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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **W.P.(C) 2502/2023 & CM APPLs. 9574/2023, 24838/2023**

Between: -

KAMALJEET SEHRAWAT
W/O RAJ KUMAR SEHRAWAT
RESIDING AT PLOT NO 28-29 NANDA ENCLAVE,
AMBERHAI SECTOR 19 DWARKA NEW DELHI - 110075
.....PETITIONER

(Through: Mr. Mahesh Jethmalani, Senior Advocate alongwith Mr. Pavan Narang, Mr. Shoumendu Mukherji, Mr. Ravi Sharma, Mr. Mugdha Pande, Ms. Vidhi Gupta, Mr. Satya Ranjan Swain & Ms. Megha Sharma, Advocates.)

AND

OFFICE OF LIEUTENANT GOVERNOR OF DELHI
THROUGH PRINCIPLE SECRETARY,
BLOCK-6, RAJ NIVAS, CIVIL LINES,
NEW DELHI-110054
.....RESPONDENT NO.1

GOVERNMENT OF NCT OF DELHI
THROUGH SECRETARY,
DELHI SECRETARIAT, IP ESTATE,
NEW DELHI
.....RESPONDENT NO.2

MUNICIPAL CORPORATION OF DELHI
THROUGH ITS COMMISSIONER,
24th FLOOR, DR. SPM CIVIC CENTER,
MINTO ROAD,
NEW DELHI-110002
.....RESPONDENT NO.3

MAYOR /RETURNING OFFICER
THROUGH MUNICIPAL SECRETARY,
MUNICIPAL CORPORATION OF DELHI

DR. MUKHERJEE CIVIC CENTER
MINTO ROAD,
NEW DELHI-110002

.....RESPONDENT NO.4

(Through: Mr. Udit Malik, ASC, GNCTD alongwith Mr. Vishal Chanda, Advocate, Mr. Ajay Digpaul, Standing Counsel alongwith Mr. Kamal Digpaul & Ms. Swati Kwatra, Advocates for R-3 Mr. Rahul Mehra, Senior Advocate alongwith, Mr. Mohit Siwach, Mr. Chaitanya Gosain, Mr. Priyanka Tiwary and Mr. Anand Thumbayil, Advocates for R-4)

+ **W.P.(C) 2503/2023 & CM APPL.9576/2023**

Between: -

SHIKHA ROY
W/O SANJEEV KUMAR PABBI
R/O B-13,GF, GREATER KAILASH ENCLAVE-2,
GK-2,NEW DELHI-48.
COUNCILLOR GREATER KAILASH WARD NO. 173

.....PETITIONER

(Through: Mr. Jayant Mehta, Senior Advocate with Mr. Amit Tiwari, Mr. Neeraj, Mr. Bansuri Swaraj, Mr. Yogesh Verma, Mr. Chetanya Puri, Mr. Vedansh Anand, Ms. Anu Srivastav & Mr. Himanshu Seth, Advocates.)

AND

OFFICE OF LIEUTENANT GOVERNOR OF DELHI
THROUGH PRINCIPLE SECRETARY,
BLOCK-6, RAJ NIVAS, CIVIL LINES,
NEW DELHI-110054

.....RESPONDENT NO.1

GOVERNMENT OF NCT OF DELHI
THROUGH SECRETARY,
DELHI SECRETARIAT, IP ESTATE,
NEW DELHI

.....RESPONDENT NO.2

MUNICIPAL CORPORATION OF DELHI
THROUGH ITS COMMISSIONER,
24TH FLOOR, DR. SPM CIVIC CENTER,
MINTO ROAD,
NEW DELHI-110002

.....RESPONDENT NO.3

RETURNING OFFICER FOR THE ELECTION OF MEMBERS OF
STANDING COMMITTEE OF MCD/MAYOR,
THROUGH MUNICIPAL SECRETARY
MUNICIPAL CORPORATION OF DELHI
DR. MUKHERJEE CIVIC CENTER
MINTO ROAD,
NEW DELHI-110002

.....RESPONDENT NO.4

(Through: Mr. Udit Malik, ASC, GNCTD alongwith Mr. Vishal Chanda, Advocate Mr. Udit Malik, ASC alongwith Mr. Vishal Chanda, Advocate for R-2

Mr. Ajay Digpaul, Standing Counsel alongwith Mr. Kamal Digpaul & Ms. Swati Kwatra, Advocates for R-3

Mr. Rajshekhar Rao, Senior Advocate alongwith Mr. Mohit Siwach, Mr. Priyankar Tiwary, Ms. Mansi Sood and Ms. Vishakha Gupta, Advocates for R-4.)

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Pronounced on: 23.05.2023

J U D G M E N T

1. These two writ petitions relate to the election of members of Standing Committee required to be constituted under Section 45 of the Delhi Municipal Corporation Act, 1957 (hereinafter '**DMC Act, 1957**'). In both the matters, since common issues viz. rejection of ballot paper; decision of re-poll; and scope of interference under writ jurisdiction are involved therefore, the same are being decided by a common order.

2. The petitioner in W.P.(C) 2502/2023, namely, Kamaljeet Sehrawat, contested the general election of Municipal Corporation of Delhi (hereinafter 'MCD') held on 04.12.2022 and was elected as Municipal Counsellor from Ward No.120, Dwarka-B, New Delhi.

3. The petitioner prays for *inter alia* a direction to declare him as elected in pursuance to the election held on 24.02.2023 for the

Standing Committee of the DMC. For the sake of clarity, relief claimed in W.P.(C) 2502/2023 is reproduced as under:-

“In the view of the submissions made hereinabove, the Applicant herein most respectfully pray that this Hon'ble Court may graciously be pleased to:-

a) Direct the Respondent no. 4, in the capacity of Returning Officer to officially declare the results of elections held on 24.02.2023 of 06 members of Standing Committee to be elected by the General House of Municipal Corporation of Delhi, strictly as per Regulation 51(10)&(11) of the Delhi Municipal Corporation (Procedure & Conduct of Business) Regulation 1958; and

b) Declare candidates namely (i) Ms. Mohini (AAP), (ii) Shri Mohammad Aamil Malik (AAP), (iii) Ms. Raminder Kaur (AAP), (iv) Shri Gajendra Singh Daral (Independent), (v) Ms. KamalJeet Sehrawat (BJP), (vi) Shri Pankaj Luthra (BJP) as having been validly elected as members of the Standing Committee of the Municipal Cooperation of Delhi in the elections held on 24.02.2023; and

c) Pass orders declaring the notice bearing No. D-1029/M.S./2023, dated 24.02.2023 as null and void being contrary to the provisions of law; and

d) pass directions staying the operation of notice bearing No. D-1029/M.S./2023, dated 24.02.2023 during the pendency of the present proceedings; and

e) pass directions for appointment of a Judicial Officer as an observer to oversee the remaining process of the election i.e, declaration of result; and

f) Pass directions To Call For Records Of The Entire Electoral Process In The Interest Of Justice,

g) pass directions to the RO/Mayor/Municipal Secretary to preserve the ballots, recordings of the videography of the counting process and other relevant record of the election process till further directions; and

h) Pass such other and further order(s) as may deem fit in the circumstances of the case.”

4. In W.P.(C) 2503/2023, the petitioner is the Counsellor elected in MCD election, 2022 from Ward No.146, Amar Colony. She being interested in constitution of the Standing Committee has also

challenged the action of the Mayor/RO in issuing notice dated 24.02.2023. It is thus seen that she is also supporting the case put forth by the petitioner i.e. Kamaljeet Sehrawat in W.P.(C) 2502/2023. This writ petition, W.P.(C) 2502/2023, is therefore being considered as the lead matter.

5. The facts, pertinent to the present dispute, originate in the DMC elections conducted on 04.12.2022, wherein despite the election of 250 Counsellors, the election of the Mayor/Deputy Mayor and the Standing Committee was not conducted. The Hon'ble Supreme Court was then moved by way of a writ petition filed by Ms. Shelly Oberoi and others under Article 32 of the Constitution of India.

6. The Hon'ble Supreme Court thereafter in ***Shelly Oberoi & Anr. v. Office of Lieutenant Governor of Delhi & Ors.***¹ vide order dated 17.02.2023 issued the following directions:-

"16. Hence, we issue the following directions:-

(i) At the first meeting of the Municipal Corporation of Delhi, the election shall be held first for the post of Mayor and at that election, the members who are nominated in terms of Section 3(3)(b)(i) of the Act shall not have the right to vote;

(ii) Upon the election of the Mayor, the Mayor shall act as the presiding authority for conducting the election of the Deputy Mayor and the members of the Standing Committee at which also the prohibition on the exercise of vote by the nominated members in terms of Section 3(3)(b)(i) shall continue to operate; and

(iii) The notice convening the first meeting of the Municipal Corporation of Delhi shall be issued within a period of twenty four hours. The notice shall fix the date for convening the first meeting at which the election of the Mayor, Deputy Mayor and members of the Standing Committee shall be conducted in terms of the above directions."

7. Thereafter, on 18.02.2023, a notice was issued in exercise of powers conferred under Section 73 of DMC Act, 1957 for the first

meeting of MCD on 22.02.2023 for the election of Mayor, Deputy Mayor and six members of the Standing Committee.

8. The petitioner, in order to contest the election of the members of the Standing Committee, submitted his nomination form in accordance with the prescribed form.

9. The election of Mayor and Deputy Mayor was concluded on 22.02.2023. However, the election of six members of the Standing Committee could not take place on 22.02.2023, therefore, another notice dated 23.02.2023 was issued by the Mayor/RO re-fixing the first adjourned meeting of the MCD on 24.02.2023 at 10:00 AM.

10. In the process of election of members of the Standing Committee which took place on 24.02.2023, 242 elected members exercised their franchise/vote as per The Delhi Municipal Corporation (Procedure & Conduct of Business) Regulations, 1958 (hereinafter '**Regulations, 1958**').

11. Out of the six elected candidates, three members each, belonged to Bhartiya Janta Party (hereinafter '**BJP**') which also included the petitioner, and Aam Aadmi Party (hereinafter '**AAP**'). After the poll was over, the scrutiny for valid and invalid votes was conducted. However, no invalid ballot was found. Thereafter, the report was prepared with respect to six elected candidates.

12. Subsequently, the Mayor, who also happens to be the Returning Officer (hereinafter '**RO**'), declared one vote as invalid on the ground that the voter, instead of putting his priority on the ballot paper as his preference, 1, 2 or 3, has given his first preference to one candidate and given second preference to two candidates. The Mayor/RO thus did not declare the results but rather re-fixed the adjourned first

meeting for 27.02.2023. The Mayor/RO also, through notice dated 24.02.2023, directed for re-election/re-poll of the members of the Standing Committee. The petitioner, thus has moved this court through the instant petition.

13. Learned senior counsel Mr. Mahesh Jethmalani and Mr. Jayant Mehta, appearing for the respective petitioners have submitted that after the scrutiny was over, the Mayor/RO has no authority to declare any vote as invalid and hence the notice dated 24.02.2023 issued for re-election of the members of the Standing Committee is not only illegal, improper and without jurisdiction but the same also suffers from *malafide* intent.

14. The learned senior counsel also canvassed that the action of respondent no.4/Mayor/RO is in gross violation of the Regulations, 1958 and therefore, the impugned action deserves to be set aside while directing the Mayor/RO to constitute the Standing Committee in accordance with the election held on 24.02.2023.

15. Learned senior counsel have taken this court through the Regulations, 1958. They have placed specific reliance on Regulations 51(7)–(10), of the Regulations, 1958 to indicate a particular scheme of procedure that the Regulations, 1958 envisage. They contend that after casting of the votes, the Mayor/RO as per Regulation 51 (10) of the Regulations, 1958 shall open the ballot box and take out the ballot papers contained therein. Thereafter, the Mayor/RO has to count the number of ballot papers so taken out or caused to be counted and shall record such number in a statement. The Mayor/RO thereafter, has to scrutinise the ballot papers and separate the ballot papers which she deems valid from those which she rejects as invalid by endorsing thereon the word 'rejected' and the ground of such rejection.

Thereafter, the Mayor/RO has to arrange the valid ballot papers in parcels according to the first preference recorded for each candidate. Lastly to count the votes in the meeting, in the presence of such of the members as may be present with the assistance of such persons, as may be appointed by the Mayor/RO in that respect. It is, therefore, submitted that upon completion of the counting of votes the Mayor/RO shall prepare and certify a return in Form-4 setting forth— (1) the names of the candidates for whom valid votes have been given; (2) the number of valid votes given to each candidate; (3) the number of votes declared invalid and rejected; and (4) the names of the persons declared elected.

16. It is thus submitted by them that the process of scrutiny of the valid and invalid ballot is prescribed under Regulation 51(10) of the Regulations, 1958.

17. It is also, importantly, contended, by the learned counsel that Regulation 10(b) of the Regulations, 1958 provides and mandates for the counting of votes at the election of the members of Standing Committee to be governed by Rule 115, sub-rule (ii) of Rule 116, Rule 121 to 127 and Rule 129 of the Representation of the People Act (Conduct of Election and Election Petition) Rules, 1956 (hereinafter '**Rules, 1956**').

18. Learned senior counsel for the petitioners, therefore, states that the two stages, i.e., scrutiny and counting are independent to each other and must precede one after the other. According to them, once the stage of scrutiny is over and the process has reached up to the stage of counting of votes, at that point of time, the Mayor/RO cannot put the clock back to again assume the jurisdiction of scrutinising

valid ballot paper. Such an approach according to them is erroneous and *de hors* the Regulations, 1958.

19. They also seek to place reliance on a Handbook for ROs for Elections to the Council of States and State Legislative Councils, February 2016. Specific reference is made to Clause 10.1 to 12.1.

20. Learned senior counsel for the petitioners have placed reliance on various decisions to substantiate their submission in the cases of *Election Commission of India v. Ashok Kumar*², *Ashraf Yunus Motiwala v. State of Maharashtra*³, *Saroj v. Delhi State Election Commission and Ors.*⁴, *Pondicherry Basketball Association v. Union of India and Others*⁵ and *Shivsagar Tiwari v. UOI*⁶.

21. Mr. Rahul Mehra, learned senior counsel appearing on behalf of the respondent no.4-Mayor/RO states that these petitions are not maintainable in view of the limited scope of interference under Article 226 of the Constitution of India *qua* elections. He supports his contention while placing reliance on the decisions in the cases of *N.P. Ponnuswami v. Returning Officer*⁷, *Namakkal Constituency*⁸, *Krishna Ballabh Prasad Singh v. SDO Hilsa-cum Returning Officer*⁹, *Election Commission of India v. Shivaji*¹⁰, *Harnek Singh v. Charanjit Singh*¹¹ and *Kiran Pal Singh Tyagi v. State (NCT of Delhi)*¹².

² (2000) 8 SCC 216.

³ 2000 (4) MhLJ 13.

⁴ MANU/DE/1258/2017.

⁵ W.P.(C) 1731/2023.

⁶ (1996) 6 558.

⁷ AIR 1952 SC 64.

⁸ (1952) 1 SCC 94.

⁹ (1985) 4 SCC 194.

¹⁰ (1988) 1 SCC 277.

¹¹ (2005) 8 SCC 383.

¹² 2020 SCC OnLine Del 421.

22. Learned senior counsel for respondent no.4/Mayor/RO also states that re-poll is a stage prior to the declaration of election result and an order for re-poll cannot be challenged under Article 226 of the Constitution of India. According to him, this submission is supported by the Constitution Bench decision in the case of ***Mohinder Singh Gill & Anr. v. The Chief Election Commissioner & Ors.***¹³ and the decision of High Court of Gujarat in the case of ***Gauravbhai Babubhai Maniya v. Chief Election Commissioner***¹⁴.

23. Learned senior counsel while taking this court through various documents states that the Municipal Secretary prior to the issuance of notice for the adjourned first meeting dated 24.02.2023 had issued a similar notice on 23.02.2023 indicating re-fixing of the adjourned first meeting of MCD on 24.02.2023. The said notice dated 23.02.2023 was challenged by Mr. Sharad Kapoor (Counsellor) in W.P.(C) 2431/2023. The notice which was challenged in W.P.(C) 2431/2023 was worded similar to the impugned notice dated 24.02.2023. Since W.P.(C) 2431/2023 was withdrawn against the challenge to the similar notice therefore, these petitions are not maintainable.

24. He states that respondent no.4-Mayor/RO in her note dated 24.02.2023 meant 're-poll' and not 'fresh election'. He further states that the same is the understanding of the petitioners in their rejoinder in reply to paragraph 9 of the consolidated counter affidavit and also of the Municipal Secretary in paragraph 5 of his note dated 24.02.2023. He also states that the word used 'fresh election' should not be construed as a new/*de novo* election as the same is not intended by respondent no.4.

¹³ 1978 1 SCC 405.

¹⁴ 2015 SCC OnLine Guj 4729.

25. He states that the election process cannot be said to be completed without the respondent no.4 preparing and certifying a return in Form-IV as laid down in Regulation 51(11) of the Regulations, 1958. He states that this Regulation could not be circumvented and without the compliance of the same, the election process cannot be said to have been completed.

26. Learned senior counsel takes this court through Form-III (Ballot Papers) and instruction no. 5 written therein. He submits that instruction no. 5 specifically mandates that the voters are not to place the same figure opposite the names of more than one candidate. He further submits that if the applicable legal regime requires a vote to be casted in a particular way, the same has to be done in that manner alone. He further submits that in the instant case, admittedly, one of the ballot papers contains figure 2 in front of two candidates, which is completely impermissible and cannot be considered to be a valid ballot.

27. Learned senior counsel while specifically emphasising upon instruction no. 5 of the ballot paper submits that, if the said instruction is read with Regulation 51(8)(a) of Regulations, 1958, it would be unequivocally clear that the disputed ballot paper has to be rejected as the voter has marked the preference contrary to instruction no.5, which reads as under:

“do not place the same figure opposite the names of more candidate than one”

28. Learned senior counsel submitted that instruction no.5 assumes statutory recognition and any violation thereto undoubtedly results in the rejection of ballot paper.

29. He also states that the manner of conducting the election and counting of votes is explained in the Regulations, 1958 and therefore the Rules, 1956 relied upon by the petitioners, will have no assistance to them. According to him, the Rules, 1956 and Regulations, 1958 are required to be harmoniously interpreted so as to achieve the ultimate object of fairness and transparency in the manner of conducting the election and counting of the votes. According to him, in case of any conflict between Regulations, 1958 and Rules, 1956, the Regulations, 1958 would have precedence over Rules, 1956 as the Regulations are framed under Section 82 of the DMC Act, 1957.

30. Learned senior counsel has extensively read over a note prepared by the Mayor/RO and juxtaposed it with the note prepared by Mr. Ravi Prakash, the technical expert. He highlights that the technical expert does not have any authority under any of the Rules or Regulations to declare the result of the elected candidates. According to him, it is the Mayor/RO who alone can declare the result of election in Form-III. The statutory power of Mayor/RO cannot be usurped by the technical expert. If the Mayor/RO records her satisfaction that the election process was not free and fair and the same requires a 're-poll', no fault can be found with the approach of the Mayor/RO.

31. According to the learned senior counsel, the Mayor/RO in her note, mentioned that the process of election and counting is supposed to be a sacrosanct process which should not just be free and fair, but should also appear to be free and fair. The learned senior counsel canvassed the following perspective on the events which took place—the Mayor/RO noted, that the election process on 24.02.2023 could not be completed with all the fairness and transparency. One of the ballot papers was objected as the same was against the basic instructions for marking on ballot paper. The Member Secretary,

thereafter, instead of waiting for the Mayor/RO to decide upon the validity of ballot paper in question, on his own wisdom, defying the directions of the Mayor/RO, tried to force a calculation sheet for votes with reference to different candidates. Since the Mayor/RO found that those calculations were manipulated and were not projecting a fair result, therefore, the Mayor/RO on her own due diligence, worked out fresh calculations. When she began declaring the final calculations of votes along with names of the elected members, during the said time, the BJP councillors attacked her, dragged her out of the Mayor/RO seat and somehow the Mayor/RO had to escape herself from the attack by the BJP councillors.

32. It is stated that the BJP councillors also looted all the relevant papers of the election process and therefore, declaration of any result would be devoid of legal and moral sanctity. She, therefore, declared the incomplete election process as null and void in the House itself, that that cannot be interfered with in the instant proceedings.

33. He also states that the reliefs prayed in the instant petitions are beyond the scope of Article 226 of the Constitution of India. There are two sets of results, i.e. one prepared by the Technical Expert and the second prepared by the Mayor/RO, none of the results can be directed to be declared by this court. He also states that in the instant cases, the Mayor/RO, on her own wisdom, directed for 're-poll' instead of declaring the result, in order to obviate any aspersion expressed by the other side.

34. He distinguishes all the decisions relied upon by the petitioners and rather, submits that the decision in the case of **Ashok Kumar** (*supra*) would help respondent no.4 as the relief in the instant petitions

is not in furtherance of the election but the same would cause interruption, obstruction and protraction of the election.

35. Mr. Raj Shekhar Rao, leaned senior counsel, who appeared on behalf of the Mayor/RO in W.P. (C) No.2503/2023, highlighted that the Rules, 1956 have been repealed by way of new set of rules namely Conduct of Election Rules, 1961 (hereinafter '**Rules, 1961**') in terms of the notification dated 15.04.1961. He, however, states that as per Section 8 of the General Clauses Act, 1897 after repeal of the Rules, 1956, any reference in the said enactment or in any instrument to the provisions so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted. He states that in the Rules, 1961, almost similar provisions exist except that they are numbered differently.

36. He further states that if Section 7 (i) and Section 15 of the Act, 1957 are perused, the same would mean that the aggrieved person can still have a remedy of filing an election petition after the elections are concluded.

37. This court has taken note of the Rules, 1961 and since the parties agreed that the provisions are the same in both the sets of Rules except some variation, to which this court, at present, is not concerned with, the reference, is, therefore, being made from the Rules, 1956 as they have been referred by the parties extensively.

38. Even otherwise, the Rules 115, 116(1), 121-127 and 129 of the Rules, 1956 are incorporated by way of reference, therefore, any amendment in the Rules, 1956 will not automatically be read into the Regulations, 1958. The legal position has been succinctly explained

by the Hon'ble Supreme Court in the case of **Gauri Shankar v. State of U.P.**¹⁵ Paragraph nos. 22 and 23 of which are reproduced as under:

“22. It would thus be clear that in case of legislation by incorporation, incorporated provisions would become part and parcel of the later fresh statute as if it is written by pen in ink or printed bodily therein as part of the later statute and became an integral scheme of that Act. The legislature while incorporating them did not intend to speculate that any subsequent amendment to the previous Act or its repeal would alter the texture of the later Act unless the Previous Act is supplemental to the later Act or both are in pari materia in which case it would render the later Act wholly unworkable and ineffectual or by necessary intendment applies it.

23. Let us then proceed to consider the cases on reference. In Collector of custom, Madras v. Nathella Sampathu Chetty and Anr.,¹⁶ Section 23A of the Foreign Exchange Regulation Act as amended in 1952 provided that the restriction imposed in Section 8 thereto shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all the provisions of the Act shall have effect accordingly. A contention was raised that the Sea Customs Act was incorporated and that, therefore, the procedure therein alone would be followed. Their constitutional validity was also assailed. This Court held that there is a “distinction between a mere reference to or a citation of one statute in another and incorporation which in effect means the bodily lifting of the provisions of one enactment and making it part of another so much so the repeal of the former leaves the later wholly untouched”. Considering the provisions of Section 19 of Sea Customs Act, Section 8 of General Clause Act and Section 23A of the Foreign Exchange Regulation Act this Court held that adaptation is only by way of reference and not by incorporation and the repeal of the Sea Customs Act had no consequence. The order of confiscation and detention orders were upheld.”

[Emphasis Supplied]”

39. Mr Ajay Digpaul, learned counsel appearing on behalf of the Municipal Secretary/respondent no.3 has placed on record a copy of the minutes of the adjourned first meeting of the Municipal Corporation of Delhi held on 24.02.2023. The minutes of meeting are admittedly signed by the Municipal Secretary and the Mayor/RO and have also been confirmed in the following meeting of the Municipal Corporation of Delhi.

¹⁵ (1994) 1 SCC 92.

¹⁶ (1962) 3 SCR 786.

40. Mr. Mahesh Jethmalani and Mr. Jayant Mehta, learned senior counsel in their rejoinder submissions emphasised that according to them, Regulation 51(8)(a) of the Regulations, 1958 is not mandatory. Even if the said Regulation is read with the instructions of ballot paper, it would be seen that the ballot paper itself specifically draws a distinction between mandatory and directory instructions. Learned senior counsel explained after juxtaposing instruction no. 5 with instruction no. 6, that in instruction no. 6 of the ballot paper, it is specifically mentioned that ballot paper having written figure other than 1, 2, 3 in other language i.e. Roman, Hindi, Urdu etc. will be considered as invalid. They, therefore, explained that against instruction no. 5, in case of a violation, no specific consequence is prescribed, therefore, the same cannot be considered to be mandatory in nature. They further explained that even Regulation 51(8)(a) of the Regulations, 1958 itself is not mandatory and cannot be considered for the specific purposes of declaring any ballot paper as invalid as such aspect, as to which ballot papers are to be declared as invalid, is prescribed under Rule 116 (1) of the Rules, 1956.

41. According to them, Rule 116 (1) of the Rules, 1956 is applicable as per Regulation 51(10)(b) of the Regulations, 1958 and the said Rule 116 (1) is a complete Code in itself for the purposes of declaring any ballot paper as invalid. Nothing beyond Rule 116 can be taken into consideration for the purposes of declaring any ballot paper as invalid.

42. It is submitted that the alleged disturbance in the House, is an afterthought and it was invited by the Mayor/RO herself in order to avoid declaration of result as per the sheet prepared by the Municipal Secretary. Since the result so prepared was not palatable to the

Mayor/RO who belongs to a ruling party, therefore, the decision for re-poll has been taken.

43. They also state that under the Regulations, 1958 or the Rules, 1956, there is no provision for re-poll or re-election. According to them, neither re-poll nor re-election can be directed by the Mayor/RO unless, the Mayor/RO enjoys such a power in the applicable regulatory regime. They then contend that if at all, re-poll or re-election or recounting is to take place, the same has to be done only by the order of the competent court.

44. Learned senior counsel pointed out that undisputedly the minutes approved by the House, signed by the Municipal Secretary and the Mayor/RO shows that the result was prepared and then only the Mayor/RO started objecting to the same. They also submit that there is no dispute with respect to the fact that the disputed ballot paper marked his first preference in favour of Mr. Pankaj Luthra who is a BJP candidate and if the same is rejected, it would amount to declaring Ms. Sarika Chaudhary, as elected who is of AAP candidate.

45. Reliance is placed by learned senior counsel on a decision of the Division Bench of the High Court of Bombay (Aurangabad Bench) in the case of *Save Moreshwa Dina Nath v. Shri Shantaram Kale and Ors.*¹⁷ to contend that the petition would be maintainable when results are arbitrarily withheld and meeting is adjourned.

46. Further emphasis is made to substantiate the said proposition on the decision in the case of *Ashraf Yunus Motiwala (supra)*. They also relied on the decision in the case of *Udey Chand v. Surat Singh and Anr.*¹⁸ to contend that recounting cannot be ordered as a matter of

¹⁷ 1989 SCC OnLine Bom 128.

¹⁸ (2009) 10 SCC 170.

course. In order to substantiate their submission that the power of the RO and its role is circumscribed under the statute, they rely on the decisions in the cases of *Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil*¹⁹, *Jyoti Basu and others v. Debi Ghosal and Ors.*²⁰ and *Prahladdas Khandelwal v. Narendra Kumar Salave*²¹.

47. In order to substantiate their submission that only the first preference is mandatory, they relied on the decisions in the cases of *K.M. Shradha Devi v. Krishan Chandra Pant and Ors.*²² and *Ananga Uday Singh Deo v. Ranga Nath Mishra and Ors.*²³

48. Mr. Rahul Mehra and Mr. Raj Shekhar Rao, learned senior counsel in order to clarify certain submissions made by the petitioners in their rejoinder submitted that the re-poll, if is allowed, would not cause any prejudice to any of the parties and the same would be in larger public interest. The same would instil confidence in the democratic system, therefore, it is the only way forward for the Mayor/RO under the facts of the present case.

49. They state that the Mayor/RO is not left with any other available mechanism which can deal with such a situation. They also state that the Municipal Secretary has no power or authority to finalize the result sheet as the power for the same is vested only with the Mayor/RO which cannot be exercised by any other authority.

50. They also state that as on date, neither Mr. Pankaj Luthra (BJP candidate) nor Ms. Sarika Chaudhary (AAP candidate) can be declared as the elected candidates as the counting could not be completed and the result was not finalized in Form-IV. They also

¹⁹ (2009) 13 SCC 131.

²⁰ (1982) 1 SCC 691.

²¹ (1973) 3 SCC 104.

²² (1982) 3 SCC 389.

²³ (2002) 1 SCC 499.

explained that the power to frame the Regulations, 1958 flows from Section 82 of the DMC Act, 1957 and the same will have precedence over the Rules, 1956. Any instruction in the ballot paper has to be mandatorily followed and deviation, therefrom, necessarily has to result in invalidating the ballot paper, otherwise, there is no purpose of any instruction.

51. The learned counsel further attempt to specifically rebut the arguments of the petitioners. They state that instruction no.6, which has been relied upon by the petitioners to draw a distinction between mandatory and directory nature of instruction, is not an instruction forming part of Form-III prescribed under the Regulations, 1958. They, therefore, state that the Municipal Secretary acted beyond the authority in incorporating instruction no. 6 with *malafide* intent. The instruction no. 5 cannot be termed to be ornamental. It must be given due importance.

52. They also submit that the argument raised by the petitioners that so far as the first preference is concerned, the ballot paper is valid and with respect to the second preference, the same is invalid, is not acceptable at all. According to them, no ballot paper can be accepted to be partly valid and partly invalid. They then contend that the writ of the Mayor/RO must prevail as the Mayor/RO is the best authority who can adjudge the situation in House and take a call.

53. Mr. Rahul Mehra and Mr. Raj Shekhar Rao, learned senior counsel distinguished the decision relied upon by the petitioners in their rejoinder submissions and while taking this court through paragraph nos.4 and 67, state that the facts in the case of *Shri Shantaram Kale (supra)* were different and therefore, the decision is distinguishable.

54. Mr. Rao, learned senior counsel specifically states that in paragraph no. 67, the decision by the Division Bench of the High Court of Bombay (Aurangabad Bench) was arrived, mainly for the reason, that the Advocate General in that case had consented that the resolution passed by the Corporation was unjustified and was in excess of power vested in them.

55. While further placing reliance on a decision in the case of **Ashok Kumar** (*supra*), specifically on paragraph no. 28 thereof, it is submitted that this court neither can turn a blind eye to the controversies which have been arisen nor can assume the role of an over enthusiastic activist, as both the extremes are to be avoided in dealing with election disputes and therefore, under the facts of the present case, when the Mayor/RO has taken a view, the same must prevail. Accordingly, prayer is made to dismiss the petitioners and leaving the parties at liberty to avail appropriate remedy.

56. I have heard the learned counsel appearing on behalf of the parties and perused the record.

57. Since the respondents had mounted a challenge to the maintainability of the present writ petitions. This court must first deal with this issue at the threshold stage. So far as the availability of alternate remedy of filing an election petition in the instant case is concerned, Section 15 of the DMC Act, 1957 is attracted. It provides for the filing of election petition in the case of election of councillors. Section 15 of the DMC Act, 1957 reads as under:-

(1) No election of a councillor shall be called in question except by an election petition presented to the court of the district judge of Delhi within fifteen days from the date of the publication of the result of the election under section 14.

(2) An election petition calling in question any such election may be presented under any of the grounds specified in section 17 by

any candidate at such election, by any elector of the ward concerned or by any councillor.

(3) A petitioner shall join as respondents to his petition all the candidates at the election.

(4) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall, with sufficient particulars, set forth the ground or grounds on which the election is called in question; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908), for the verification of pleadings.

58. It is thus, seen that the instant case being for the election of the members of the Standing Committee, there is no remedy provided for filing an election petition under Section 15 of the DMC Act, 1957.

59. The second challenge put forth on the issue of maintainability by the respondents is that even in the absence of a remedy to file an election petition; the instant petition, is not maintainable, as the petitioner can file a civil suit.

60. This court in the case of **Pondicherry Basketball Assn. v. Union of India**,²⁴ had an occasion to consider the scope of interference under Article 226 of the Constitution of India with respect to the election process. An objection, similar to the one raised in the present petitions, was raised by the RO and others that in the absence of there being a specific Tribunal to entertain an election dispute, the aggrieved party should wait for the declaration of final result and then file a civil suit. In paragraph nos. 48 to 50, 54 and 55, this court had held as under:-

48. In paragraph No.19 of the said decision it has been noted that the Constitution Bench in the Mohinder Singh Gill case (supra) could not resist commenting on the Ponnuswami case (supra) by observing that the non obstante clause in Article 329 pushes out Article 226 where the dispute takes the form of calling into question an election, except in special situations pointed out at, but left unexplored in Ponnuswami case (supra). It has also been observed in paragraph No. 20 that the Constitution Bench in the case of

Mohinder Singh Gill (*supra*) in paragraph No. 29 noticed two types of decisions and two types of challenges—the first relating to proceedings which interfere with the progress of the election and the second which accelerate the completion of the election and acts in furtherance of an election. In paragraph No. 28 in the case of **Ashok Kumar** (*supra*) the Hon'ble Supreme Court observed that election disputes are not just private civil disputes between two parties. The stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is then called for. Whilst neither turning a blind eye to the controversies which have arisen nor assuming a role of overenthusiastic activist would do. The two extremes, therefore, have to be avoided in dealing with election disputes.

49. It is thus seen that neither the provisions of the Constitution nor the provisions of the RP Act totally exclude the right of a citizen to approach the High Court to remedy a wrong done. Nevertheless, normally, remedy under Article 226 of the Constitution of India would not be available to the petitioner, except in exceptionally extraordinary circumstances. Any approach which has the effect of interrupting, obstructing or protracting the election process in any manner, through the invocation of judicial remedy, has to be postponed till after the completion of the proceedings in elections. An approach which subserves the progress of the election and facilitates the completion of the election cannot be described as questioning the election. Any attempt at retarding, interrupting, protracting or stalling of the election proceedings needs to be avoided. Judicial review is only permissible on the well-settled parameters which enable judicial review of the decisions of statutory bodies, on grounds such as for instance, mala fide or arbitrary exercise of power. Care has to be taken, in order to ensure, that there is no attempt being made to utilise the courts indulgence, by the filing of a petition outwardly innocuous but essentially a subterfuge or otherwise a pretext for achieving an ulterior or hidden end.

50. It is thus seen that there is a narrow scope to interfere into matters arising out of elections. The scope becomes narrower when the election relates to parliamentary or legislative constituencies as the RP Act, provides for efficacious alternative remedy once the election is over. Similar principle applies in all such elections where the statute or scheme that provides for the election or regulates the same, itself provides for a mechanism for adjudication of election dispute.

54. It is settled law that the existence of an alternative remedy does not affect the jurisdiction of the court to issue writs and there is no absolute bar against the same. It is a rule of policy, convenience and discretion rather than a rule of law. There cannot be a blanket ban on the exercise of such jurisdiction as that would effectively mean that the writ court is denuded of its jurisdiction, provided

under Article 226 of the Constitution of India, and consistently held by the courts of this land to be plenary, to entertain such writ petitions. The court can, and has in the past, in exceptional circumstances issue a discretionary writ, notwithstanding the fact that the statutory remedy has not been exhausted. However, in the instant case, it is seen that there is no efficacious alternative remedy provided under the applicable Sports Code or MEG. It is equally correct in law that in all cases where there is non-existence of an efficacious alternative remedy, the writ court does not come under an obligation to exercise its powers and can still leave the parties to file a civil suit before the competent court. However, before taking such a decision, the writ court may still examine as to what is sought to be agitated by the parties under Article 226 of the Constitution of India. If a dispute raised in writ proceedings is capable of being adjudicated without requiring any evidence to be adduced or witnesses to be cross examined, the writ petition can still be entertained.

55. *The principle that jurisdiction of Article 226 is not barred in election matters has been recognised along with the caveat of it needing to be sparingly exercised. It is also to be seen that in exercising powers under Article 226, the court has to bear in mind that such an exercise is not creating any obstruction or interruption or protracting the election process in any manner. Once a wrong is found to have been conducted, the court cannot stultify itself by allowing the wrong to be consummated. Any situation that results in postponing the election or creating a situation where the sanctity of the election itself is at stake, is also to be avoided.*

61. The Division Bench of the Bombay High Court (Aurangabad Bench) in the case of ***Save Moreshwa Dina Nath*** (*supra*), has held that if the constitutional court is called upon to remove the clog on the election process, the same cannot be denied on the pretext that the court cannot interfere when the election is progressing. Such an argument has been held to be misplaced. In that case, after the polling was over and votes were counted, instead of declaring the result of the election, the entire meeting and the proceedings were cancelled and it was decided to go for a re-poll. Although in that case the Advocate General conceded that the resolution passed by the Corporation on that date cancelling the entire proceeding of the election was unjustified. However, the principle of law laid down therein was not based on the admission of the Advocate General, as was contended by Mr. Rao,

learned senior counsel, but the same has been enunciated on the basis of the legal position discussed therein, after relying upon various decisions of the Hon'ble Supreme Court. It was held that the cancellation of the election proceedings operated as an obstacle in the election's progress. Importantly then, the election in that case was cancelled after voting and completion of counting and before the final declaration of the result.

62. The Division Bench in ***Save Moreshwa Dina Nath*** (*supra*) had directed the petitioner therein as the elected Mayor. The extract of paragraph nos. 67, 68 and 69 reads as under:-

“67. Several other authorities were cited before us during the course of the hearing to contend that this Court has no jurisdiction to interfere in such matters and also that the discretion vested in the Court should not be utilised in the present case. In ⁷(K.K. Shrivastava etc. v. Bhupendra Kumar Jain), (1977) 2 SCC 494 : A.I.R. 1977 S.C. 1703, it is held that where there is an appropriate or equally efficacious remedy, the Court should keep its hands off and this is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms. In ⁸(D.L.F. Housing Construction (P) Ltd. v. Delhi Municipal Corpn.), (1976) 3 SCC 160 : A.I.R. 1976 S.C. 386, it was held that in a case where basic facts are disputed and complicated questions of law and facts depending on evidence are involved the writ Court is not the proper forum for seeking relief. In ⁹(Babhutmal Raich and Oswal v. Laxmibai R. Tarte), (1975) 1 SCC 858 : A.I.R. 1975 S.C. 1297, the Supreme Court held that there is no scope for interference in the finding of facts. The decision in ¹⁰(GanpatLadha v. Sashikant Vishnu Shinde), A.I.R. 1978 S.C. 965, is also to the same effect that a finding of fact cannot be interfered with either under Article 226 or under Article 227 of the Constitution of India. There is no dispute with the proposition. But the circumstances in which this Court is required to interfere have been elaborately dealt with in earlier paragraphs. The fact is that the process of election was tried to be forestalled by a resolution and the progress of election was stopped in between and was not allowed to be concluded by declaration of result. This Court is called upon to interfere to remove the clog on election process. The contention that this Court shall not interfere when the election is progressing in mis-placed in the present case. In fact, this Court is called upon to remove the blockade in the way of the progress of the election, because, after polling was over and votes were counted, instead of declaration of result of the election, the entire meeting proceedings were cancelled, in which meeting the proceedings of election had taken place and to go for a repoll was resolved, which is not contemplated or provided for under the provisions of the relevant statute.

The learned Advocate-General has fairly conceded that the resolution passed by the Corporation on that date cancelling the entire proceedings of the election is unjustified and was in excess of powers vested in them. The cancellation of the election proceedings operated as an obstacle in the election progress. The petition is filed by the petitioner to remove that obstacle in the way of the election process. If the election would have been concluded on that date and taken to logical end by declaration of result, the question of interference by this Court under Article 226 of the Constitution at this stage would not have been necessary. But, this Court is called upon to interfere and use the discretion vested in it to remove the obstacle, which was created by passing a resolution, which was in excess of the powers vested in the Corporation. The authorities cited before us. Therefore, have no relevance to the facts of the present case. We are, in fact, called upon to interfere to remove the obstacle in the way of the entire election process, which terminates only by the declaration of the result. Even though the petitioner is party to the resolution which cancelled the entire proceedings and resolved for a repoll, in the petition the petitioner has explained the circumstances in which he is party to the resolution. We need not go into the details, as all have agreed that the resolution cancelling the proceedings of election is bad in law. But the election was cancelled after voting and completion of counting and before declaration of result in this case by passing a resolution by the councillors. In view of this, in fact, in the present petition, we are called upon to interfere to complete the entire progress of the election which had taken place on that date. Interference to remove obstacle in the election is different thing than interference in the election process itself.

68. *It was also argued by the learned Advocate-General and other learned Counsel that there is an alternative remedy available under section 16 of the said Act by way of an election petition. In the present case, the remedy was of no avail, as the process of election was cancelled before the declaration of result itself. The question to challenge the election thereafter does not arise, because the resolution itself provided for a repoll contrary to the provisions of the said Act. If the election is cancelled and the result is not allowed to be declared at, the remedy by way of an election petition cannot be said to be adequate and efficacious.*

69. *In the result, this petition is allowed and rule is made absolute. The petitioner is declared elected as Mayor of Respondent No. 2-Auranga bad Municipal Corporation. The declaration of the petitioner as Mayor shall be deemed to be from the month of May 1989 for the purposes of section 19 of the Bombay Provincial Municipal Corporations Act, 1949. No order as to costs."*

63. The facts in the case of ***Save Moreshwa Dina Nath*** (*supra*) are close to the facts obtained in the present case.

64. It is thus seen that the legal position is that if the court under the facts of a given case is satisfied that the action of the respondents is

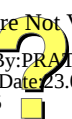
creating an obstruction, interrupting and protracting the election process, the court in exercise of powers under Article 226 of the Constitution of India can entertain a writ petition to ensure that the election, once commenced, must reach its logical end without any unwarranted interference.

65. This court is therefore of the considered opinion that is no bar to entertain a writ petition under Article 226 of the Constitution of India even in a case of an election dispute.

66. This court shall now decide upon the issue as to whether the Mayor/RO could have, after the polling and scrutiny of votes was conducted, engaged in an exercise of re-scrutiny.

67. In order to decide upon this issue, it is important to consider the scheme of the DMC Act, 1957, the Regulations, 1958 and Rules of 1956 to the extent that they are applicable for the constitution of the Standing Committee. The applicable law is to be carefully examined in order to decipher whether the Mayor/RO had the powers to direct a re-scrutiny of ballots at the stage of counting of votes.

68. The scheme of the DMC Act, 1957 is as follows—Chapter II of the DMC Act, 1957 deals with the establishment of Corporations. Section 35(1) provides that a corporation shall at its first meeting in each year, elect one of its members to be the chairperson, who is known as the Mayor and another member to be the Deputy Mayor of the corporation. Section 3 provides for the establishment of the municipal corporation. Sub-section 3 of Section 3 then indicates the composition of the corporation.



69. As per Section 45 of the DMC Act, 1957 at the first meeting of the corporation, a Standing Committee is to be constituted consisting of six members elected by the Councillor amongst themselves.

70. Section 49 of DMC Act, 1957 deals with the functions of the Standing Committee which provides *inter alia* that the Standing Committee shall exercise such powers and perform such functions as are specifically conferred or imposed upon it by or under the Act of 1957. A cursory look at the provisions of the DMC Act, 1957 shows that various powers and functions are assigned to the Standing Committee, specifically in Section 83, 109, 110, 139, 200, 202, 205, 206, 302, 313, 314, 376 and 450 etc. It includes power of adoption of budget estimates, disposal of property, procedure for making contracts, minimum width of new public streets, layout plans, alteration or modification of streets made in breach of Section 303, general power to pay compensation and power to institute legal proceedings/legal opinion etc. The Standing Committee is, therefore, an important statutory committee required to be constituted in accordance with the provisions of the DMC Act, 1957.

71. This now brings me to consider the Regulations, 1958. Regulation 51 of the Regulations, 1958 provides *inter alia* election of six members to be elected by the Councillors from amongst themselves for the membership of the Standing Committee. Regulation 51 of the Regulations, 1958 reads as under:-

“Election of six members to be elected by the Councillors from among themselves for member of the Standing Committee:

51. (1) Every candidate for election as a member of the Standing Committee shall be nominated by a nomination paper in Form 2 which shall be signed by the candidate and two other members of the Corporation as proposer and seconder and delivered to the Municipal Secretary between the hours of Eleven O' Clock in the forenoon and Five O'Clock in the afternoon at least three clear days before the date of meeting at which the election is to be held.

(2) No member of the Corporation shall sign as proposer or seconder the nomination papers of more candidates than the number of vacancies to be filled. Any nomination paper subscribed in contravention of this clause shall be invalid and shall be declared as such by the Mayor.

(3) Any candidate may withdraw his candidature at any time before the election is proceeded with in the meeting.

(4) When the number of valid nominations is the same as, or less than the number of members to be elected, the Mayor shall declare such candidate or candidates to be duly elected as members or members of the Standing Committee.

(5) Where the number of nominations exceeds the number of vacancies the election shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be held by secret ballot.

(6) The Municipal Secretary shall provide at the meeting

- (a) a ballot box;*
- (b) a sufficient number of ballot papers as prescribed in Form 3;*
- (c) materials sufficient for the purpose of enabling members of the Corporation to mark the ballot papers.*

(7) (a) Every member of the Corporation shall have one vote only.

(b) A member in giving his vote:-

(i) shall place on his ballot paper the Figure 1 in the space opposite the name of the candidate for whom he votes; and

(ii) may, in addition, place on his ballot paper the Figure 2 or the Figure 2 & 3 or the Figures 2, 3 & 4 and so on in the spaces opposite the names of other candidates in the order of his preference.

(8) (a) Every member of the Corporation on receiving a ballot Paper shall proceed into one of the polling compartments provided for the purpose of recording vote and shall there record his vote in accordance with the instructions set out on the ballot paper.

(b) The member shall then before quitting the polling compartment, fold up his ballot paper so as to conceal his vote and put the ballot paper so as to conceal his vote and put the ballot paper so folded into the ballot box in the presence of the Mayor.

(c) Every member shall record his vote and quit the polling compartment without undue delay.

- (9) *The ballot box shall remain open for the casting of votes for such period as may be fixed by the Mayor.*
- (10) (a) *As soon as the period fixed for casting of votes is over, the Mayor shall*
- (i) open the ballot box and take out the ballot papers contained therein;*
 - (ii) count the number of ballot papers so taken out or cause it to be counted and record such number in a statement;*
 - (iii) scrutinise the ballot papers and separate the ballot papers which he deems valid from those which he rejects as invalid by endorsing thereon the word "Rejected" and the ground of such rejection;*
 - (iv) arrange the valid ballot papers in parcels according to the first preference recorded for each candidate; and*
 - (v) count the votes in the meeting in the presence of such of the members as may be present with the assistance of such person as may be appointed by the Mayor in this behalf.*
- (b) The provisions of Rule 115 Sub-rule (1) of Rule 116, Rules 121 to 127 and Rule 129 of the Representation of the People (Conduct of Election & Election Petitions) Rules, 1956, shall so far as may be, apply in relation to the counting of votes at an election of the members of the Standing Committee as they apply in relation to the counting of votes at elections in council constituencies subject to the modification that any reference to the "Returning Officer" in any of those provisions shall be construed as a reference to the "Mayor".*
- (11) *Upon the completion of the counting of votes, the Mayor shall prepare and certify a return in Form 4 setting forth-*
- (i) the names of the candidates for whom valid votes have been given;*
 - (ii) the number of valid votes given to each candidate;*
 - (iii) the number of votes declared invalid and rejected; and*
 - (iv) the names of the persons declared elected.*
- (12) *The ballot papers shall be kept by the Municipal Secretary for three months from the date of election and may then be destroyed by him."*

72. The scheme of Regulation 51 of the Regulations, 1958 would indicate that every candidate for election as a member of the Standing Committee is required to submit his nomination in the prescribed

format with the necessary compliances to the Municipal Secretary between the time prescribed for that purpose.

73. Under Regulation 51(4) of the Regulations, 1958, if the number of valid nominations is the same as, or less than the number of members to be elected, the Mayor/RO shall declare such candidate or candidates to be duly elected as member or members of the Standing Committee. However, as per Regulation 51(5) of the Regulations, 1958, where the number of nominations exceeds the number of vacancies, the election shall be held in accordance with the system of proportional representation by means of a single transferrable vote and the voting at such an election shall be held by a secret ballot. The Municipal Secretary needs to provide a ballot box, sufficient number of ballot papers as prescribed in Form-III and material sufficient for the purpose of enabling members of the Corporation to mark the ballot papers at the meeting for the purposes of conducting the election for the members of the Standing Committee.

74. As per Regulation 51(7) of the Regulations, 1958, every member of the corporation shall have one vote only. A member in giving his vote shall place on his ballot paper the figure 1 in the space opposite to the name of the candidate for whom he wants to vote and may in addition, place on his ballot paper the figure 2 or the figures 2 and 3 or the figures 2, 3 and 4 and so on in the spaces opposite the names of other candidates in order of his preference.

75. Regulation 51(8) of the Regulations, 1958 would also indicate that every member of the Corporation, on receiving a ballot paper, shall proceed into one of the polling compartments provided for the purpose of recording vote and shall record there, his/her votes, in accordance with the instructions set out on the ballot paper. It also

requires maintaining the secrecy of vote and exit from the polling compartment without any undue delay.

76. The role of the Mayor/RO would come into play firstly, at the stage of scrutiny of the nomination paper (Regulation 51 (2) of Regulations, 1958) and secondly at the stage of putting the ballot paper into the ballot box (Regulation 51(8)(b) of the Regulations, 1958). The Mayor/RO is then required to open the ballot box as per Regulation 51 (10)(a)(i) of the Regulations, 1958 and to take out the ballot papers contained therein and to count the number of ballot papers so taken out or cause it to be counted and record such numbers in a statement.

77. The Mayor/RO is then required to scrutinize the ballot papers and separate the ballot papers which she deems valid from those which she rejects as invalid by endorsing thereon that they were 'rejected' and the ground of such rejection. Then the Mayor/RO is required to arrange the valid ballot papers in parcels according to first preferences as recorded for each candidate and then to count the votes in the meeting in the presence of such members as may be present with the assistance of such persons as may be appointed by the Mayor/RO in that behalf.

78. It is at this stage that, Regulation 51(10)(b) of the Regulations, 1958 requires that the Rules of 1956 shall have application so far as they apply in relation to the counting of votes at the election of the members of the Standing Committee as they apply in relation to the counting of votes at election in the council constituencies subject to the modification that any reference to the Returning Officer in any of those provisions shall be construed as a reference to the Mayor.

79. The election of the members of the Standing Committee has to take place with the system of proportional representation by means of a single transferrable vote. It is by way of incorporation, that the Rules, 1956 have been made applicable in relation to the counting of votes. Therefore, Rule 115, 116(1), 121 to 127 and 129 of the Rules, 1956 will have full application in relation to the counting of votes at an election of the members of the Standing Committee.

80. Regulation 51(11) of the Regulations, 1958 which provides for the preparation and certification of a return in Form-IV, would therefore have application after the counting of votes takes place as envisaged under Regulation 51(10)(b) of the Regulations, 1958.

81. This court must now consider the scheme of the Rules, 1956, and specifically Rule 115, 116(1), 121 to 127 and 129 of the Rules, 1956, as they are applicable in relation to the counting of votes.

82. Rule 115, 116(1), 121 to 127 and 129 of the Rules of 1956 are reproduced as under:-

“115. Definitions.—In this Chapter—

(1) the expression 'continuing candidate' means any candidate not elected and not excluded from the poll at any given time;

(2) the expression 'first preference' means the figure 1, the expression 'second preference' means the figure 2 and the expression 'third preference' means the figure 3, set opposite the name of any candidate and so on;

(3) the expression 'unexhausted paper' means a ballot paper on which a further preference is recorded for a continuing candidate;

(4) the expression 'exhausted paper' means a ballot paper on which no further preference is recorded for a continuing candidate provided that a paper shall also be deemed to be exhausted in any case in which -

(a) the names of two or more candidates, whether continuing or not, are marked with the same figure and are next in order of preference; or

(b) the name of the candidate next in order of preference, whether continuing or not, is marked by a figure not following consecutively after some other figure on the ballot paper or by two or more figures;

(5) the expression 'original vote' in relation to any candidate means a vote derived from a ballot paper on which a first preference is recorded for such candidate;

(6) the expression 'transferred vote' in regard to any candidate means a vote the value or the part of the value of which is credited to such candidate and which is derived from a ballot paper on which a second or a subsequent preference is recorded for such candidate;

(7) the expression 'surplus' means the number by which the value of the votes, original and transferred of any candidate exceeds the quota; and

(8) the expression 'count' means-

(a) all the operations involved in the counting of the first preferences recorded for candidates; or

(b) all the operations involved in the transfer of the surplus of an elected candidate; or

(c) all the operations involved in the transfer of the total value of votes of an excluded candidate.

116. Grounds for declaring ballot papers Invalid.—(1) A ballot paper shall be invalid on which—

(a) the figure 1 is not marked; or

(b) the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or

(c) the figure 1 and some other figures are set opposite the name of the same candidate; or

(d) any mark is made by which the elector may afterwards be identified; or

(e) if it is a postal ballot paper, the signature of the elector is not duly attested.

.....

121. Counting of votes—(1) The returning officer shall then count the number of papers in each parcel and credit the candidates concerned with the value of those papers.

(2) The returning officer shall also ascertain and record the total number of valid papers.

(3) For the purpose of facilitating the process prescribed in rules 122 to 127, each valid ballot paper shall be deemed to be of the value of one hundred.

(4) In carrying out the provisions of rules 122 to 127 the returning officer shall disregard all fractions and ignore all preferences recorded for candidates already elected or excluded from the poll.

122. Ascertainment of quota.—(1) The returning officer shall add together the values of the papers in all the parcels and divide the total by a number which exceeds by one the number of vacancies to be filled.

(2) The quotient so obtained increased by one shall be the, number sufficient to secure the return of a candidate, hereinafter called 'the quota'.

123. Candidates with quota elected.—If at the end of any count or at the end of the transfer of any parcel or sub-parcel of an excluded candidate the value of ballot papers credited to a candidate is equal to, or greater than the quota, that candidates shall be declared elected.

124. Transfer of surplus.—(1) If at the end of any count the value of the ballot papers credited to a candidate, is greater than the quota the surplus shall be transferred to the continuing candidates indicated on the ballot papers of that candidate as being next in order of the elector's preference in accordance with the provisions of this rule.

(2) If more than one candidate has a surplus, the largest surplus shall be dealt with first and the others in order of magnitude; Provided that every surplus arising on the first count of votes shall be dealt with before those arising on the second count and so on.

3) Where there are more surpluses than one to distribute and two or more surpluses are equal, regard shall be had to the original votes of each candidate and the candidate for whom most original votes are recorded shall have his surplus first distributed; and if the values of their original votes are equal, the returning officer shall decide by lot which candidate shall have his surplus first distributed.

(4) (a) If the surplus of any candidate to be transferred arises from original votes only, the returning officer shall examine all the papers in the parcel belonging to that candidate, divide the unexhausted papers into sub-parcels according to the next preferences recorded thereon and make a separate sub-parcel of the exhausted papers.

(b) He shall ascertain the value of the papers in each sub-parcel, and of all the unexhausted papers,

(c) If the value of the unexhausted papers is equal to or less than the surplus, he shall transfer all the unexhausted papers at the value at which they were received by the candidate whose surplus is being transferred.

(d) If the value of the unexhausted papers is greater than the surplus, he shall transfer the sub-parcels of unexhausted papers, and the value at which each paper shall be transferred shall be ascertained by dividing the surplus by the total number of exhausted papers.

(5) If the surplus of any candidate to be transferred arises from transferred as well as original votes, the returning officer shall re-examine all the papers in the sub-paragraph last transferred to the candidate, divide the unexhausted papers into sub-paragraphs according to the next preferences recorded thereon, and then deal with the sub-parcels in the same manner as is provided in the case of subparcels referred to in sub-rule (4).

(6) The papers transferred to each candidate shall be added in the form of a sub-paragraph to the papers already belonging to such candidate.

(7) All papers in the, parcel or sub-paragraph of an elected candidate not transferred under this rule shall be set apart as finally dealt with.

125. Exclusion of candidates lowest on the poll. —(1) If after all surpluses have been transferred as hereinbefore provided, the number of candidates elected is less than the required number, the returning officer shall exclude from the poll the candidate lowest on the poll and shall distribute: his unexhausted papers among the continuing candidates according to the next preferences recorded thereon; and any exhausted papers shall be set apart as finally dealt with.

(2) The papers containing original votes of an excluded candidate shall first be transferred, the transfer value of each paper being one hundred.

(3) The papers containing transferred votes of an excluded candidate shall then be transferred in the order of the transfers in which, and at the value at which, he obtained them.

(4) Each of such transfers shall be deemed to be a separate transfer but not a separate, count.

(5) The process directed by this rule shall be repeated on the successive exclusions one after another of the candidates lowest on the poll until such vacancy is filled either by the election of a candidate with the quota or as hereinafter provided.

(6) If at any time it becomes necessary to exclude a candidate and two or more candidates have the same value of votes and are the lowest on the poll, regard shall be had to the original

votes of each candidate and the candidate for whom fewest original votes are recorded shall be first excluded; and if the values of their original votes are equal the candidate with the smallest value at the earliest count at which these candidates had unequal values shall be first excluded.

(7) If two or more candidates are lowest on the poll and each has the same value, of votes at all counts the returning officer shall decide by lot which candidate shall be first excluded.

126. Transfer when to be discontinued.—*If as a result of the transfer of papers, the value of the votes obtained by a candidate is equal to or greater than the quota the count then proceeding shall be completed but no further papers shall be transferred to him.*

127. Filling the last vacancies.—*(1) When at the end of any count the number of continuing candidates is reduced to the number of vacancies remaining unfilled, the continuing candidates shall be declared elected.*

(2) When at the end of any count only one vacancy remains unfilled and the value of papers of some one candidate exceeds a total value of all the other continuing candidates together with any surplus not transferred, that candidate shall be declared elected,

(3) When at the end of any count only one vacancy remains unfilled and there are only two continuing candidates and each of them has the same value of votes and no surplus remains capable of transfer, the returning officer shall decide by lot which of them shall be first excluded; and after the exclusion to one of the candidates in the manner aforesaid the other candidate shall be declared elected.

129. Illustration of the procedure as to the counting of votes under this Chapter—*An illustration of the procedure as to the counting of votes in accordance with the provisions of this Chapter is given in Schedule. II."*

83. In the case at hand, admittedly, as per Rule 122 of Rules, 1956, the Mayor/RO ascertained 3458 as quota sufficient to secure the return of a candidate. In Rule 121, it is prescribed that the Mayor/RO is to count the number of papers in each parcel and credit the candidates concerned with the value of those papers. The Mayor/RO has to ascertain and record the total number of the ballot papers and for the purpose of facilitating the process prescribed in Rules 122 to 127 each valid ballot paper shall be deemed to have the value of 100.

84. It is thus seen that in the instant case, the quota 3458 is ascertained while multiplying 242 valid ballots with 100 as per sub-Rule 3 of Rule 121, dividing the same by, exceeding by one the number of vacancies to be filled i.e. $6+1=7$ (As per the Rule 122(1)) and then increasing by one, the quotient so obtained to be the number sufficient to secure the return of a candidate. To put it in a mathematical format. The same reads as under:-

$$242 \times 100 / 7 = 3457 + 1 = 3458.$$

85. It is also to be noted that under sub-regulation 10 (a) of Regulation 51 of the Regulations, 1958, after the opening of the ballot box and taking the ballot papers out of the boxes, the ballot papers are to be counted and it is to be recorded in a statement. It is, thereafter, that the scrutiny is contemplated which includes the separation of the ballot paper as valid from the one which are invalid endorsing thereon, the ballot rejected and the ground of such rejection. It is thereafter, the valid ballot papers are to be arranged in parcels according to the first preference recorded for each candidate. Then the count of the votes, in the meeting, in the presence of such of the members as may be present, with the assistance of such persons, as may be appointed by the Mayor/RO, would take place.

86. As to how the candidate would be elected, it is prescribed under Rule 123 of the Rules, 1956 which says that if at the end of any count or at the end of the transfer of any parcel or sub-parcel of an excluded candidate, the value of the ballot paper credited to a candidate is equal to, or greater than the quota, that candidate shall be declared elected.

87. In the instant case, the quota ascertained was 3458 and after the count of votes in the meeting started, five candidates admittedly

achieved the quota 3458. The said aspect is not disputed by any of the parties.

88. The dispute is only with respect to candidate number 6 who according to the Mayor/RO should be Ms. Sarika Choudhary belonging to AAP and according to the petitioners Mr. Pankaj Luthra belonging to BJP.

89. As per the note of Mayor/RO, there was an objection against one ballot paper to be declared as invalid. The reason for the objection was the marking in the said ballot paper as preference number 1 to one candidate and preference number 2 to two candidates. It is thus contended that the same was in violation of instruction no.5 of the ballot paper and if the same is read with sub-regulation 8(a) of Regulation 51 of Regulations, 1958, the said ballot paper cannot be considered to be valid.

90. It is thus seen that in the instant case, the entire reason for not declaring the result is that an objection with respect to one ballot paper was received at the stage of counting. The Municipal Secretary claims to have prepared a result sheet, where the first preference of disputed ballot paper was counted in favour of Mr. Pankaj Luthra. According to the Municipal Secretary's note, the preference was mounted as one in favour of the said candidate and preference two was expressed against two candidates. Therefore, according to the Municipal Secretary the preference number 1 was undoubtedly and expressly mounted in favour of Mr. Pankaj Luthra.

91. The said note is disputed by the Mayor/RO on the ground that as per sub-Regulation 10(a) of Regulation 51 of Regulations, 1958, the instructions set out in the ballot paper are mandatory and there was a specific instruction in ballot paper to the effect that the voter is not to

place the same figure opposite the name of more than one candidate and hence the same was invalid.

92. The Mayor/RO besides other grounds also supports her decision of re-poll for the reasons recorded by her in the note dated 24.02.2023 filed along with the consolidated counter-affidavit the same reads as under:-

"The process of election and counting is supposed to be a sacrosanct process which is not just free and fair but should also appear to be free and fair today's election process could not be completed with all the fairness and transparency. In the election under the reference there were objections against one ballot paper to be declared invalid. The marking in the said ballot paper was 1-2-2 and as per the basic instruction for marking on ballot paper the allowed preferences were 1-2-3-.. The marking were against the allowed instruction hence was a invalid ballot paper. Later some ballot papers were objected to be declared invalid. Like one of the ballot paper was tore and anther ballot paper had overwriting where preferences were marked.

The municipal secretary instead of working for the mayor to decide the validity of the ballot papers in question on his own wisdom defying my direction tried to force a calculation sheet for votes with reference to different candidates. I found that those calculation to be manipulated and were not projecting a fair result. There were multiple demand of recounting on the basis of this, despite my multiple directions to recount the votes, the sectary did not follow my directions, I after my due diligence worked out fresh calculations. I started to declare the final calculation of vote's alongwith the names of the elected members. During this time B.J.P counsellors attacked me, dragged me out of the mayor's seat and I had to somehow escape the attack from the B.J.P counsellors. The B.J.P counsellors also looted the relevant paper of the election process. I believe any result which will be declared now will lack legal and moral sanctity. Therefore i have declared the incomplete election process as null and void in the house.

Also as per DMC (procedure of conduct of Business) Regulations 1958 part3, section 51 sub-section 10A(3)

Its the mayor to scrutinize the ballot papers and repuate the ballot papers which she rejects as invalid be endorsing thereon the word 'reject' & the ground of such rejection.

V) Count the votes in the meeting in the presence of such of the members as may be present with the association of such person as may be appointed by the mayor in this behalf.

11) upon the compilation of the counting of the votes the mayor shall prepare and certify a return in form-4 setting forth

- (i) the names of the candidates to whom valid votes have been given:-*
- (ii) numbers of valid votes given to each candidate*
- (iii) numbers of votes declared invalid and rejected and*
- (iv) the name of the person declared elected*

It is important to mention as per the fresh calculation worked upon by me, the result of the elected members are as follows

1. Ms. Mohini (AAP)
2. Sh. Mohd aamil malik (AAP)
3. Ms. Raviender kaur (AAP)
4. Sh. Gajender singh daral (IND)
5. Ms. Kamal jeet sehrawat (BJP)
6. Ms. Sarika chaudhary (AAP)

However before I could declare the name of all the elected candidates I was attacked, in the house and I had to run for my life. The attack is well recorded by many media / tv channels. During the attack the B.J.P counsellors looted the ballot papers, calculation sheets and other paper lying there,

I vow of the above, I had no other alternative than declaring the election null and void. Subsequently I have announced fresh election for 6 members of standing committee to be conducted on 27th feb 2023. At 11:00 am.

It may not be out of place to add that sh. Bhagawan singh, the municipal secretary acted in a biased manner he did not follow my repeated instruction to conduct recounting the whole process of election had to be declared null & void.

It is, therefore requested to make arrangements for the fresh election as 27/02/23 in consultation with me at the earliest."

93. The respondent No.4/Mayor/Returning Officer in her consolidated counter affidavit in paragraph Nos. 27 and 28 takes the following stand:-

"27. It is submitted that despite issuance of multiple directions by the answering Respondent the recounting could not be done. Therefore, the answering Respondent scrutinized the Ballot papers herself as per rules and marked the ballot papers / votes as Valid / Invalid. Further, on the said basis, the answering Respondent focused diligently on working out fresh calculations as per rules. It is pertinent to mention here that as per the aforesaid calculations worked up by the answering Respondent, the results of the elected members are as follows:

(1) Ms. Mohini (AAP)

- (2) Sh. Mohd. Aamil Malik (AAP)
- (3) Ms. Raminder Kaur (AAP)
- (4) Sh. Gajender Singh Daral (IND)
- (5) Ms. Kamaljeet Sehrawat (BJP)
- (6) Ms. Sarika Chaudhary (AAP)

28. That the Municipal Secretary without any authorization or power, because of its mala-fide intentions circulated a note dated 24.02.2020 thereby declaring the result for the Re-polling /Re-election held for election of (06) Six Members of Standing Committee as under:

- (i) Ms. Mohini (AAP)
- (ii) Shri Mohammad Aamil Malik (AAP)
- (iii) Ms. Raminder Kaur (AAP)
- (iv) Shri Gajendra Singh Daral (Independent)
- (v) Ms. Kamal Jeet Sehrawat (BJP)
- (vi) Shri Pankaj Luthra (BJP)

It is pertinent to mention here that the Municipal Secretary acting contrary to the regulations and without any statutory power because of its mala-fide intentions stated that no vote was found invalid by the technical expert and there was no need to undertake re-counting. It was further admitted by the Municipal Secretary that he was asked to undertake recounting of votes and prepare a fresh result sheet by the Hon'ble Mayor. However, he did not follow the said instructions."

94. The reason for candidate no.6, namely, Ms. Sarika Choudhary (AAP) being included as per the calculation made by the Mayor/RO is the rejection of one ballot paper on account of one figure of priority being assigned opposite to the names of two candidates. Had this not been the case, there is no reason to dispute the calculation sheet prepared by Municipal Secretary, wherein, the elected candidate no. 6 is Mr. Pankaj Luthra (BJP). As to why the said ballot paper is to be rejected, the same has been explained by the Mayor/RO in paragraph No. 26, which reads as under:-

"26. That the bare reading of Regulation 51(10) (a-iii) of the Regulations, 1958, empowers only the Mayor / Returning Officer to determine the validity / invalidity of a ballot. Thus, the Respondent no. 4 was within the bounds of her power to have considered one ballot as invalid due to the reason that same figure of priority was placed opposite the names of more candidates than one. Thus as per Regulation 51 (10) (a-iii), the Respondent No. 4 is the final authority

for declaring any vote to be invalid. It is further submitted that as per Regulation 51 (10) (a-iv) only valid ballot papers are to be arranged in parcels by the Respondent no. 4 according to the first preference recorded for each candidate. That the relevant excerpt of Regulation 51 (10) (a) is reproduced hereunder:

“[...]

(10) (a) As soon as the period fixed for casting of votes is over, the Mayor shall:-

(iii) scrutinise the ballot papers and separate the ballot papers which he deems valid from those which he rejects as invalid by endorsing thereon the word "Rejected" and the ground of such rejection;

(iv) arrange the valid ballot papers in parcels according to the first preference recorded for each candidate;

[...]”

95. Some of the aspects discernible from the Mayor/RO's own note are that;

- i. She directed for the re-count of votes to the Municipal Secretary who did not follow her instructions which clearly shows that the counting was already over.
- ii. The Mayor/RO worked out a fresh calculation and started to declare the final evaluation of votes along with the names, which would mean that once the quota was ascertained, it was sought to be unsettled, while treating one ballot as rejected.
- iii. Fresh calculation was conducted by the Mayor/RO which reinforces the fact that in place of Mr. Pankaj Luthra, the Mayor/RO sought to declare Ms. Sarika Chaudhary as the elected candidate.
- iv. The reason for objection against one ballot, to be declared invalid, was the marking in the said ballot paper as 1-2-2 which according to the Mayor/RO was contrary to basic instructions for the marking on the ballot paper.

- v. There was no disturbance during the process of poll and even during the course of counting.
- vi. The objection against one ballot paper was raised only when calculation sheet was prepared, therefore, counting was smoothly over.
96. The result sheet and the note prepared by Municipal Secretary which has been placed on record along with writ petition reads as under:-

“3889
24.02.2023
Stamped

Sub :- Result of Election of six members to the Standing Committee held on Friday, 24th February, 2023.

The total value secured by different candidates after round six as per calculation sheet handed over to the Mayor for consideration is as under & the qualifying quota was 3458:-

S.N	Name of Candidate	Result (Round 6)	Remarks
1.	Ms. Mohini	3458	Elected-3
2.	Ms. Sarika Chaudhary	3338	Lowest
3.	Shri Mohammad Aamil Malik	3458	Elected-1
4.	Ms. Raminder Kaur	3458	Elected-4
5.	Sh. Gajendra Singh Daral	3458	Elected-5
6.	Ms. Kamaljeet Sehrawat	3458	Elected-2
7.	Shri Pankaj Luthra	3469	Elected-6

Submitted, Please

Sd/-
Ravi Prakash
Technical Expert

MUNICIPAL CORPORATION OF DELHI

Subject : Elections of 6 members of standing committee

1. It may be noted that in today's adjourned first meeting of Municipal Corporation of Delhi to elect six members of the standing committee, the voting process was carry doubt peacefully under the guidance of Hon'ble Mayor.

2. The Municipal Secretary Office had received 07 nominations against six members to be elected to the standing committee by the House. The seven candidates are: (i) Ms. Mohini (MP), (ii) Sarika Chaudhary (MP), (iii) Shri Mohammad Aamil Malik (MP), (iv) Ms. Raminder Kaur (MP), (v) Shri Gajendra Singh Daral (Independent), (vi) Ms. Kamaljeet Sehrawat (BJP) and (vii) Shri Pankaj Luthra (BJP).

3. After the polling today, a break of 10 minutes was given by Hon'ble Mayor which was to be followed by counting of votes. The voting for election of six (06) members involved preferential voting. The counting of votes was carried out by independent technical expert viz. Shri Ravi Prakash. During the counting, it was found that one vote which had preferred three candidates but the preference was Mount as '1', '2' and '2'. As per the independent expert who assisted in the counting of preferential votes, this vote has been found to be in order and valid since it has marked the candidate as his/her first reference. The very fact that first preference is given to a candidate, the candidate is eligible to be counted for that vote as first preference and this vote cannot be declared as invalid. It was only in case when there was no indication of first preference in the ballot paper and second preference was repeated, then the vote could be counted as invalid.

4. Since no vote was found invalid by the technical expert, Members viz. (i) Ms. Mohini (MP), (ii) Sarika Chaudhary (AAP), (iii) Shri Mohammad Aamil Malik (AAP), (iv) Ms. Raminder Kaur (AAP), (v) Shri Gajendra Singh Daral (Independent), (vi) Ms. Kamaljeet Sehrawat (BJP) and (vii) Shri Pankaj Luthra (BJP) were found elected by them. A copy of the report of Technical expert is enclosed.

5. While the undersigned was asked to undertake recounting of votes and prepare a fresh Result sheet by the Hon 'ble Mayor, many Councillors stormed the dias and melee broke out forcing the process to come to a halt and the result could not be declared. Moreover, there was no need to undertake recounting as the counting process was videographed and during the counting process there was no murmur of any protest from any quarter.

Stamped
SDMC

Sd/-
(Bhagwan Singh)
Municipal Secretary
24.02.2023

Hon'ble Mayor

97. As per Municipal Secretary's version, since the first preference was clearly marked to the concerned candidate therefore, the said ballot paper could not be rejected and he also states that the re-counting was not necessary as the counting process was conducted without any murmur or protest from any quarter.

98. If for the sake of arguments, both the versions, Mayor/RO; Municipal Secretary are ignored, this court has the benefit of perusing the undisputed minutes of meeting dated 24.02.2023 which have been approved by the House and signed by the Municipal Secretary and the Mayor/RO both.

99. The minutes of the meeting dated 24.02.2023 are reproduced as under:-

"सभा के प्रारम्भ में महापौर ने सदन में उपस्थित सभी सदस्यों का स्वागत करते हुए आशा व्यक्त की कि सदन के सभी सदस्य सदन की कार्यवाही को शांतिपूर्वक ढंग से चलाने में सहयोग करेंगे तथा महापौर व उप-महापौर के चुनाव में जिस प्रकार सदन के सभी सदस्यों ने सहयोग किया, उसी प्रकार स्थायी समिति के सदस्यों के चुनाव में सभी मिलकर सहयोग करेंगे। उन्होंने स्थायी समिति के 6 सदस्यों के चुनाव हेतु चुनाव की प्रक्रिया को नए सिरे से शुरू करने की घोषणा की तथा किसी भी सदस्य को मोबाइल फोन ले जाने की अनुमति नहीं होगी।

अपराह्न 11:00 बजे, महापौर ने निर्वाचन प्रक्रिया प्रारंभ करने के निर्देश दिए और घोषणा की कि सभी सदस्य एक-एक करके मतदान करेंगे चाहे इस प्रक्रिया में कितना भी समय लगे बैलेट बॉक्स खुला रहेगा।

महापौर ने सत्तापक्ष व विपक्ष के नेताओं को निर्देश दिया कि मतगणना पर निगरानी रखने के लिए, प्रत्येक पक्ष की ओर से तीन-तीन निगम पार्षद मनोनीत किए जाएं, इस पर सत्तापक्ष की ओर से सर्वश्री मुकेश कुमार गोयल, नेता-सदन, प्रवीण कुमार व प्रेम चौहान तथा विपक्ष से सुश्री शिखा राय, श्री योगेश वर्मा व श्री संदीप कपूर को नियुक्त किया गया।

महापौर ने दिल्ली नगर निगम (प्रक्रिया एवं कार्य संचालन) विनियम, 1958 के नियम 51(10) के अनुपालन में, स्थायी समिति के छः सदस्यों के निर्वाचन के लिए डाले गए मतों की गणना करने में उनकी सहायता करने के लिए निम्नलिखित अधिकारियों को मनोनीत किया:-

1. श्री भगवान सिंह, निगम सचिव

2. श्री रवि प्रकाश, अनुभाग अधिकारी
3. श्री प्रवीण कुमार, कनिष्ठ सहायक
4. श्री जितेन्द्र शर्मा
5. सुश्री स्नेह नरूला
6. सुश्री प्रमिला तहलान
7. सुश्री प्रवेश जैन

मतगणना से पूर्व अपराह्न 2-30 बजे महापौर ने सभा को 10 मिनट के लिए स्थगित कर दिया तथा सभी सदस्यों को निर्देश दिया कि कोई भी सदस्य सदन छोड़कर बाहर नहीं जाएगा। सभी सदस्य अपनी सीट पर ही भोजन ग्रहण करेंगे।

अपराह्न 2-40 बजे मतगणना की प्रक्रिया आरम्भ की गई तथा मत-पेटी को खोला गया और मत-पत्रों की छंटाई की गई तथा निगम सचिव कार्यालय द्वारा, रा.रा.क्षेत्र, दिल्ली सरकार से आमंत्रित विशेषज्ञों/पर्यवेक्षकों के पर्यवेक्षण अधीन परिणाम-शीट (तालिका) तैयार की गई तथा परिणाम घोषित करने हेतु तालिका महापौर को सौंप दी।

अपराह्न 4-30 बजे इसी बीच सत्तापक्ष के सदस्य श्री प्रवीण कुमार द्वारा महापौर से अनुरोध किया कि श्री पंकज लूथरा के पक्ष में डाले गए 1 बैलेट पेपर पर प्राथमिकता के लिए 1, 2 तथा 3 के स्थान पर 1, 2, 2 लिखा गया है, अतः इस मत को अवैध घोषित किया जाए और उन्होंने उस मत को महापौर को सौंप दिया। मत-पत्र देखने के पश्चात् महापौर ने कहा कि वे इस मत को वैध नहीं मान सकती। उन्होंने आमंत्रित विशेषज्ञों से भी पूछा कि यह मत वैध है या अवैध, तो उन्होंने कहा कि उनके तथा उनके पास उपलब्ध चुनाव आयोग की दिशा-निर्देशिका के अनुसार यह मत वैध है। उन्होंने दिल्ली सरकार से आमंत्रित विशेषज्ञों/प्रेक्षकों को निर्देश दिया कि इस मत को अवैध मानते हुए दोबारा परिणाम-शीट तैयार की जाए जिसके लिए उन्होंने असहमति व्यक्त की तथा जिसका विपक्ष द्वारा भी विरोध किया गया।

श्री रवि प्रकाश, तकनीकी विशेषज्ञ ने महापौर को पुनः बताया कि उपरोक्त बैलेट पेपर 1 नम्बर पर प्रथम राउंड में वैध है परन्तु दूसरे राउंड में यदि इस मत की वैल्यू को ट्रांसफर किया जाता है तो यह अवैध माना जाएगा। लेकिन महापौर ने उनकी बात न मानते हुए 1 बैलेट पेपर को अवैध घोषित करने तथा दोबारा परिणाम शीट तैयार करने का निर्देश दिया। इस पर निगम सचिव तथा तकनीकी विशेषज्ञ ने महापौर से अनुरोध किया कि वे प्रत्येक मत के बारे में अपना निर्णय दें कि कौन सा मत वैध है तथा कौन सा मत अवैध है। इस पर महापौर ने सभी मतों के पीछे वैध तथा अवैध लिखकर अपना निर्णय दिया। जिसके अनुसार दो और मतों को अवैध घोषित कर दिया क्योंकि उनमें से एक मत फटा हुआ था तथा दूसरे मत पर ओवर राईटिंग की हुई थी। तकनीकी विशेषज्ञों द्वारा मतों को अवैध करने का आधार जानना चाहा जिनको महापौर ने वैध मान लिया



क्योंकि श्री भगवान सिंह, निगम सचिव ने उनकी बात नहीं मानी और उन्हें गुमराह किया।

विपक्षी सदस्यों ने महापौर को चोर व धोखेबाज बताते हुए सदन में नारेबाजी शुरू कर दी। प्रत्युत्तर में सत्तापक्ष के सदस्यों ने भी अपनी सीटों पर खड़े हो कर नारेबाजी आरम्भ कर दी। महापौर ने सभी सदस्यों से शांति बनाए रखने का अनुरोध किया परन्तु सदस्यों पर इसका कोई असर नहीं पड़ा। उन्होंने निगम सचिव तथा मतगणना के लिए नियुक्त स्टाफ को दोबारा मत पत्रों की छंटाई करके पुनः मतगणना करने का निर्देश दिया। जिसका विपक्ष द्वारा यह कहकर पुरजोर विरोध किया गया कि मतगणना में एजेंटों का होना अनिवार्य होता है इसीलिए बिना एजेंटों के मतगणना का कोई औचित्य नहीं है। उन्होंने बार-बार 1 बैलेट पेपर को अवैध मानकर परिणाम शीट तैयार करने का निर्देश दिया। महापौर मतगणना के लिए नियुक्त स्टाफ को सदन के वेल में बैठकर पुनः मतगणना करने का निर्देश दिया परन्तु मंच के दोनों ओर विपक्षी सदस्यों द्वारा घेराबंदी करने के कारण स्टाफ वेल में नहीं पहुंच पाया। इस पर महापौर ने कहा कि मतगणना मंच पर ही होगी तथा दोनों दलों से एक-एक एजेंट मंच पर आ सकता है परन्तु विपक्षी सदस्य इसके लिए भी सहमत नहीं थे। महापौर ने कहा कि न तो आप परिणाम घोषित होने दे रहे हैं तथा न ही आप पुनर्मतगणना के लिए तैयार हैं इसी बीच महापौर के एक मत को अवैध घोषित करने के निर्णय के विरुद्ध सुश्री कमलजीत सहरावत जो इस चुनाव के लिए प्रत्याशी थी, ने अपना लिखित विरोध संबंधी ज्ञापन महापौर महोदया को सौंपा। श्री रवि प्रकाश तकनीकी विशेषज्ञ तथा मतगणना के लिए नियुक्त कर्मचारी/अधिकारी महापौर के आदेशानुसार एक मत को अवैध मानकर परिणाम शीट तैयार करने लगे तथा पहले से तैयार परिणाम-शीट (तालिका) को महापौर द्वारा अपने पास रखा गया। इसी बीच शोर-शराबे के बीच सुरक्षा के लिए तैनात कर्मचारियों के साथ धक्का-मुक्की करते हुए विपक्ष के सभी सदस्य मंच पर आ गए तथा महापौर से सभी कागजात छीनने की कोशिश करते हुए श्री चंदन कुमार चौधरी, निगम पार्षद वार्ड सं. 163 ने महापौर की कुर्सी खींची और सर्वश्री रविन्द्र सिंह नेगी तथा अर्जुन पाल सिंह मारवाह सहित विपक्ष के कुछ अन्य सदस्य महापौर के पीछे भागे जिसके कारण महापौर गिर गई तथा उनसे सभी कागजात छीन लिये। महिला सुरक्षा कर्मियों की सहायता से अपराह्न 7.30 बजे महापौर को सदन से बाहर भागना पड़ा। उनके सदन से बाहर जाने के बाद भी दोनों पक्षों के सदस्यों में तीखी नोक-झोंक, मार-पीट व धक्का-मुक्की जारी रही।

अपराह्न 9-30 बजे महापौर पुनः सदन में उपस्थित हुई तो उन्होंने विपक्ष के व्यवहार की भर्त्सना करते हुए कहा कि विपक्ष न तो पुनः मतगणना कराना चाहता है तथा न ही परिणाम घोषित करने दे रहा है, इस प्रकार वह न्यायालय की अवहेलना कर रहा है तथा सभी सम्मानित सदस्यों का समय भी बर्बाद कर रहा है। वे विपक्ष

के दबाव में एक अवैध मत को वैध नहीं मान सकती, इसीलिए इसके लिए पुनर्मतदान ही एकमात्र विकल्प है।

अपराहन 09:35 बजे महापौर ने स्थायी समिति के 6 सदस्यों के चुनाव हेतु सभा सोमवार, दिनांक 27 फ़रवरी, 2023 पूर्वाहन 10:00 बजे तक के लिए स्थगित कर दिए"

100. The English translation of the minutes of the meeting are also reproduced as under:-

"At the outset, Mayor welcomed all members present in the house and expressed hope that all members shall extend their cooperation in peaceful conduct of the proceedings of the house. And just as all members cooperated in election of Mayor and Deputy Mayor, they shall extend their similar cooperation in election of Standing Committee also. For election of 6 members of Standing Committee, process to commence the election afresh was declared and no member shall be allowed to take mobile phone.

At 11:00 AM, Mayor issued direction for commencing electoral process and declared that all members shall vote one by one and the Ballot Box shall remain open for howmuchever time that may take.

Mayor also directed leaders of ruling party and opposition parties that for keeping vigil on the counting of votes, three -three members shall be nominated by each side and on this issue, ruling party nominated Sh. Mukesh Kumar Goyal, Leader of house, Pravin Kumar and Prem Chauhan. Opposition party nominated Ms. Shikha Rai, Sh. Yogesh Verma and Sh. Sandeep Kapoor.

In compliance with the Delhi Municipal Corporation (Procedure and Working) Regulations, 1958 Rule 51 (10) thereof, Mayor nominated following officers for electing six members of Standing Committee:

- 1. Sh. Bhagwan Singh, Secretary*
- 2. Sh. Ravi Prakash, Branch Officer.*
- 3. Sh. Pravin Kumar, Junior Assistant.*
- 4. Sh. Jitendra Sharma*
- 5. Ms. Sneh Narula.*
- 6. Mrs. Pramila Tehlan*
- 7. Ms. Pravesh Jain.*

Before commencement of counting at 2:30, Mayor adjourned the house for 10 minutes and directed all members not to go outside the house and all members to remain seated and take refreshment.

At 2:40 noon, counting of votes started and Ballot Box was opened and ballot papers were scrutinized. Secretary of Corporation and the Experts/observers of Delhi Government prepared the Result-Sheet and for declaring the result, Table was handed over to Mayor.

At 4:30 noon, Sh. Pravin Kumar, member of ruling party requested Mayor that one ballot paper cast in favour of Sh. Pankaj Luthra for primary reasons instead of '1,2, and 3', '1,2,2' has been written therefore this ballot may be declared invalid and they handed over the said ballot paper to the Mayor. On seeing the ballotpaper, Mayor said that this ballot paper cannot be treated as valid. She asked the Experts as to whether this ballot is valid or invalid. To which they responded that according to the Directives issued by Election Commission, this ballot paper is valid. She directed the Experts/observers invited by the Delhi Government that while treating this ballot as invalid, another Result sheet be prepared, for which they expressed their dissent. The same was also resisted by the opposition.

Sh. Ravi Prakash, Technical Expert again told Mayor that the aforesaid ballot paper No. 1 is valid in first round. But if this ballot value is transferred in second round, then it shall be treated as invalid. But Mayor did not concede to their opinion and directed to prepare the fresh Result sheet while declaring ballot paper as invalid. On this Technical Expert and Corporation Secretary requested Mayor to take her own decision on each ballot paper and which vote is valid or not valid may be commented on the overleaf of ballot paper. According to the decision two more ballot papers were declared invalid since one ballot paper was torn and the other had an overwriting. Technical Experts were curious to know the basis upon which the Mayor had decided to treat the ballots invalid as Sh. Bhagwaan Singh, Corporation Secretary did not agree to her terms and had misrepresented to her.

Members from Opposition side described Mayor as Thief and Fraudster and started raising slogans in the house. In counter reply, members of ruling party too stood up on their seats and raised counter slogans. Mayor requested all members to maintain peace. But it made no effect on members. She directed Nigam Secretary and staff appointing for election to scrutinize the ballot papers again and again conduct the counting afresh. The same was vehemently opposed by opposition party stating that the presence of agents in counting is compulsory. Hence, there is no justification for counting without agent. She again directed to count the ballots while treating one ballot as invalid. For counting ballots, Mayor directed the staff to sit in well and prepare result sheet. But due to slogan shoutings from both sides, staff could not reach to the well. On this, Mayor said that counting is to be conducted on the dias itself. One agent of both sides can come to the dias. But opposition members were not inclined to agree with this. Mayor said that neither you are letting the result declared nor you are ready for re-counting. In the meantime, decision to declare one ballot as invalid was opposed by Ms. Kamaljit Sehrawat who was candidate in this election. She

opposed in writing and submitted a memorandum to Mayor. Sh. Ravi Prakash, Technical Expert and employees/officers appointed for elections started preparing result sheet while treating one ballot as invalid as decided by Mayor. A Result Sheet Table which was already prepared was kept by Mayor with her. In the meantime, during the ruckus, in the house, pushing the security guards posted inside the house, the members of the opposition came to the dias and while trying to snatch the Result sheet from Mayor, Sh. Chandan Kuman Chaudhary, councillor, ward no.163 pulled the Mayor's chair and Mr. Ravindra Singh Negi and Arjun Pal Singh Marwah along with other members of the opposition ran after the Mayor following which she fell and all papers were taken away from her. With assistance of security staff, at 7.30 PM Mayor had to go outside the house. After her leaving the house, members of both sides indulged in beating up and using force against each other.

At 9:30 PM Mayor again appeared in the house whereupon she criticized the conduct of members of opposition side and said that opposition neither wants to get the result declared nor get the results declared. Thus it is violating the court direction also. It is wasting the time of honourable members also. She said that she cannot treat one invalid vote as valid under pressure. Hence the re-election is the only option.

At 9:35 hrs Mayor adjourned the house for Monday, 27th February, 2023 at 10:00 for election of 6 members of Standing Committee.

Corporation Secretary

Mayor"

101. The minutes reproduced in preceding paragraphs indicate that Mr. Ravi Prakash was nominated by the Mayor/RO amongst other officers, in compliance with Regulation 51(10) of the Regulations, 1958.

102. The admitted minutes also records that after the poll was over, the ballot box was opened and ballot papers were scrutinised. The experts/observers prepared the result sheet for declaration of the result.

103. At around 4:30 PM, one Mr. Praveen Kumar, member of the ruling party requested the Mayor/RO that one ballot paper casted in favour of Mr. Pankaj Luthra, be rejected.

104. After perusal of the ballot paper, the Mayor/RO expressed the opinion that the said ballot paper cannot be treated as valid and asked

the experts to declare the same as invalid. The minutes further goes on to indicate that Mr. Ravi Prakash, Technical Expert, explained the Mayor/RO that the same cannot be done, however, the explanation was not accepted by the Mayor/RO and accordingly, the disturbance and consequent ruckus had happened.

105. From the official record i.e. minutes of the meeting which is a public document under Section 74 of the Indian Evidence Act, 1872, the following inevitable conclusion can be drawn:-

- i. The poll was over without any disturbance and the scrutiny was also conducted and none of the ballot paper was declared invalid.*
- ii. All 242 ballot papers were found to be valid.*
- iii. The quota was ascertained and counting took place.*
- iv. The final result sheet was present before the Mayor/RO, then an objection was raised by the member of the ruling party regarding one ballot paper.*

106. Having considered the applicable DMC Act, 1957, the Regulations, 1958 and the Rules 1956, and after applying them to the facts of the present case, this court is of the considered opinion that if the rejection of a ballot paper, at the stage of counting is allowed, the same would vitiate the entire process of the election which cannot be the mandate of law. If any ballot paper is allowed to be rejected during the counting stage, then in a given case, the Mayor/RO can also declare an invalid ballot paper as a valid one. Such an interpretation would be disastrous under the existing regulatory regime. Once the stage of scrutiny is over, valid and invalid ballot papers are segregated, then the re-scrutinising of those ballot papers cannot be deemed permissible under law.

107. If such an exercise is allowed, the wheels of the election process could never come to a halt. If such powers are declared to have existed with the Mayor/RO, there is nothing that would further prevent the Mayor/RO from again scrutinising the already re-scrutinised ballots, and to again count the re-counted votes, and force the people to again go for polls after having already re-pollled. Elections would then be an unruly horse, the halter of which would lie exclusively in the hands of the Mayor/RO.

108. It is a fundamental rule of election that once the election process has started, it must see its logical end in declaration of the final result. The same is necessary in order to ensure that all valid votes are counted and the will of the people is accurately reflected. Stopping the election process prematurely would result in an incomplete or inaccurate count of votes, which could lead to disputes, claims of fraud and a lack of confidence in the election results. The same has happened in the instant case. Such an approach would ultimately undermine the democratic process and the legitimacy of the elected officials.

109. An argument made on behalf of respondent No.4/Mayor/RO that a well-recognized rule, namely, that where a power is given to do a certain thing in certain way the thing must be done in that way or not at all is applicable in her favour for the reason that the instructions in the ballot paper have not been followed and secondly the declaration of result in prescribed form has not been made. There is no dispute with respect to the well-recognized principle laid down in the case of *Nazir Ahmad v. King Emperor*.²⁵ However, the same will not support the case of the respondent rather would substantiate the case of the petitioner to make good their argument that once the ballot boxes were

opened, the overall ballot papers were counted, scrutiny was conducted, valid and invalid ballot papers were segregated and quota was ascertained, and counting was started, which also reached to its final conclusion, then there was no occasion for again scrutinizing the ballot papers as the same is not the procedure prescribed under the rule.

110. Undisputedly, the poll has taken place, the scrutiny was conducted and the quota was ascertained and then if the entire process ends up with a non-declaration of result, the same would be seen as an act of disrespect towards the voters who have taken the time to cast their votes and the candidates who have invested their time, efforts and resources in the election process.

111. In the interest of democracy, fairness and respect of the electoral process must be maintained. It is crucial to see the election process attains its finality even if the outcome is not in favour of a particular party.

112. If the valid paper is rejected during the counting process the same can create several anomalies such as reducing the overall number of valid votes, in turn, resulting in the entire ascertained quota being disturbed. For example, in the instant case on the basis of 242 valid papers, the quota was ascertained as 3458 with the formula discussed in preceding paragraphs. If one valid paper is rejected the entire quota will have to be re-worked out. It is, therefore, clear that a pattern is envisaged under the Regulations, 1958 and the applicable Rules, 1956 relating to the process and manner of polling, scrutiny, ascertainment of quota and counting which does not allow the things to be done otherwise.

113. The rejection of a poll ballot paper once the counting was over would lead to a distortion of the entire election result. The same will create doubts in the minds of the voters about the fairness and transparency of the election process, and this can erode the confidence that the voter has in the election system which in turn strikes at the core of our democratic setup.

114. The fundamental intent of the Rules is that once at the stage of scrutiny, the ballot paper was not rejected, the same cannot be rejected, at the stage of final declaration of result.

115. As has been stated above, if such a discretion to reject and declare invalid an otherwise accepted ballot or to accept and declare valid an otherwise rejected ballot is conferred upon the Mayor/RO, no result would be finalised unless the same is of the choice of, and is favourable to, the Mayor/RO.

116. The preamble of our Constitution proclaims that we are a democratic republic. Democracy being the basic feature of our Constitutional setup, there can be no doubt, that elections to our legislative bodies, when free from arbitrary and unwarranted interferences, stripped from unjustified obstructions, conducted with principles of fairness by authorities and officials committed to constitutional values, would guarantee the growth of a healthy democracy in the country. It is inherent in a democracy setup that an agency which is entrusted the task of holding the elections to the legislatures should be fully insulated so that it can function as an independent agency free from external pressures from the party in power or executive of the day.

117. The Hon'ble Supreme Court in the case of **Anoop Baranwal v. Union of India**,²⁶ while considering the importance of the Election Commission of India as an independent Constitutional body has held that the democracy works when the citizens are given a chance to decide the fate of the ruling Government by casting their vote in periodical elections. The faith of the citizens in the democratic processes is ensured by conducting free and fair elections through an independent and neutral agency. In paragraph No. 384 of the said decision, the Hon'ble Supreme Court has held that keeping in view the importance of maintaining the neutrality and independence of the office of the Election Commission to hold free and fair election which is a *sine qua non* for upholding the democracy as enshrined in our Constitution, it becomes imperative to shield the appointment of Election Commissioners and to insulate it from the executive interferences. Various guidelines have been issued for appointment of the Chief Election Commissioner and the Election Commission in order to ensure that free and fair elections are conducted by the Election Commission towards the working of our democracy. The principles laid down therein with respect to the importance of free and fair election to our legislative bodies are equally applicable in the cases of other elections of statutory bodies. There cannot be any compromise in the free and fair conduction of any election under any statute.

118. This court is therefore of the considered opinion that since, in the instant case, the stage of scrutiny was over, the rejection having taken place at the stage of counting, the same is impermissible under law.

119. Despite this court coming to the conclusion that the power to engage in a re-scrutiny of ballots at the stage of counting did not vest with the Mayor/RO and she thereby acted in excess of the powers so conferred upon her by the applicable law, this court shall also delve into whether the rejection and declaration of invalidity on merits, was bad in law. To satisfy the conscience of the court, the reason for not accepting the disputed ballot paper as propounded by the Mayor/RO, was asked to be examined. This court shall test the rejection on two fronts—first, from the perspective of the ballot being a single transferable vote under a preferential system and the resultant consequences it has *qua* rejection of a ballot; and second, on the anvil of the Rule 116 of the Rules, 1956 which has application in the instant case in its full force, as the scheme of Regulations of 1958 would indicate that a valid ballot can only be declared as invalid when the same falls within any of the categories as mentioned in Rule 116 of the Rules, 1956.

120. First, the aspects relating to the vote in the present case being a single transferable vote in a preferential system, and the consequences it has on the present dispute, is being discussed. As had been noted before, the election of the members of the Standing Committee has to take place with the system of proportional representation by means of a single transferrable vote. It is by way of incorporation, that the Rules, 1956 have been made applicable in relation to the counting of votes. Chapter VI of the Rules, 1956 deals with the counting of votes at elections in the council constituencies, at election to fill seats in the Council of States and at elections by the members of the legislative assemblies to fill up seats in the legislative councils. By way of sub-regulation 10(b) of Regulation 51 of Regulations, 1958 only provisions of Rule 115, sub-Rule 1 of Rule 116, Rule 121 to 127 and

Rule 129 of the Rules, 1956 are made applicable in relation to the counting of votes at an election of the members of the Standing Committee.

121. Rule 115 of the Rules, 1956 deals with the definition clause which defines amongst others, the expression of 'unexhausted paper', 'exhausted paper', 'original vote', 'transferred vote', 'surplus' and 'count' etc. Reading of the aforesaid expressions in Rule 115 would indicate that the expression 'unexhausted paper' would mean a ballot paper on which further preference is recorded for a continuing candidate. An expression 'continuing candidate' would mean any candidate not elected and not excluded from the poll at any given time.

122. It is thus seen that in a case of a further preference being assigned by any voter, in addition to first preference to a candidate who is the continuing candidate, the same would be taken into consideration in favour of the continuing candidate and the ballot paper would remain as unexhausted paper. On the contrary, exhausted paper would mean that a ballot paper on which no further preference is recorded for a continuing candidate and in addition, a ballot paper would also be deemed to be exhausted in case—(a) the names of two or more candidates, whether continuing or not, are marked with the same figure and are next in order of preference, or (b) the name of the candidate next in order of preference, whether continuing or not, is marked by a figure not following consecutively after some other figure on the ballot paper or by two or more figures.

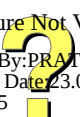
123. It is thus clear that the assignment of preferences has peculiar intricacies unlike the counting of general ballot paper. In the scheme of definitions under Rule 115, the expression 'count' includes all the operations involved in the counting of the first preferences recorded

for candidates or all the operations involved in the transfer of the surplus of elected candidates or all the operations involved in the transfer of the total value of votes of an excluded candidate.

124. More importantly, in a preferential voting system by way of single transferable vote, each voter is given a ballot paper that lists all the candidates running in the election. The voter instead of voting for just one candidate, marks the preferences of the candidates in order of preference, numbering them 1, 2, 3 and so on and the candidate to be elected needs to reach a specific quota of votes as has been discussed in preceding paragraphs and if the candidate reaches the quota in the first round they are declared elected and if no candidate reaches the quota in the first round, the candidate with the lowest number of first preference votes is eliminated and their votes are transferred to the remaining candidates according to the second preference indicated on each ballot paper. The process of eliminating the lowest ranked candidate and transferring their votes to the remaining candidates continues until all the positions are filled or until there are only as many candidates remaining as there are positions to be filled.

125. The single transferable votes system is designed to ensure that voters have more choice and their preferences are taken into account. It also tends to produce more proportional results than other voting systems. However, it can be more complex to count and can take a longer time to produce results than other systems, but in the instant case what remains material case is that the said exercise was successfully completed.

126. In a single transferable voting system, a ballot paper can be accepted as valid for the first preference and invalid for subsequent preferences. This is because a single transferable vote allows voters to

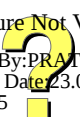


indicate their preferences in an order, rather than requiring them to rank all candidates or limiting them to a single choice. If the voter has made their first preference with a clear indication, the same has to be considered valid for that preference. If the voter ranks multiple candidates as his first preference or indicates a preference for a candidate who has already been eliminated, those preferences may be considered invalid.

127. The key differences between a single transferable voting system and the traditional voting system relate to the accommodation of intention. Whereas under the traditional model the voter, and its vote, evinced a single and clear intention, the transferable voting system allows for a multiplicity of preferences. Under the traditional voting system, votes cast for candidates other than the winning candidate are not transferred or redistributed. With the single transferable voting system, if a candidate surpasses a predetermined threshold or quota of votes required to be elected, surplus votes beyond that threshold are transferred to the next preferred candidate on those ballots. Similarly, if a candidate is eliminated or does not reach the quota, their votes are redistributed based on the voters' subsequent preferences.

128. There are two dimensions to this difference. First, from the perspective of the voter, under the single transferable voting system he is able to make choices expressing his true diversified preferences, without fearing the wastage of his vote. In contradistinction, under the traditional voting system, a single compromised preference is depicted, where often the factor of a vote being wasted i.e., not voting for a candidate on the perception that they would eventually lose the election, is considered by the voter.

129. The second dimension of the difference between these two systems is the manner in which the vote can be treated in law. Under

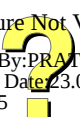


the traditional system, if there is an error committed by a voter and that error is pathological to the extent that it is not possible to decipher the intention of the voter, then the vote itself becomes invalid. The intention of the voter being unilateral, there is no inference that could be drawn, after severing the vote from the error.

130. Under the single transferable voting system, the situation is different. If there is an error on the ballot under this system, and the error qualifies the test of invalidation, then *ipso facto* the entire vote does not become invalid. Despite there being an error in the marking of preference, and the intention of the voter *qua* that particular preference not being decipherable the vote in its entirety cannot be deemed invalid, as the transferable voting system, and the ballot for it, allows for this error to be severed from the rest of the preferences. The error relating to a particular preference cannot obfuscate the clear intention *qua* the other marked preferences. The scope and ambit of the error must remain confined to the specific preference to which it related. Such an exercise, however, cannot be considered under the traditional voting system, as the system allows for the manifestation of a single preference.

131. It is thus seen that under the single transferable voting system an error relating to a particular preference, does not *ipso facto* lead to the conclusion that the vote in its entirety, including the other preferences are deemed to be invalid.

132. The Hon'ble Supreme Court in the case of ***K.M. Shradha Devi*** (*supra*) had an occasion to consider the dispute with respect to the biennial election for electing members to Council of States (Rajya Sabha) from the constituency of the elected members of the Uttar Pradesh Legislative Assembly. The election had been held as

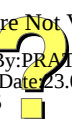


mandated by clause (4) of Article 80 of the Constitution in accordance with the system of proportional representation by means of a single transferable vote. After the poll was closed, the RO commenced counting of votes. 11 ballot papers were rejected by RO as invalid. As mandated under Rule 76 of the Conduct of Election Rules, 1961, the RO proceeded to ascertain the quota. Accordingly, the quota was worked out at the value of 3147. The petitioner therein was one of the candidates who was not elected and, therefore, he filed an election petition before the High Court of Judicature at Allahabad (Lucknow Bench). He prayed for scrutiny and recount on the allegation of miscount and sought directions for his declaration as elected to the last vacancy. The learned Single Judge of the High Court rejected the election petition substantially holding that the petitioner therein had failed to prove that all 11 rejected ballot papers were not shown to the counting agents.

133. On an appeal being preferred, the Hon'ble Supreme Court in paragraph no. 11 considered the scheme of Part-VII of the applicable Rules, where almost similar technical terms were considered as have been taken into consideration in the instant case. It was held by the Hon'ble Supreme Court, that when voting is in accordance with the system of proportional representation by means of a single transferable vote, it is obligatory to cast the first preference vote for ensuring the validity of the ballot paper. Further, the first preference vote must be so cast so as not to leave any one in doubt about it. The remaining preferences are optional with the elector. He may or may not exercise his franchise for the remaining preferences. If he chooses not to exercise remaining preferences, the ballot paper cannot be rejected as invalid for failure to exercise the remaining preferences.

For the sake of clarity, the extract of paragraph no.12 is reproduced as under:-

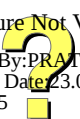
“12. The Returning Officer while counting votes at election by Assembly members has to bear in mind the implication of voting in accordance with the proportional representation by means of the single transferable vote. What is obligatory in this system of voting is that every elector must exercise his first preference vote. Rule 37-A(1) specifies that every elector has one vote only irrespective of the number of seats to be filled in at such election. Rest are preferences. In order to exercise franchise at such election the elector is under a duty to give his 1st preference vote. Where the 1st preference vote is not exercised the ballot-paper will have to be rejected as invalid as mandated by Rule 73(2)(a) which provides that the ballot-paper shall be invalid on which figure 1 is not marked. By the combined reading of Rule 37-A(2)(a) with Rule 73(2)(a) it unquestionably transpires that in this system of voting as understood in contradistinction to single-member constituency where a cross has to be placed against the name or the symbol of the candidate the first preference vote is a sine qua non for validity of the ballot-paper. The provision contained in Rule 37-A(2)(b) read with Rule 73(2)(a) and (b) would manifestly show that the elector is not required to exercise all preferences available to him at the election. To illustrate, if as in the present case there were 11 vacancies, the elector can go on exercising his preferences up to 11th number by putting figures 1 to 11 against the candidates whom the elector wants to accord his preferences according to his own choice. But while exercising the preferences it is obligatory in order to render the ballot-paper valid to give first preference vote. It is optional for the elector to exercise or not to exercise his remaining preferences. This must be so in the very nature of things because this system of voting was devised to provide minority representation. If amongst 421 electors as in the present case a party has 220 members owing allegiance to the party and each one can exercise 11 votes with the reservation that not more than one vote can be given to one candidate and that a cross up to the totality of number 11 can be placed against 11 different candidates, no one else having 201 votes in his pocket can get elected. To avoid this monolithic political pocket borough of votes this more advanced system of proportional representation by means of the single transferable vote was devised. The very expression “proportional representation” is onomatopoeic in the sense it shows that various interests especially the minority groups can secure representation by this more advanced method of franchise. True, where there are single-member constituencies this system is not helpful ; but where there are multi-member constituencies this system has a distinct advantage and the



advantage becomes discernible from the fact that Rule 37-A(2)(a) provides that an elector in giving his vote shall place on his ballot-paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance. The expression "shall" demonstrates the mandate of the section and when compared with clause (b) which provides that an elector in giving his vote may, in addition, place in his ballot-paper the figure 2 or the figures 2, 3, 4, etc. which would bring in sharp focus the mandatory and the directory part in sub-rules (2)(a) and (2)(b). The underlying thrust of the section becomes further manifest by referring to Rule 73(2)(a) and (b) which provide that a ballot-paper shall be invalid on which the figure 1 is not marked or the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which it is intended to apply. Clause (c) of sub-rule (2) of Rule 73 further brings out the intendment of the provision because it mandates that the ballot-paper shall be invalid on which the figure 1 and some other figures are set opposite the name of the same candidate. It, therefore, necessarily follows that when voting is in accordance with the proportional representation by means of the single transferable vote it is obligatory to cast the first preference vote for ensuring the validity of the ballot-paper and the first preference vote must be so cast as not to leave any one in doubt about it. The remaining preferences are optional with the elector. He may or may not exercise his franchise for the remaining preferences. If he chooses not to exercise remaining preferences the ballot paper cannot be rejected as invalid for failure to exercise the remaining preferences. Rule 73(2) is exhaustive of the grounds on which a ballot-paper at a voting at election by Assembly members shall be rejected as invalid and on a true and in-depth reading of it, it does not transpire that the failure to cast the remaining preference would invalidate the ballot-paper. This conclusion is reinforced by the provision contained in Rule 37-A(1) which provides that every elector has only one vote at an election irrespective of the number of seats to be filled. Therefore, the vote is only one and even if there is more than one seat to be filled in, subsequent preferences may be indicated by the elector and it is optional with him not to exercise preferences outside his only one vote which he must cast by indicating unambiguously his first preference."

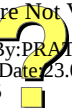
134. Further in paragraph no.13 very pertinent observations have been made with an illustration which reads as under:-

"13. What then follows? If there is only one vote at such an election and the preferences are as many as there are seats chronologically to be indicated and failure to exercise preferences



subsequent to first preference would not invalidate the ballot-paper, it must follow as a corollary that if the elector has committed some error in exercising his preferences lower down the ladder the whole of the ballot-paper cannot be rejected as invalid. To illustrate, if the elector has with sufficient clarity exercised his preferences, say 1 to 5 in chronological order but while exercising his sixth preference he having the right to exercise the preference up to 11, has committed an error, the error in exercising his sixth preference would not render the whole ballot-paper invalid and his preference up to 5 will have to be taken into account while computing the votes. We specifically invited learned counsel on both sides to assist us in examining this aspect as we were treading on an uncovered ground. In fact, we adjourned the matter to enable Mr. Chauhan, learned counsel for the petitioner and Mr A.K. Sen, learned counsel for the respondents to study the problem and at the resumed hearing it was not only not disputed but unambiguously conceded that in view of the provision contained in Rule 37-A read with Rule 73(2) once the first preference vote has been clearly and unambiguously exercised the ballot-paper cannot be rejected on the ground that lower down the ladder there was some error in exercising the subsequent preferences. If this is the correct interpretation of Rule 37-A, it must follow that not only such a ballot-paper has to be held as valid ballot-paper but its validity shall continue up to the stage in preferences where an error or confusion transpires which would not permit computation of subsequent preferences below the level of error. To illustrate the point, if as in the present case the voter had option to exercise 11 preferences and if he has exercised his preferences 1 to 5 correctly and unambiguously and has committed an error in exercising sixth preference and it cannot be said with certainty for whom the sixth preference vote was cast, the ballot-paper has to be held valid in computation of votes up to and inclusive of the fifth preference and rejected for the preferences down below as if the elector has not exercised his further preferences which was optional with him. The ballot-paper can thus be partially valid. This is not a startling proposition but is the logical outcome of the system of voting. No authority is needed in support of it but if one is required it is to be found in the statement of law in para 636, p. 345, Vol. 15 of Halsbury's Laws of England, 4th Edn. It may be extracted:

636. Ballot-papers rejected in part.—Where at a local government election or poll consequent on a parish or community meeting the voter is entitled to vote for more than one candidate or at a poll consequent on a parish or community meeting on more than one question, a ballot paper is not to be deemed to be void for uncertainty as respects any vote as to which no uncertainty arises and that vote is to be counted.



We have examined this aspect in depth because out of 11 invalid ballot-papers which we have marked now in the Xerox copies from 'A' to 'K' for identification, ballot-paper marked 'B' has been rejected under Rule 73(2) (b) by the Returning Officer on the ground that figure 1 appears against two candidates J.P. Singh and Surendra Mohan. The High Court has accepted the rejection as valid. It is difficult to accept this view of the Returning Officer affirmed by the High Court because figure 1 has been clearly marked against the candidate Surendra Mohan and the figure 11 is noted against the candidate J.P. Singh. There is some overwriting in the two strokes of figure 11 but it must be remembered that explanation appended to Rule 37-A permits that the figures indicating preferences 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. All other figures indicating the preferences have been written in Hindi numerals and 11 is by two strokes having the loop at the top slightly overwritten but the preference is the 11th preference against J.P. Singh, is indisputable and is clearly visible to the naked eye. Obviously this ballot-paper marked 'B' could not have been rejected on the ground mentioned in Rule 73(2)(b)."

135. In paragraph no. 16 of the said decision, it has been held that free and fair election being the fountain source of Parliamentary democracy, attempt of the RO and the court should be, not to chart the easy course of rejecting ballot papers as invalid under the slightest pretext but serious attempts should be made before rejecting the ballot papers as invalid, so as to ascertain, if possible, whether the elector has cast his vote with sufficient clarity revealing his intendment. Paragraph no. 16 is also reproduced as under:-

"16. Free and fair election being the fountain source of Parliamentary democracy attempt of the Returning Officer and the Court should be not to chart the easy course of rejecting ballot papers as invalid under the slightest pretext but serious attempt should be made before rejecting ballot papers as invalid to ascertain, if possible, whether the elector has cast his vote with sufficient clarity revealing his intendment. In this case we are satisfied that the Returning Officer has charted an easy course unsupportable by evidence and the High Court failed to exercise its jurisdiction of scrutiny of all ballot papers once a serious error has been pointed out in respect of two ballot papers out of a total of 11 invalid ballot papers. Therefore, we find it difficult to

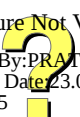
accept the view taken by the High Court. Accordingly, this appeal is allowed and the judgment and order of the High Court are set aside and the matter is remanded to the High Court for further proceeding according to law. The High Court shall examine all invalid ballot papers, ascertain the reasons for the rejection, satisfy itself whether the reason is valid or unconvincing, and decide the validity of the ballot-paper as a whole or in part and direct computation of the votes over again. The High Court may bear in mind that the decision of the Returning Officer rejecting ballot papers as invalid is subject to review of the High Court in a proper election petition (see Halsbury's Laws of England, 4th Edn., Vol. 15, para 638, p. 345)."

136. The principle law laid down by the Hon'ble Supreme Court in the case of ***K.M. Shradha Devi*** (*supra*) will have full application under the facts of the present case. It would lead us to the conclusion that once the intention of the voter with respect to first preference is unambiguously clear, there is no reason to reject the said preference and not to count it in favour of the concerned candidate.

137. Next, this court shall test the rejection specifically on the grounds mentioned under Rule 116 of the Rules, 1956. It requires that a ballot paper shall be invalid on which the figure 1 is not marked or the figure 1 is set opposite to the name of more than one candidate or is so placed so as to render it doubtful to which candidate it is intended to apply; or the figure 1 and some other figures are set opposite the name of same candidate or any marks is made by which the elector may afterwards be identified or if it is a postal valid ballot paper, the signatures of the elector is not duly attested.

138. A careful perusal of Rule 116 of the Rules, 1956 and the reason that the preference 2 is given to two candidates would clearly reveal that such an objection cannot be the reason for declaring any valid ballot paper as invalid under Rule 116 of the Rules, 1956.

139. Even in the hand book of the Mayor/RO for election to the Council of State and State Legislative Council under Clause 11, the



provisions is stipulated with respect to valid ballot papers under the system of proportional representation by means of single transferable vote. Clause 11 and 12 of the said instructions reads as under:-

"11. Under the system of proportional representation by means of single transferable vote, every elector has one vote only as the expression "single transferable vote" implies. The voter is, however, required to indicate his preferences for the different candidates. An elector in giving his vote has to place on his ballot paper the figure '1' in the place opposite the name of the candidate for whom he wishes to vote in the first instance. He may, in addition, place on his ballot paper the figure '2' or the figures '2' and '3' or the figure '2', '3' and '4' and so on in the space opposite the names of other candidates in the order of his choice. In other words, the marking of figure '1' is obligatory and the marking of figures '2', '3', '4', etc., is optional. Therefore, a ballot paper will be valid if the figure '1' is properly marked by the elector indicating his first preference.

Thus, in order to determine whether a ballot paper is valid or invalid, you have to see whether the first preference has been validly indicated by placing figure '1' (in vertical position) on the ballot paper by the elector. A ballot paper on which figure '1' has been validly marked is a valid ballot paper, if it is not invalid for some other reason under the law.

Grounds for Rejection of Ballot Paper

12.1 A ballot paper shall be invalid on which -

- (a) the figure '1' is not marked; or*
- (b) the figure '1' is set opposite the name of more than one candidate; or*
- (c) the figure '1' is so placed as to render it doubtful to which candidate it is intended to apply; or*
- (d) the figure '1' and some other figure like 2, 3, etc., are set opposite the name of the same candidate; or*
- (e) there is any mark or writing by which the elector can be identified; or*
- (f) there is any figure marked on the ballot paper otherwise than with the article (i.e., sketch pen of violet colour ink) supplied by you for the purpose.*

12.2 The ballot papers are required to be marked by the electors only with the article supplied by you for the purpose. A ballot paper marked with any other article shall be rejected. This requirement, however, cannot obviously apply in the case of postal ballot papers. Therefore, a postal ballot paper should not be rejected on the ground that it is marked with some article other than the article which was supplied by you for the marking of ballot papers at your polling station. You should also not reject a ballot paper used at your polling station on the ground that it is marked otherwise than

with the article supplied for the purpose, if you are satisfied that any such defect has been caused by any mistake or failure on the part of a Polling Officer.

12.3 If a ballot paper is marked with an article other than supplied by you, it may be a postal ballot paper. Then the stamp of "Postal Ballot Paper" on its back side should be checked. If the stamp is not found on its back, the same should be rejected".

140. The same would also not substantiate the alleged reason for not accepting the disputed ballot paper. The aspects that arrangement of valid ballot papers in parcels, value of votes, ascertainment of quota and candidates with quota elected at first count etc. are explained in detail under Clause 22 and 23, which reads as under:-

“Ascertainment of Quota

22.1 Where only one seat is to be filled. - The quota sufficient to secure the return of a candidate at an election where only one seat is to be filled shall be determined by (i) dividing by 2(two) the total value of valid votes as determined in the preceding paragraph, and (ii) adding one to the quotient, ignoring the remainder, if any. Thus, in the above mentioned example where 401 valid votes are cast, the quota sufficient to secure the return of a candidate will be $401/2+1=201$.

22.2 Where more than one seat is to be filled. - The quota sufficient to secure the return of a candidate at an election where more than one seat is to be filled shall be determined by (i) dividing the total value of votes as determined in the preceding paragraph by a number which exceeds by one the number of vacancies to be filled, and (ii) adding one to the quotient, ignoring the remainder, if any.

Thus, in the above example of election where 401 valid votes are cast, the quota sufficient to secure the return of a candidate, supposing further that 10 candidate are to be elected, shall be

$$\frac{40,100}{10} + 1 = 3646$$

11

Candidates with Quota Elected at First Count

23.1 If any candidate has secured votes the value of which is equal to or greater than the quota sufficient to secure the return of a candidate as determined above, such candidate shall be declared elected by you at the first count.

23.2 If only one seat is to be filled at the election, the counting of votes will come to an end if a candidate is declared elected at the first count as mentioned above.

23.3 At an election where more than one seat is to be filled, if the number of candidates, who are declared elected at the first count in the manner indicated above, is equal to the number of seats to be filled then

also the counting of votes would come to an end and the election would be complete”.

141. The argument that since the instruction no.5 of the ballot paper is violated, the same must result in the rejection of the ballot paper is also not acceptable at the stage when the counting was over.

142. However, Rule 116(1) of the Rules, 1956 envisage the reason for rejection of valid paper as invalid and therefore, the deviation of instruction no. 6 will not automatically result in declaring any valid paper as invalid unless, the reason falls within the ambit and scope of Rule 116(1) of the Rules, 1956.

143. This court has thus come to the conclusion that separate from the Mayor/RO not having the powers to direct the re-scrutiny at the stage of counting, the rejection itself was bad in law. It was not done not the grounds of the applicable law, specifically, Rule 116 of the Rules, 1956, but rather undermined the intention of the voter insofar as it disallowed the voter's first preference to be counted.

144. Lastly, this court must consider the argument made by the learned senior counsel for the respondents, that the 're-poll' would not cause any prejudice to any of the persons. This court cannot countenance this argument for multiple reasons. The first and foremost reason is that there are no provisions for 're-poll' or for 're-count' in the Regulations, 1958 or the applicable Rules, 1956. Rule 128 of Rules, 1956 provides for re-count but the same has not been borrowed in Regulations, 1956. Even the re-count provisions in Regulations, 1958 does not envisage for re-scrutiny, once the same is conducted. Even under the provisions of the Representation of People Act, 1951 (hereinafter '**RP Act, 1951**') the re-poll is permissible only when the poll is interrupted or obstructed by any riot or open violence or if at an

election it is not possible to take the poll at any polling station or such place on account of any natural calamity or any other sufficient cause. Sub-Section 1 of Section 57 of the Act of 1957 also indicates that the Presiding Officer (hereinafter 'PO') for such polling station or the RO presiding over such place, as the case may be, shall announce an adjournment of the poll to a date to be notified later and where the poll is so adjourned by the PO, he shall forthwith inform the RO concerned.

145. As per Section 57 and 58 of the Representation of People Act, 1951 fresh poll in case of destruction etc. of ballot boxes can be ordered when such an irregular procedure is likely to vitiate the poll. Section 57 and 58 of the Act of Representation of People Act, 1951 is reproduced as under:-

Section 57:-

" 57. Adjournment of poll in emergencies.—

(1) If at an election the proceedings at any polling station provided under section 25 or at the place fixed under sub-section (1) of section 29 for the poll are interrupted or obstructed by any riot or open violence, or if at an election it is not possible to take the poll at any polling station or such place on account of any natural calamity, or any other sufficient cause the presiding officer for such polling station or the returning officer presiding over such place, as the case may be, shall announce an adjournment of the poll to a date to be notified later, and where the poll is so adjourned by a presiding officer, he shall forthwith inform the returning officer concerned.

(2) Whenever a poll is adjourned under sub-section (1), the returning officer shall immediately report the circumstances to the appropriate authority and the Election Commission and shall, as soon as may be, with the previous approval of the Election Commission appoint the day on which the poll shall recommence, and fix the polling station or place at which, and the hours during which, the poll will be taken, and shall not count the votes cast at such election until such adjourned poll shall have been completed.

(3) In every such case as aforesaid the returning officer shall notify in such manner as the Election Commission may direct the date, place and hours of polling fixed under sub-section (2)."

Section 58:-

"58. Fresh poll in the case of destruction, etc., of ballot boxes.—

(1) If at any election,—

(a) any ballot box used at a polling station or at a place fixed for the poll is unlawfully taken out of the custody of the presiding officer or the returning officer, or is accidentally or intentionally destroyed or lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station or place cannot be ascertained; or 2[(aa) any voting machine develops a mechanical failure during the course of the recording of votes; or]

(b) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll, the returning officer shall forthwith report the matter to the Election Commission.

(2) Thereupon the Election Commission shall, after taking all material circumstances into account; either—

(a) declare the poll at that polling station or place to be void, appoint a day, and fix the hours, for taking a fresh poll at that polling station or place and notify the day so appointed and the hours so fixed in such manner as it may deem fit, or

(b) if satisfied that the result of a fresh poll at that polling station or place will not in any way, affect the result of the election or that 1[the mechanical failure of the voting machine or] the error or irregularity in procedure is not material, issue such directions to the returning officer as it may deem proper for the further conduct and completion of the election.

(3) The provisions of this Act and of any rules or orders made thereunder shall apply to every such fresh poll as they apply to the original poll."

146. What is to be noted is that once a poll is conducted without any disturbance or objection; there is no provision even under the RP Act, 1951 to declare the same as invalid and go for a fresh poll.

147. However, in the instant case, the facts as have been discussed would clearly indicate that it is not only the poll which was conducted smoothly but even the counting that was over without any objection. It is only because of the rejection of one ballot by the Mayor/RO since the same was not of the choice the Mayor/RO and the counsellor of ruling party had an objection to it after the counting, that some

disruption took place. It is clear therefore, that the disruption has not taken place during the poll or the counting.

148. In the instant case, a decision of re-poll has been taken by the Mayor/RO which could be directed very rarely and cannot be made as a matter of course. The Hon'ble Supreme Court in the case of **Suresh Prakash Yadav v. Jai Prakash Mishra**²⁷ in paragraph nos. 5 and 6 has held as under:-

“5. Before dealing with these contentions, we may recall, what this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of the course. The reason is twofold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against mistakes and fraud in counting, that it can be called almost trickery foolproof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court, may be indicated thus.

6. The Court would be justified in ordering a recount of the ballot papers only where:

(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and

(3) the court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.”

149. The same principles have been followed in the case of **Satyanarain Dudhani v. Uday Kumar Singh and Ors.**²⁸, and other subsequent judgments including in the case of **Udey Chand** (*supra*). However, in the present factual matrix, a perusal of the note prepared

²⁷1975 4 SCC 822

²⁸1993 Suppl (2) SCC 83

by the Mayor/RO would indicate that the re-counting was directed on the basis of an objection raised by one of the members of ruling party.

150. In the instant case it is seen that firstly, there is no alternative remedy that the petitioners could have exercised, secondly, the decision of the Mayor/RO was not to further the election but the same is affecting, interrupting, obstructing and protracting the election process. If this court refrains to exercise writ jurisdiction under the facts of the present case, the same would amount to nullify a validly conducted poll, scrutiny and counting, and to force the electorate to participate in a re-poll which normally cannot be resorted to unless the facts and situation so demands.

151. This court has found that the actions of the Mayor/RO of engaging in the re-scrutiny of ballots when the stage of scrutiny had passed and the stage of counting of votes had been undergoing was beyond the powers that so vest with the Mayor/RO. The actions are thus found by this court to be bad in law. This court has further found that even when, the powers are so assumed to vest with the Mayor/RO and the action of rejecting the ballot, on merits is considered, the same is found to be impermissible by law.

152. It is to be noted, that this court on 25.02.2023, while entertaining the instant petition, directed the stay of the impugned notice dated 24.02.2023 for holding re-election/re-poll on 27.02.2023.

Paragraph no. 20 to 23 of the order dated 25.02.2023 reads as under:-

"20. In view of the same, the impugned notice bearing No. D-1029/M.S./2023 Dated 24.02.2023 for holding the re-elections on 27.02.2023 shall remain stayed till the next date of hearing.

21. In the meanwhile, without expressing any opinion, it is made clear that the Municipal Secretary will preserve the ballot papers and ballot box(s) in terms of Regulation 51(12) of the Delhi Municipal Corporation (Procedure & Conduct of Business)

Regulations, 1958. It is further directed that the video recording of the proceedings shall also be preserved.

22. At this stage, learned senior counsel for Respondent No. 4 states that the ballot papers and the ballot boxes have been violated. Let the learned counsel file his response bringing out the said fact on record.

23. List on 22nd March, 2023 before the Roster Bench."

153. The Municipal Secretary has also filed the affidavit stating therein that all the ballot papers used during the election of six members to the Standing Committee held on 24.02.2023 and the record of the proceedings are in safe custody of the respondent. The subsequent disturbance which is alleged to have taken place after the counting was over has no bearing for rejection of one ballot paper as the same is a subsequent act which has taken place on account of the decision of the Mayor/RO in not declaring the result as per result sheet. However, if any party has any grievance with respect to the aforesaid aspect they are free to take appropriate recourse in accordance with law.

154. In the instant case interestingly, as per the Mayor/RO's note, she wanted to declare one Ms. Sarika Chowdharya as elected candidate no. 6 while rejecting one ballot paper. Having understood the scheme of single transferable voting system, such an exercise is completely impermissible. The candidates are to be declared elected on the basis of achieving the quota ascertained. This court is therefore of the considered opinion that the entire approach of the Mayor/RO is contrary to the provisions of Regulations, 1958 and the Rules, 1956. The decision taken by the Mayor/RO is nothing but a colourable exercise of power.

155. The decision relied upon by the learned senior counsel appearing on behalf of the respondents in the case of **Harnek Singh** (*supra*) will not come to their aid for the reason that in paragraph no.

15 of the said decision, the Hon'ble Supreme Court has noted that there was efficacious alternative remedy and the lot was to be drawn which could not be completed owing to the commotion created by a particular group.

156. The decision in the case of **Krishna Ballabh Prasad Singh** (*supra*) relied upon by respondent no.4 is with respect to the election of assembly constituencies and the Hon'ble Supreme Court has taken note of the fact that there was a bar imposed by Clause (b) of Article 329 of the Constitution of India to entertain a writ petition as an election petition was the proper remedy. The decision in the case of **Kiran Pal Singh Tyagi** (*supra*) was also with respect to the rejection of a nomination form in the election of the legislative assembly of National Capital Territory of Delhi.

157. The analysis above can be summarised in the form of the following conclusions:

- i. The writ petitions are found to be maintainable;
- ii. The action of Mayor/RO of rejecting the ballot and declaring it to be invalid, after the stage of scrutiny had reached and the quota successfully ascertained, the same is bad in law;
- iii. The decision of re-poll taken by the Mayor/RO is impermissible as the same was not based on any material relevant to the issue;
- iv. The decision of the Mayor/RO was in excess of powers conferred by the applicable law. The actions were without any power or authority and taken without jurisdiction.

158. In view of the aforesaid, the instant petitions are allowed. The impugned notice dated 24.02.2023 is hereby set aside. The respondent no.4-Mayor/RO is directed to declare the result in form no.4, forthwith while treating the disputed vote to have been validly cast in favour of Mr. Pankaj Luthra.

159. Accordingly, the petitions are disposed of along with pending applications.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

MAY 23, 2023
MJ/p'ma/nc

