.

65. The Apex Court held that these words imply something more than a mere possibility of identification, before a vote can be invalidated. This may happen when some pre-arrangement is either proved or the marks are so many or of such a nature that an inference of such arrangement may be drawn without further evidence. It was held that these words do not mean that there must be an actual identification of the elector by the mark or writing before the vote can be invalidated. If such was the intention of the legislature, clause (d) would have read something like "any mark or writing which identifies the elector". These words mean something more than a mere possibility of identification but do not require actual proof of identification before the vote can be invalidated, though by such proof, when offered, the disability would be attracted. In paragraph 13, the Apex Court held that the second construction, out of the three alternatives is the real construction of these words. When the legislature used these words it was providing that any mark or writing by which the elector can reasonably and probably be identified would invalidate the ballot paper. The words "can be

identified" imply something more than a mere possibility of identification; at the same time they do not require that before the ballot paper is rejected the elector's identity must be actually established. Truly construed these words mean that the mark or writing should be such that the elector can be identified thereby with reasonable probability. Thus it is not the mere possibility of identification which will invalidate the vote under Rule 73(2)(d), nor is it necessary that there should be certain identification before the vote is invalidated. All that these words require is that there should be reasonable probability of identification by the mark or writing and if there is such a reasonable probability of identification, the ballot paper would be rejected.

66. In paragraph 14, it was observed that when these words mean that there should be a reasonable probability of identification by means of the mark or writing there would be a difference in the approach of the Returning Officer as well as of the tribunal and of the court when dealing with a mark as distinguished from a writing. So far as the mark is concerned it has by itself very little value for purposes of identification and therefore in the case of marks, the Returning Officer or the tribunal or the court may require the evidence to show that there was arrangement between the elector and the candidate to put a certain mark on the ballot paper which would lead to his identification. But in the case of a writing, the mere presence of the writing in certain circumstances would be sufficient to warrant the Returning Officer, or the tribunal or the court to say that the elector can be identified by the writing. Whether the elector can be identified by the writing would always be a question of fact in each case and in that connection the extent of the writing on the ballot paper may have a bearing on the question whether the elector can be identified thereby. But if the writing consists of a number of words, it would be open to the Returning Officer

after taking into account the entire circumstances to say whether the elector can be identified by the presence of so much writing. In dealing with this question, the size of the constituency and the number of words may not be irrelevant. When scrutinizing the ballot papers and considering whether a particular ballot paper should be rejected, it is not necessary for the Returning Officer to take evidence, though if any party is prepared to give evidence then and there while the scrutiny is going on and votes are being counted, there is nothing to prevent the Returning Officer to take such evidence to determine whether the mark or writing is such that the elector can be identified thereby. Generally evidence may not be forthcoming and it will be for the Returning Officer, the tribunal or the court to decide on the ballot paper as it stands whether the mark or writing is such that the elector can be identified thereby. The Apex Court further held that the difficulty is greater in the case of a mere mark; the difficulty may be less in the case of a writing depending upon the amount of writing that is available on the ballot paper and it will be for the Returning Officer, the tribunal or the court in each case to decide in all the circumstances, whether the writing is of such a nature and of such an extent that the elector can be identified by it.

67. The Apex Court considered the decisions by English Courts. In **Woodward's case**¹¹, the validity of voting papers which bore marks as well as writing other than permitted under the rules came up for consideration. So far as the marks were concerned, they consisted of two crosses instead of one as required by rule, and the court observed that in such a case, if there were evidence of an arrangement that the voter would place two marks, so as to indicate that it was lie, that voter, who had used that ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses is not a substantial breach of the

statute. As to the writing on two ballot papers, however, the Court held with some hesitation that it should disallow them, and the rule was put this way :

"We yield to the suggestive rule that the writing by the voter of the name of the candidate may give too much facility, by reason, of the handwriting, to identify the voter".

68. In paragraph 19, it was observed that the law in England appears to be in accord with the construction made by the Apex Court of the words 'by which the elector can be identified' appearing under Rule 73 (2)(d). In that case, ballot paper exhibit P-76 bore figures 1, 2 and 3 which were permissible under Rule 37-A, the ballot paper also bore crosses in each case. A cross however is a slender basis on which the elector can be reasonably identified. The Apex Court, therefore, overlooked crosses. After the cross, the words "One, Two, Three" written in each case along with the figures, "1, 2, 3" which came last. The appellant contended that the words "One, Two, Three" were really written as a matter of emphasis and it cannot be said that the voter can be identified by writing these words. There was no dispute that these words constituted the writing of the elector on the ballot paper, and the only question was whether by that writing, he can be identified. Applying the interpretation of the words appearing in Rule 73(2)(d), the Apex Court held that the writing was sufficient in extent, particularly when the constituency was of 152 electors and therefore, there was a reasonable probability of the identification of the elector by that writing which he had put on the ballot paper. To say that the elector merely wanted to emphasize his choice was of no assistance to the appellant if the writing was of the nature and extent that it can with reasonable probability lead to the identification of the elector. By writing the words, "One, Two, Three" on the ballot paper, the elector has left sufficient evidence of his identity which could lead to his identification. The Apex

Court, therefore, held that the ballot paper exhibit P-76 was rightly rejected.

69. In the case of **N. E. Horo**⁶, the appellant belonged to Jharkhand Party. The respondent belonged to Congress (I) Party. In the general election held in 1985, the appellant secured 19,159 votes as against 19,120 by the respondent. The appellant was elected by a narrow margin of 39 votes. The respondent instituted election petition alleging various and varied irregularities in the process of counting. It was claimed that Hans Raj Singh, the then B.D.O. was on inimical terms with the respondent and had manoeuvred the entire process of counting to his prejudice. The specific instances of illegalities committed by Hans Raj Singh were also highlighted in the petition. The respondent demanded recounting and setting aside the appellant's election. He sought a declaration under Section 98(c) as the duly elected candidate. Respondent filed an application under Order 11 Rule 15 of the Code of Civil Procedure, 1908 read with Rule 93(1) of the Rules for inspection of ballot papers counted in favour of the appellant and other contesting candidates. He also produced some evidence in proof of the prima facie case required for inspection. The appellant objected to inspection and alternatively contended that the votes counted in favour of the respondent should also be inspected. By order dated 17.11.1987, the High Court allowed the request of the respondent but not that of the appellant on the ground that the respondent in his written statement has not alleged any irregularity in the counting of votes in favour of the respondent and, therefore, votes secured by the latter need not be inspected. It was also observed that the election petition itself could be disposed of by the result of inspection and no additional evidence would be necessary. The appellant challenged the legality of that order before the Apex Court by filing SLP, which was dismissed. In the course of hearing, the High Court scrutinized every packet and every ballot paper

sorted out by the designated officer. The opportunity was also afforded to Advocates for both parties to have their say. The High Court found that the respondent has polled 19, 166 valid votes as against 18,988 by the appellant.

70. In paragraph 13, the Apex Court noted the contention advanced on behalf of the appellant in relation to the packet No. 8 containing 56 ballot papers. 55 ballot papers were rejected by the High Court on the ground that they contained no seal of arrow cross marks of the rubber stamp of the particular booth. It was contended that the High Court ought not to have taken up those ballot papers for scrutiny for want of specific pleading in that regard.

71. In paragraph 14, the Apex Court observed that the High Court while allowing the inspection, did not restrict the operation to specified ballot papers. The inspection was permitted in respect of all ballot papers to the credit of the appellant. In the course of such inspection, if a ballot paper which ought not to have been accepted has, in fact, been counted in favour of the appellant, it must also fall to be excluded. There may not be any specific allegation in the pleading in respect of such ballot paper. But the absence of specific averments in the pleading is no bar to inspect such ballot papers. When illegality is noticed upon inspection, it must be corrected. Invalid votes, if any, should be excluded. That is precisely the purpose of inspection of ballot papers.

72. In the case of **Era Sezhiyan**⁸, the dispute pertained to the election of six Members to the Rajya Sabha by the elected Members of the Tamil Nadu Legislative Assembly. The election was held on 28.06.1986. The appellant and respondents No.1 to 7 were the eight candidates in the field, all the nominations having been found valid. The 7th respondent secured nil first preference votes. The appellant secured 33 first

preference votes. Out of the 33 first preference votes cast in favour of the appellant, one ballot paper was rejected by the 8th respondent-Returning Officer on the ground that the said ballot paper was marked by the voter otherwise than with the article supplied for that purpose. The first preference was indicated on the said ballot paper by a ball-point pen with **green** ink whereas in the ball point pen kept along with the ballot box had **blue** ink. The Apex Court considered Rule 39-A(2) (b) and Rule 73(2)(e) of the Rules. The Apex Court also considered the decision of the Constitution Bench of the Apex Court in the case of ***Hari Vishnu Kamath v. Syed Ahmad Ishaque***¹², wherein it was held thus:

"But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a court of law, in the same position as an intention not expressed at all."

73. The Apex Court ultimately held that the voter had expressed his intention clearly by marking the figure '1' in green ink, he did so in violation of the express provisions of the Rules which have a statutory force and hence no effect can be given to that intention.

74. In the case of ***T. A. Ahammed Kabeer***⁹, the Apex Court considered decision in ***N. E. Horo's case***⁶. In that case, the elections for the Kerala Legislative Assembly were held on 10.05.2001. There were five candidates in the fray including the appellant and the respondent No. 1. Appellant secured 55617 votes. Respondent No.1 secured 55638 votes. Respondent No.1 was declared elected defeating his nearest rival, the appellant by a margin of 21 votes. In paragraphs 28 to 30, it was observed thus,

28. It is true that a recount is not be ordered merely for the asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the Court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving jurisdiction of the Court. Once a recount has been allowed the Court cannot shut its eyes on the

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result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the recount which has to be given effect to.

29. So also, once the Court exercise its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate under Section 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to Section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevant for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to.

30. In N.E. Noro's case (supra), the High Court reached and recorded a finding as to the availability of a prima facie case calling for inspection of ballot papers having been made out on consideration of relevant evidence produced by the parties. It was held that thereafter the scope of inspection could not be kept confined to the pleadings alone. In the course of such inspection, if the ballot papers which ought not to have been accepted have, in fact been counted in favour of a candidate, such votes must also fall to be excluded. There may not be any specific allegation in the pleading in respect of such ballot papers but the absence of specific averments in the pleadings is no bar to inspect such ballot papers. "When illegality is noticed by the inspection, it must be corrected. Invalid votes, if any, should be excluded. That is, precisely the purpose of inspection of ballot papers." In *S. Raghbir Singh Gill v. Gurcharan Singh Tohra* (1980) Supp SCC 53 it was held that a petition for a recount on the allegation of miscount or error in counting is based not upon specific allegation of miscounting but error which may indicate a miscount, and recount becomes necessary. When it is alleged that postal ballot papers were tampered with, the implication in law is that those ballot papers have been wrongly received in favour of a candidate not entitled to the same, and improperly refused in favour of the candidate entitled to the same, and this is miscount and a recount is necessary. In the very nature of things the allegation can be not on each specific instance of any error of counting or miscount but broad allegations indicating error in counting or miscount necessitating a recount (para 32, *ibid*). On a pure grammatical construction of the relevant clause it cannot be gainsaid that an improper reception of any vote or an improper refusal of any vote implies not only reception or refusal of a vote contended to be invalid or valid, as the case may be, but consequent reception in favour of any contesting candidate at the election which would simultaneously show the vote being refused in counting to any other candidate at the election. The expression 'refusal'

implies 'refuse to accept' and the expression 'reception' implies 'refuse to reject'. Apart from the setting and the context in which the clause finds its place, in its interpretation it is to be borne in mind that it seeks to specify one of the grounds for declaration an election to be void. In this situation the expression 'improper reception' and 'improper refusal' have to be interpreted as would carry out the purpose underlying the provision contained in Section 100." (para 46, *ibid*).

75. In **Arikala's case**¹, election was held on 30.03.2009 for 18, Nizamabad Local Authority Constituency of the Andhra Pradesh Legislative Council. There were 706 total votes, out of which 701 votes were polled. Respondent No.1 instituted election petition mainly on the grounds that three votes in question exhibits X-1 to X-3 polled in his favour had been wrongly rejected and one vote Y-13 which had been counted in favour of the appellant ought to have been declared invalid. During the trial of the election petition, the High Court picked up 17 ballot papers from the bundle of rejected ballot papers as determined by the Returning Officer. At the time of initial counting, both the candidates got equal votes as 336 and 29 votes were found invalid. On the request of the appellant, the Returning Officer permitted recounting of the votes and the appellant got 336 votes while respondent No.1 got 335 votes and 30 votes were found to be invalid. The appellant was declared as a successful candidate.

76. In paragraph 15, the Apex Court observed that it is consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been materially affected. There can be no dispute to the settled legal proposition that as a rule relief not founded on the pleadings should not be granted. Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled

legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fishing material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

77. Before I record my findings on the rival submissions advanced by the learned Counsel appearing for the parties, certain undisputed facts are required to be noted. Election Commission of India declared the Election Programme for the 6 Local Authorities Constituencies for the Legislative Council of the State of Maharashtra for the Biennial Election for the year 2012. The election was conducted as per the system of proportional representation by means of a single transferable vote. Only two candidates were in the fray namely petitioner and the respondent. The Returning Officer rejected 4 ballot papers exhibits P-17 to P-20 on the ground that the voter is identifiable on the basis of mark as contemplated under Rule 73(2) (d) of the Rules. In other words, it is nobody's case that there is any writing on these ballot papers by which the elector can be identified. The Returning Officer rejected these ballot papers on the ground that there is a mark by which the elector can be identified. Total 475 voters were eligible to vote in the election. Out of that, 467 voters actually exercised their right. Out of 467 votes, 23 ballot papers were invalidated till last round of

counting and scrutiny on different grounds. There were 15 polling stations / centres all over the Nashik District. The Returning Officer declared that the petitioner and respondent both secured 221 votes. The Returning Officer, after consulting Election Commission of India, conducted draw of lots. In the draw of lots, the chit containing name of the petitioner was taken out from the bowl. The Returning Officer declared respondent as a returned candidate under Rule 84(1)(b) and issued result of poll. The respondent filed Recrimination Petition, which was dismissed by this Court on the ground of limitation. The said order was challenged before the Apex Court by filing S.L.P. and the Apex Court dismissed the S.L.P.

78. In the light of the law laid down by the Apex Court in the aforesaid judgments, it is now necessary to consider ballot papers, exhibits P-17 to P-20.

P-17

79. It is the case of the petitioner that against his name, the voter has given preference. The Returning Officer declared the same as invalid, as against the name of the petitioner, there is a single dot (.). As against this, it is the case of the respondent that exhibit P-17 can be read in the following ways:

- i. A figure of '1' in the Devnagari script accompanied by a dot; or
- ii. A figure of '9' in the English script accompanied by a dot; or
- iii. A figure of '1' in the Devnagari script accompanied by '0' in the Urdu script; or
- iv. A figure of '9' in the English script accompanied by a figure of '0' in the Urdu script;

80. The respondent, therefore, contended that if different interpretations are possible with regard to the preference shown by the voter in respect of any candidate then the concerned ballot paper is

required to be rejected. Though the Returning Officer has rejected the ballot paper on the ground that there is any mark by which the elector can be identified as per Rule 73(2)(d), the ballot paper can be rejected under Rule 73(2)(a) as the figure '1' is not marked.

81. I have carefully perused exhibit P-17. Perusal of exhibit P-17 shows that no preference is indicated against the name of the respondent. As far as the petitioner is concerned, after figure '1' in Marathi, there is a dot (.). The question, therefore, is whether this dot (.) is capable of identifying the voter as per Rule 73(2)(d).

82. Mr. Korde invited my attention to answers given by the petitioner in cross-examination to questions 44, 47, 84, 91, 137, 145 to 153 and 158. He also submitted that exhibit P-17 is not covered in the petition. In the case of **Dr. Anup Singh**⁷, the Apex Court has held that the words “by which the elector can be identified” mean such mark or writing as can reasonably and probably lead to the identification of the elector. In paragraph 14, it was observed that these words mean that there should be a reasonable probability of identification by means of the mark or writing, there should be a difference in the approach of the Returning Officer as well as of the tribunal and of the court when dealing with a mark as distinguished from a writing. **So far as the mark is concerned it has by itself very little value for purposes of identification and therefore in the case of marks, the Returning Officer or the tribunal or the court may require the evidence to show that there was arrangement between the elector and the candidate to put a certain mark on the ballot paper which would lead to his identification.** The Apex Court further held that the difficulty is greater in the case of a mere mark. In the present case, the respondent did not lead any evidence for establishing any arrangement between the elector and the

petitioner for putting a certain mark on the ballot paper which would lead to his identification. As the ballot paper exhibit P-17 stands, applying the tests laid down by the Apex Court in the case of **Dr. Anup Singh**⁷, I am clearly of the opinion that the Returning Officer committed error in rejecting the ballot paper on the ground that voter is identifiable. In my opinion, the voter is not identifiable. It is also not possible to accept the submission of Mr. Korde that exhibit P-17 can be read in different ways extracted hereinabove.

83. Mr. Korde submitted that **Dr. Anup Singh's case**⁷ was decided some 50 years back. The rigour or the force of the expression “by which the elector can be identified” is far less today than in the days when **Dr. Anup Singh's case**⁷ was decided by the Apex Court. Today, if there is any mark on the ballot paper, the Court should presume that the same was put by the voter for identifying himself to the candidate. I do not find any merit in this submission as well. The decision in **Dr. Anup Singh's case**⁷ was followed in **Arikala's case**¹, which is decided on 04.02.2014 and in paragraph 20, the Apex Court has reproduced paragraphs 10 to 12 of **Dr. Anup Singh's case**⁷.

84. Mr. Korde submitted that in paragraph 6-a of the petition, the petitioner has described that on the top of the said ballot paper, there was a single dot (.). Perusal of exhibit P-17 however, shows that dot (.) is after figure '1' against the name of the petitioner. The inspection of the ballot papers was taken on 10.10.2013 and the affidavit of evidence was filed by the petitioner on 23.10.2013. However, petitioner did not amend paragraph 6-a of the petition and therefore, exhibit P-17 is not covered in the entire petition. In other words, there is no pleading as regards exhibit P-17. I do not find any merit in this submission for more than one reason.

85. In the first place, the petitioner has explained this while answering question No.47, which is to the following effect:

Q.47 Will you therefore agree when I say that out of the four ballot papers identified by you as Exhibits P-17 to P-20, not a single ballot paper which corresponds or answers to the description given in sub-paragraph (a) on page 15 of your petition?

Ans: Yes. [But, I will have to explain. **During the counting process with the big chaos that time I thought that the dot was given at the top of the ballot paper but on inspection as it was found against my preference.**]

(emphasis supplied)

86. Secondly, the respondent has not challenged the jurisdiction of this Court while ordering inspection. In fact, the respondent has taken active part in the inspection of the ballot papers and obtained certified copies. I also find merit in the submission of Mr. Jethmalani that if the contention of the respondent that exhibit P-17 can be read in different ways is accepted then the consequence would be that the voters are of a hybrid variety. They write one figure in English and one in other language.

87. Thirdly, in the case of **N. E. Horo**⁶, the Apex Court has observed in paragraph 14 as under:

“14. ... It may be noted that the High Court while allowing inspection, has not restricted the operation to specified ballot papers. The inspection was permitted in respect of all ballot papers to the credit of the appellant. In the course of such inspection, if a ballot paper which ought not to have been accepted has, in fact, been counted in favour of the appellant, it must also fall to be excluded. **There may not be any specific allegation in the pleading in respect of such ballot paper. But the absence of specific averments in the pleading is no bar to inspect such ballot papers. When illegality is noticed upon inspection, it must be corrected. Invalid votes, if any, should be excluded. That is precisely the purpose of inspection of ballot papers.**”

(Emphasis supplied)

88. In the case of **T.A. Ahmmmed Kabeer**⁹, the Apex Court considered its decision in **N.E.Horo's case**⁶. In paragraph 29, it was observed thus:

“29. So also, once the Court exercise its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate under Section 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to Section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevant for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to.”

89. Fourthly, Mr. Korde submitted that the decision in **N. E. Horo's case**⁶ is not approved in **Arikala's case**¹ as is evident from paragraph 15 thereof. In that case, respondent No.1 had instituted election petition challenging the election of the appellant mainly on the ground that 3 votes in question, exhibits X-1 to X-3, polled in favour of the respondent No.1 had been wrongly rejected and one vote exhibit Y-13 which had been counted in favour of the appellant ought to have been declared invalid. During the trial of the election petition, the High Court picked up 17 ballot papers from the bundle of rejected ballot papers as determined by the Returning Officer and marked the same as exhibits Y-1 to Y-17. The High Court also picked up 2 ballot papers from the valid votes of the appellant and marked the same as exhibits R-1 and R-2. 4 ballot papers were picked up from the valid votes of respondent No.1 and marked as exhibit P-16 to P-19. After considering all these ballot papers, the High Court allowed the election petition by judgment and order dated 20.07. 2012 holding that certain votes cast in favour of respondent No.1 had been wrongly rejected and the vote which should have been declared as invalid had wrongly been counted in favour of the respondent as valid and hence, respondent No.1 was declared as successful candidate and declared as a MLC.

90. In paragraph 26, the Apex Court observed that in the election petition, the only grounds had been that 3 votes i.e. exhibits X-1 to X-3 polled in favour of respondent No.1 which had wrongly been rejected and one vote exhibit Y-13 which had been counted in favour of the appellant ought to have been declared invalid. In paragraph 27, the Apex Court observed that in view of the pleadings in the election petition, the case should have been restricted only to these four votes and even if the recrimination petition is taken into account, there could have been no occasion for the High Court to direct recounting of all the votes and in case certain discrepancies were found out in recounting of votes by the Registrar of the High Court as per the direction of the High Court, it was not permissible for the High Court to take into consideration all such discrepancies and decide the election petition or recrimination petition on the basis thereof. The course adopted by the High Court is impermissible and cannot be taken note of being in contravention with statutory requirements. Therefore, the case has to be restricted only to the four votes in the election petition and the allegations made in the recrimination petition ignoring altogether what had been found out in the recounting of votes as under no circumstance the recounting of votes at that stage was permissible. It is in that context, the Apex Court observed in paragraphs 15 and 27 as under:

“15. This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been materially affected. There can be no dispute to the settled legal proposition that as a rule relief not founded on the pleadings should not be granted. Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.

Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts. (Vide: Ram Sewak Yadav v. Hussain Kamil Kidwai & Ors.; Bhabhi v. Sheo Govind & Ors.; and M. Chinnasamy v. K.C. Palanisamy & Ors.

27. In view of the pleadings in the election petition, the case should have been restricted only to these four votes and even if the recrimination petition is taken into account, there could have been no occasion for the High Court to direct recounting of all the votes and in case certain discrepancies were found out in recounting of votes by the Registrar of the High Court as per the direction of the High Court, it was not permissible for the High Court to take into consideration all such discrepancies and decide the election petition or recrimination petition on the basis thereof. The course adopted by the High Court is impermissible and cannot be taken note of being in contravention with statutory requirements. Therefore, the case has to be restricted only to the four votes in the election petition and the allegations made in the recrimination petition ignoring altogether what had been found out in the recounting of votes as under no circumstance the recounting of votes at that stage was permissible.”

91. In view thereof, I do not find merit in the submission of Mr. Korde that the decision in **N.E. Horo's case**⁶ was not approved in **Arikala's case**¹.

92. I also do not find merit in the submission of Mr. Korde that even if the Returning Officer rejected exhibit P-17 under rule 73(2)(d), the said rejection can be upheld under Rule 73(2)(a). In my opinion, neither the ground under Rule 73(2)(a) nor the ground under Rule 73(2)(d) is available for rejecting exhibit P-17. In my opinion, the Returning Officer committed error in rejecting the ballot paper exhibit P-17 on the ground that voter is identifiable.

P-18

93. It is the case of the petitioner that the voter had clearly given preference in his favour but after giving preference to the petitioner,

there was a slight stroke of pen by the side of the preference. As against this, it is the case of the respondent that exhibit P-18 can be read in the following ways:

- (i) '1' written in the Devnagri script accompanied by a figure of '8' in the Telugu script; or
- (ii) '1' written in the Devnagri script accompanied by '8' written in the Kannada script; or
- (iii) '1' written in the Devnagri script accompanied by a “mark”; or
- (iv) '1' in the Devnagri script accompanied by the English alphabet 'u'; or
- (v) '1' written in the Devnagri script accompanied by the English alphabet 'U'; or
- (vi) A “mark” accompanied by a figure of '8' in the Telugu script; or
- (vii) A “mark” accompanied by a figure of '8' in the Kannada script; or a 'mark' accompanied by the alphabet 'v' or 'u'.
- (viii) The petitioner is reading ballot paper Exhibit P-18 as a figure of '1' in the Devnagri script accompanied by “a stroke of the pen”. By no stretch of imagination, can ballot paper Exhibit P-18 be read as the figure of '1' accompanied by a stroke of the pen.

94. I have carefully perused exhibit P-18. Perusal of exhibit P-18 shows that no preference is indicated against the name of the respondent. As far as petitioner is concerned, after figure '1' in Marathi, there is a mark, which according to the petitioner, is the stroke of pen. As against this, respondent contends that it is a figure of '8' in Telgu script or Kannada script or English alphabet 'u'. As noted earlier, it is not the case of a writing and it is a case of a mark. For the self-same reasons given by me while discussing exhibit P-17, I am of the opinion that the Returning Officer committed error in rejecting the ballot paper exhibit P-18. In my opinion, neither the ground under Rule 73(2)(a) nor the ground under Rule 73(2)(d) is available for rejecting exhibit P-18. In my opinion, the Returning Officer committed error in rejecting the ballot

paper exhibit P-18 on the ground that voter is identifiable.

P-19

95. It is the case of the petitioner that the preference was clearly given in his favour but there is a dot (.) against the name of the respondent. As against this, it is the case of the respondent that exhibit P-19 can be read in the following ways:

- (i) A figure of '1' in the Devnagri script against the name of the petitioner and a dot against the name of the respondent; or
- (ii) A figure of '1' in the Devnagri script against the name of the petitioner and a figure of '0' in the Urdu script against the name of the respondent; or
- (iii) A figure of '9' in the English script against the name of the petitioner and a dot against the name of the respondent; or
- (iv) A figure of '9' in the English script against the name of the petitioner and the figure of '0' in the Urdu script against the name of the respondent.

96. I have carefully perused exhibit P-19. Perusal of exhibit P-19 shows that no preference is indicated against the name of the respondent. There is a dot (.) against the name of the respondent. As against this, as far as petitioner is concerned, the voter has clearly written figure '1' against his name. For the self-same reasons given by me while discussing exhibit P-17, I am of the opinion that the Returning Officer committed error in rejecting the ballot paper exhibit P-19. Equally, ground under Rule 73(2)(e) is not available. Assuming that the mark is in a different ink, in the first place, no evidence is led to show the difference of ink. Secondly, clause (e) of Rule 73(2) cannot be attracted as the **mark** and not the **figure** which denotes the preference of the voter is in different ink. In my opinion, neither the ground under Rule 73(2) (a) nor the ground under Rule 73(2)(d) is available for rejecting exhibit P-19. In my opinion, the Returning Officer committed error in rejecting

the ballot paper exhibit P-19 on the ground that voter is identifiable.

P-20

97. It is the case of the petitioner that preference was clearly given in his favour but the ballot paper was rejected on the ground that the said figure looks like alphabet 'j'. It is the case of the petitioner that the said figure is Roman Numerical (I). As against this, it is the case of the respondent that exhibit P-20 can be read in the following ways:

- (i) As the alphabet 'J'; or
- (ii) As a mirror image of the alphabet 'C'; or
- (iii) As the numerical '7' in the Gurumukhi script; (Punjabi is a language in the 8th Schedule) or
- (iv) The petitioner is suggesting that it should be read as Roman I. It is submitted that by no stretch of imagination, it can be read as Roman I.

98. I have carefully perused exhibit P-20. Perusal of exhibit P-20 shows that no preference is indicated against the name of the respondent. Against the name of the petitioner, preference is given. It is the case of the petitioner that it represents Roman Numerical (I). As against this, respondent has suggested the interpretation extracted hereinabove. In my opinion, the Returning Officer ought to have considered the intention of the voter in giving preference to the petitioner. After perusing exhibit P-20, it would clearly appear that the voter marked figure Roman (I) and there is no extension towards right of the said figure at the bottom. The said figure resembles Roman I. The Returning Officer committed error in rejecting Exhibit P-20. In paragraph 33 of **Arikala's case**¹, the Apex Court observed thus,

“33. The High Court had examined the votes in dispute and came to the following findings:

“Coming to Ex.X-1, the figure '1' is clearly marked by the voter in the panel meant for the petitioner in the ballot paper. Though, it was

not in the space which is actually meant for marking figure '1', since it is in the panel (space) provided for the petitioner, it has to be treated as valid. This was also, however, objected to by the first respondent that it looks like '7' and not '1'. But, it would clearly appear that the voter marked the figure '1' and there is a small extension towards left of the said figure on the top. The learned counsel appearing for the first respondent would contend that the intention of the voter is absolutely no relevance since the rules specifically state that the figure '1' has to be put. While discussing the rules and referring to the judicial pronouncements, I have already held that a duty is cast upon the Returning Officer as well as the court to ascertain the intention of the voter. As long as the figure marked resembles '1', it is illegal to reject the ballot mechanically whenever a doubt arises that the figure marked does not accord in all respects with the figure viewed by the Returning Officer or the court. This ballot, however, clearly shows that the figure '1' was specifically and correctly marked and therefore, the Returning Officer rightly validated the said vote in favour of the petitioner.

In Ex.X-2, the voter marked figure '1' in the panel meant for the petitioner. It was objected to by the first respondent that it looks like 'dot'. On careful examination, I found that the voter in fact marked figure '1', but it is short in length and the width appears to be more because of the discharge of more ink from the instrument supplied to the elector by the Returning Officer for the purpose of marking. According to me, this was improperly rejected by the Returning Officer saying that it looks like 'dot', but not one. By carefully examining the ballot paper unhesitatingly, I hold that the voter marked figure '1' and it has to be validated in favour of the petitioner and accordingly, the same is validated for the petitioner.

In Ex.X-3, a 'tick' mark was put in the column meant for the first respondent in addition to figure '1' which was clearly put in the space meant for the petitioner. This apart, the voter wrote that his vote is for 'Venkata Ram Reddy' (petitioner). By the said writing, it is not possible to identify the voter. From the writing, it is also not possible to draw any inference that there was prior arrangement between the petitioner and the voter to write those words. It is also not possible to presume that the writing furnishes any reasonable or probable information or evidence to find out the identity of the voter. As regards the 'tick' mark since such mark is not contemplated by the rules it has to be ignored. For all these reasons, since the figure '1' was clearly put by the voter, it has to be validated in favour of the petitioner. Accordingly, the same is validated in favour of the petitioner.

As regards Ex.Y-13, it requires to be noticed that the figure '1' was clearly and specifically put in the column meant for the petitioner. However, the elector in the space provided for the petitioner for marking the figure put his signature apart from marking figure '1'. From the signature also it is not possible to trace out the identity of the voter and therefore, this vote also can be validated in favour of the petitioner and accordingly, it is validated in favour of the petitioner.”

99. In paragraph 34, the Apex Court agreed with the reasoning given by the High Court with respect to exhibits X-1 and X-2. In the light of the aforesaid discussion, I am of the opinion that the Returning Officer committed serious illegality in rejecting exhibits P-17 to P-20. If these four votes are added to the votes secured by the petitioner, namely 221, it has to be held that the petitioner secured 225 votes as against 221 votes secured by the respondent. The Returning Officer ought to have declared the petitioner elected instead of having recourse to drawing of lots. Question No.1 is answered accordingly.

Question No.2

Whether in the event of equality of votes, the Returning Officer ought to have followed the procedure under Section 65 of the Act rather than invoking Rule 75 of the Rules?

100. Assuming that the Returning Officer was justified in rejecting exhibits P-17 to P-20, the next question is whether the Returning Officer was justified in invoking Rule 75(4) of the Rules.

101. Mr. Korde submitted that the Articles 80(4) and 171(4) of the Constitution provide for election in the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. The phrase “proportional representation by means of the single transferable vote” has been explained in detail by the Apex Court in (i) ***University of Poona Vs. Shankar Narhar Ageshe***¹³, and in particular, paragraphs 11, 12 and 15 to 20 and (ii) ***Lalit Mohan Pandey Vs. Pooran Singh***¹⁴, and in particular paragraphs 21 to 27, 51 and 68 to 88. He submitted that as far as counting of votes is concerned, the Rules are comprehensive. There are

¹³ (1972) 3 SCC 186

¹⁴ (2004) 6 SCC 626

two separate sets of Rules. Part V contains a set of Rules dealing with counting of votes in Parliamentary and Assembly Constituencies. Part VII deals with counting of votes at elections by Assembly Members or in Council Constituencies. The system of counting of votes in Parliamentary and Assembly Constituencies is totally different from the system of counting of votes at elections by Assembly Members and in Council Constituencies. As far as the elections in Parliamentary and Assembly Constituencies are concerned, there is only one round of counting. The candidate getting the largest number of valid votes is declared as elected. As far as counting of votes at elections by Assembly Members or in Council Constituencies is concerned, there could be several rounds of counting. The counting is based on the system of proportional representation by means of the single transferable vote as provided by Articles 80(4) and 171(4).

102. The main features of the said system are as follows:

- (a) There is a concept of a quota which a candidate must reach in order to get elected;
- (b) Candidates reaching the quota or exceeding the quota are declared as elected;
- (c) If, at the end of the count the required number of candidates do not reach the quota, a process of exclusion or elimination is commenced and the said process of exclusion or elimination goes on until enough candidates have filled their quotas or until the successive eliminations have left just enough candidates to fill the vacancies.

103. Chapter V of the Rules dealing with counting of votes in Parliamentary and Assembly Constituencies does not contain any specific rule dealing with a situation in which two candidates secured equal number of votes. Section 65 of the Act is not applicable and

cannot be applied to the counting of votes at elections by Assembly Members or in Council Constituencies. The entire scheme of Part VII and Rule 75 in particular is based on a process of exclusion. This is in accordance with the system of proportional representation by means of a single transferable vote. Even the draw of lots under Rule 75(4) is held for the purpose of exclusion. A draw of lots as provided by Section 65 is inconsistent with the system of proportional representation because the same is not based on the principle of exclusion and is in fact contrary to the principle of exclusion which is an essential feature of the system of proportional representation by the means of a single transferable vote. He submitted that Rule 75 is self-contained code and contains all the steps which are required to be taken to arrive at the result of election including the step of draw of lots in certain situations. Rule 71(1) defines expression 'continuing candidate' to mean 'any candidate not elected and not excluded from the poll at any given time'. In the present case, the petitioner and respondent are the continuing candidates as they were not elected and not excluded from the poll.

104. He submitted that the Returning Officer has applied sub-rule (1) of Rule 75 while working out the quota at 222 votes as can be seen from exhibit P-13. As per sub-rule (2) of Rule 75, at the end of the first count, neither candidate has reached the quota and the petitioner and the respondent remained in the field. Therefore, neither of them can be declared elected. Therefore, the petitioner and the respondent are continuing candidates under Rule 71(1). Sub-rule (3) could not be applied because there are two candidates with the lowest value, namely the petitioner and the respondent and both of them have been credited with the equal value. In view thereof, recourse is required to be taken to the last part of sub-rule (4) by drawing of lots to achieve the object of exclusion. All along the object was to exclude one candidate. The said object is in consonance with the system of proportional representation

by means of a single transferable vote. After the petitioner was excluded by drawing of lots, the respondent was the only candidate who remained in the field and was rightly declared elected. Merely because as matter of coincidence, there are merely two candidates, it does not mean that one has to go out of the regime of Rule 75 mid-stream and apply Section 65. Such a deviation is not permissible. The opening words of Section 65 namely, “If, **after the counting of votes is completed** ... are very significant.” Section 65 is meant to be applied to the situation in which the counting of votes is completed. In the elections to Parliamentary and Assembly Constituencies, there is only one round of counting and the candidate getting the largest number of votes is declared elected. Mr. Korde invited my attention to exhibit P-13, exhibit P-15 and exhibit P-7, that being the communication dated 28.05.2012.

105. Per contra, Mr. Jethmalani submitted that the system of proportional representation and essence of Rule 75(4) can only be applied where there are more than two candidates in the election. Where there are only two candidates, the system of proportional representation can never apply and the election is a direct one and the principle that the first past the post operates. Where there is a tie after counting of first preference votes or second preference votes in the case of two candidates, the only recourse is to the procedure mandated by Section 65 of the Act. He submitted that in case of **University of Poona**¹³, there were three candidates. One candidate was eliminated on the first count on the basis of the lowest number of first preference votes and thereafter, there was tie between the two continuing candidates. He invited my attention to paragraph 19 of that decision wherein it is observed “it is an established principle in the system of proportional representation by means of a single transferable vote by ballot that where for one vacancy, there are **three candidates** and one of them is

excluded at the first count and the two candidates continued and in the second count, both of them have equal number of votes then one of the two candidates who had the lowest number of votes than the other continuing candidates in the first count shall be excluded.

106. He submitted that in paragraph 27 of **Lalit Mohan Pandey's case**¹⁴, the Apex Court observed “**In short, the Hare system works on two principles namely, transfer of surplus votes and transfer of votes of eliminated candidates.**” In other words, where there cannot be a transfer of surplus votes of elected candidate or transfer of votes of eliminated candidate, the system of proportional representation has no application. Rule 75 envisages the situation where there are more than two candidates, which is clear from the plain words of the Rules. Rule 75(2) applies to a stage prior to transfer of votes. The principle of exclusion commences from Rule 75(3). Rule 75(4) pertains to situation where after the entire process of exclusion starting from Rule 75(3) has taken place and there is still a tie between the candidates, in such a case, the tie is decided by draw of lots which involves principle of exclusion that is whom the lot falls shall be excluded. The opening words of Rule 75(4) reads, “if when candidate has to be excluded under clause (a) of sub-rule (3), two or more than candidates have been credited with the same value”. Thus, Rule 75(4) comes into operation only after one candidate is excluded under Rule 75(3). In other words, the system of proportional representation enshrined in Rule 75 does not apply to situation where there are two candidates. This is also evident from paragraph 12 of **University of Poona's case**¹³ wherein it was observed “if when a candidate has to be excluded 2 or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the **lowest number of original votes are recorded shall be excluded.** Thus, in case of a tie between only 2 contesting candidates, it

is only Section 65 that can be taken recourse to for breaking the tie. He submitted that even the Apex Court in **Arikala's case**¹ has taken recourse to Section 102 of the Act wherein the principle of draw of lots in Section 65 is reiterated. The Apex Court did not take recourse to Rule 75 though the election was from the Local Authorities Members Constituencies for State Legislative Council. He further submitted that the petitioner filed application dated 28.05.2012 and submitted that 5 second preference votes cast in his favour are required to be taken into consideration. By order dated 28.05.2012, the Returning Officer overruled that objection by observing that the election was conducted as per the single transferable vote. The voters were entitled to give preferences while voting. In the system of single transferable vote when only two candidates are contesting the election, at that time, the second preferential votes are not counted. The Returning Officer instead of invoking Section 65, however resorted to Rule 75.

107. I have considered the submissions advanced by the learned Counsel appearing for the parties. In the case of **University of Poona**¹³, the election was held for election to the office of the Vice-chancellor. The total number of votes tendered was 149. One of the votes was invalid. The valid votes were 148. The election was in accordance with Section 56 of the Poona University Act, 1948 by the system of proportional representation by means of a single transferable vote by ballot. The result of the ballot papers appeared to be that one Dr. Apte secured 58 votes, Principal Mr. Kulkarni 37 and Principal Suru 53 first preference votes. Principal Kulkarni was thus, eliminated on the first count on the basis of the lowest number of the first preference votes. 8 of the voters who had given first preference votes to Principal Kulkarni had not exercised second preference in favour of either of the remaining two candidates Dr. Apte and Principal Suru. The remaining 29 voters gave

12 second preference votes to Dr. Apte and 17 second preference votes to Principal Suru. This resulted in both the continuing candidates Dr. Apte and Principal Suru each securing 70 votes on the second count. Dr. Apte was declared elected because in the first count, namely, the count previous to the one in which both obtained equal number of votes, Dr. Apte had a clear majority of 5 votes and therefore, Principal Suru was excluded from election. Thus, in that case, there were 3 candidates. On the first count, Principal Kulkarni was excluded as he had secured the lowest number of first preference votes and Dr. Apte and Principal Suru were the continuing candidates. The Apex Court referred to Rule 75 of the Rules and reliance was placed on sub-rule (3) and (4) for the legislative recognition of the principle of exclusion. It was observed in paragraph 12 as under:

“12. ... In the present case, at the first count Principal Kulkarni was excluded because he received the lowest number of votes on the first count. ...”

108. In the case of **Lalit Mohan Pandey**¹⁴, again there were 3 candidates viz. the appellant, the first respondent and one Bhagirath Bhatt. Rule 75 of the Rules reads as under:

“75. Counting of votes where only one seat is to be filled. - (1) At any election where only one seat is to be filled, every valid ballot paper shall be deemed to be of the value of 1 at each count, and the quota sufficient to secure the return of a candidate at the election shall be determined as follows:-

- (a) add the values credited to all the candidates under clause(c) of rule 74;
- (b) divide the total by 2; and
- (c) add 1 to the quotient ignoring the remainder, if any, and the resulting number is the quota.

(2) If, at the end of the first or any subsequent count, the total value of the ballot papers credited to any candidate is equal to, or greater than, the quota or there is only one continuing candidate, that candidate shall be declared elected.

(3) If, at the end of any count, no candidate can be declared

elected, the returning officer shall—

(a) **exclude from the poll the candidate who up to that stage has been credited with the lowest value;**

(b) examine all the ballot papers in his parcels and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon **for the continuing candidates**, count the number of papers in each such sub-parcel and credit it to the candidate for whom such preference is recorded, transfer the sub-parcel to that candidate, and make a separate sub-parcel of all the exhausted papers; and

(c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota.

(4) If, when a candidate has to be excluded under clause (a) of sub-rule (3), two or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the lowest number of original votes are recorded shall be excluded, and if this number also is the same in the case of two or more candidates, the returning officer shall decide by lot which of them shall be excluded.”

109. Sub-rule (1) of Rule 75 lays down the manner in which the quota sufficient to secure the return of a candidate at the election where only one seat is to be filled is to be determined. Sub-rule (2) provides that if, at the end of the first or any subsequent count, the total value of the ballot papers credited to any candidate is equal to, or greater than, the quota or there is only one continuing candidate, that candidate is to be declared elected. Sub-rule (3)(a) lays down that if, at the end of any count, no candidate can be declared elected, the returning officer has to exclude from the poll the candidate who up to that stage has been credited with the lowest value. Sub-rule (3)(b) and (c) lay down that the returning officer has to examine all the ballot papers in his parcels and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of papers in each such sub-parcel and credit it to the candidate for whom such preference is recorded, transfer

the sub-parcel to that candidate, and make a separate sub-parcel of all the exhausted papers and see whether any of the continuing candidates has, after such transfer and credit, secured the quota. Sub-rule (4) lays down that if, when a candidate has to be excluded under clause (a) of sub-rule (3), two or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the lowest number of original votes are recorded has to be excluded, and if this number also is the same in the case of two or more candidates, the returning officer has to decide by lot which of them shall be excluded.

110. As noted earlier, in the present case, there are only two candidates. In view thereof, there is no question of excluding from the poll any candidate and also transferring and crediting the preferences recorded in favour of the excluded candidate in favour of the continuing candidate as also finding out whether any of the continuing candidates has, after such transfer or credit, secured the quota. Equally, sub-rule (4) of Rule 75 also cannot be operated when there are only two candidates. In other words, when there are only two candidates, sub-rules (3) and (4) cannot be operated. I, therefore, find merit in the submission of Mr. Jethmalani that Rule 75(4) can be applied where there are more than 2 candidates and the system of proportional representation can never apply when there are only 2 candidates. When there are only two candidates, Section 65 of the Act is applicable. The decisions of **University of Poona**¹³ and **Lalit Mohan Pandey**¹⁴ do not assist the respondent. Question No.2 is answered accordingly.

Question No.3

Whether the second preference votes cast in favour of the petitioner ought to have been credited to the petitioner by the Returning Officer?

111. Mr. Jethmalani submitted that on 28.05.2012, the Returning Officer declared that the petitioner and the respondent secured equal votes (221). On the same day, petitioner raised objections in writing by making four different applications to the Chief Election Officer. In one of the applications, the petitioner contended that he has secured five second preferential votes and the same were not counted. It was submitted that the said votes should be taken into consideration while declaring the result of election. Mr. Jethmalani submitted that on 23.05.2012, the Election Commission of India issued instructions. Instruction 3-A is to the following effect:

“You have as many preferences as there are contesting candidates irrespective of the number of candidates to be elected. For example, if 5 candidates are contesting in the election, you can put the figures 1 to 5 before their names.”

112. In view of the aforesaid instruction, he submitted that even in a case where only two candidates are contesting, the voters can give first and second preference votes to the respective candidates. The said instructions are binding on the Returning Officer including the respondent. The respondent has not led any evidence to the contrary. He has also not led evidence to suggest that the unequivocal instructions of the Election Commission were erroneous.

113. On the other hand, Mr. Korde submitted that in the present case, there is no occasion for considering the second preference votes. When there are only two candidates for one seat, the question of second preference votes does not arise at all. Second preference vote is meaningless when there are only two candidates. For a second preference to have any meaning, there should be at least 3 candidates in the field. Under the system of proportional representation by means of a single transferable vote, when only one seat is to be filled in, the second preference votes are looked at of only one type of candidate/s, namely

excluded candidate/s. In the present case, the respondent is not an excluded candidate and therefore, there is no question of looking at the second preference votes shown on the respondent's first preference votes. He further submitted that the objections raised by the petitioner were considered by the Returning Officer and by a detailed order dated 28.05.2012, he has overruled those objections.

114. I have considered the submissions advanced by the learned Counsel appearing for the parties. As noted earlier, the election was conducted as per the system of proportional representation by means of a single transferable vote. Only two candidates were in the fray namely, the petitioner and the respondent. The petitioner filed application dated 28.05.2012 and submitted that 5 second preference votes cast in his favour are required to be taken into consideration. By order dated 28.05.2012, the Returning Officer overruled that objection by observing that the election was conducted as per the single transferable vote. The voters were entitled to give preferences while voting. In the system of single transferable vote when only two candidates are contesting the election, at that time, the second preferential votes are not counted. I do not find that the Returning Officer committed any error in overruling the objection. In other words, I do not find any merit in the submission of Mr. Jethmalani that the 5 second preference votes cast in favour of the petitioner ought to have been counted and accordingly the result should have been declared. Question No.3 is answered accordingly.

115. In the light of the aforesaid discussion, Petition succeeds. The election of the respondent held in the Biennial Election for the year 2012 from the Nashik Local Authorities Members Constituency for Maharashtra State Legislative Council is declared void and is accordingly set aside. The petitioner is declared to have been duly elected as a returned candidate.

116. At this stage, Mr. Korde orally applies for stay of this judgment for a period of 8 weeks from today so as to enable the respondent to prefer Appeal before the Apex Court. Mr. Korde submits that by the order just pronounced today, the election of the respondent is declared as void and the petitioner is declared to have been duly elected as a returned candidate. Section 107 lays down that subject to the provisions contained in Chapter IV-A relating to the stay of operation of an order of the High Court under Section 98 or 99, every such order shall take effect as soon as it is pronounced by the High Court. He submits that if the order pronounced today by this Court is not stayed, the effect will be that the respondent stands unseated. He submits that this constitutes sufficient cause as contemplated under Section 116B of the Act. He states that the next Session is to commence from 08.03.2015. Mr. Deshmukh opposes oral application on the ground that in the first place, respondent has to make written application making out a sufficient cause which can be dealt with by the petitioner. Secondly, he submitted that if the Court is inclined to grant stay then the same may be granted for a limited period subject to imposing condition that the respondent will not utilize the funds.

117. As noted earlier, the respondent intends to challenge this order before the Apex Court. In view of Section 107 of the Act, I find that the request made by Mr. Korde is reasonable. Hence, subject to respondent's not spending the funds allocated to him, there shall be stay to the operation of this order for the period of 8 weeks from today.

118. Order accordingly.

(R. G. KETKAR, J.)