REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7457 OF 2008

Uttamrao Shivdas Jankar …Appellant

Versus

Ranjitsinh Vijaysinh Mohite-Patil …Respondent

J U D G M E N T

S.B. SINHA, J :

1. The extent of jurisdiction of a returning officer to determine a question as to whether a nomination paper filed by an applicant to enable him to contest an election in terms of the provisions of the Representation of the People Act, 1951 (for short "the Act") on the premise that the names of the proposers were forged is the question involved in this appeal. It arises

out of a judgment and order dated 26.08.2008 passed by the Bombay High Court in Election Petition No. 1 of 2004.

2. Indisputably, an election to the local authorities constituency Solapur for Maharashtra Legislative Council Biennial Elections, 2003 was to take place. The parties hereto contested the said election. For the said purpose, the returning officer issued a notification declaring the programme for election of the said constituency in terms whereof nomination papers were to be submitted by 14.11.2003 before 3.00 p.m. and the scrutiny thereof was to be completed in his office on 15.11.2003 at 11.00 a.m.

3. Appellant filed his nomination paper in the prescribed form in the office of the Returning Officer on 14.11.2003. As is required, his name was proposed by 10 voters. Sharif Mohammed Badshah Sutar and Sau. Jaymala Purnanand Mhetre (for short "the proposers") were the proposer Nos. 7 and 8 respectively. All the proposers signed the nomination papers in presence of each other as also in presence of the appellant and one Ratan Govind Pandit, brother of Proposer No. 8.

4. The candidates took part in the scrutiny of nomination papers. Respondent raised an objection to the nomination of the appellant on the premise that the proposer Nos. 7 and 8 had not signed the nomination papers. A written objection to the aforementioned effect was also filed before the returning officer. Similar objection was also raised in relation to the nomination of Shri Subhash Rajaram Patil, another candidate. The aforementioned alleged proposers also submitted letters containing identical contentions that they had not signed the nomination papers of the appellant and, thus, the same should be rejected. They also affirmed affidavits inter alia contending that their signatures in the nomination papers were forged. In response thereto, appellant filed three affidavits, viz., (i) affirmed by himself, (ii) jointly affirmed by five of his proposers and (iii) by Ratan Govind Pandit, brother of proposer No. 8. In the said affidavits, it was stated that the nomination papers bore the signature of the aforementioned proposer Nos. 7 and 8. It was furthermore contended that the affidavits filed by the proposer Nos. 7 and 8 were allegedly prepared by Shri Jaksan, Advocate & Notary, Solapur which was not mentioned in his register.

5. It is, however, not in dispute that in terms of the request made by the appellant the records of the office of Mangalwedha Municipal Council whereof the proposer Nos. 7 and 8 were members were called for the purpose of verification of their signatures.

6. The scrutiny of the nomination papers was adjourned till 3.45 p.m. on 15.11.2003. The matter was again taken up at the said time. The returning officer compared the signatures of the said proposers. They were also present before him. Admittedly inter alia on the premise that the signatures of proposer Nos. 7 and 8 were not genuine, the nomination of the appellant was rejected. By a separate order, the nomination of Shri Subhas Rajaram Patil was also rejected. Another candidate Shri Dilip Dyandeo Chougule withdrew his candidature as a result whereof the respondent was declared elected as an uncontested candidate in terms of Section 53(2) of the Act read with Rule 11(1) of the Conduct of Election Rules, 1961 (for short "the Rules").

7. Appellant filed a writ petition questioning the rejection of his nomination which, however, was permitted to be withdrawn on 20.12.2003 allowing the appellant to pursue appropriate remedies available to him.

8. Appellant allegedly obtained forensic examination reports from the Forgery Detection Private Bureau upon comparative analysis of the signatures of the said two proposers in the nomination papers and the sample signatures contained in the attendance sheets of Mangalwedha Municipal Council on 20.12.2003.

9. Inter alia relying on or on the basis of the reports of the experts as also questioning the mode and manner in which the decision making process had been resorted to by the returning officer, he filed an election petition on 30.12.2003, which was marked as Election Petition No. 1 of 2004.

10. Respondent indisputably filed an interlocutory application which was marked as Application No. 1 of 2004 for summary dismissal of the said petition contending that although the same was based on allegations of corrupt practices within the meaning of Section 100(d)(ii) of the Act but it

did not contain the material particulars as required under Section 83(1)(b) of the Act read with Rule 94-A of the Rules.

11. During hearing of the said proceeding, the counsel appearing on behalf of the appellant inter alia contended that what was in question in the election petition was the decision making process on the part of the Returning Officer and it was not a case where the election petition was based on the allegations of corrupt practices.

12. By reason of a judgment and order dated 25.11.2004, the aforementioned application No. 1 was dismissed, stating:

> "14. It is really a matter of interpretation whether the petitioner has verified merely the fact that the said affidavits have been relied or whether he has verified the truth of the contents thereof. However, in my opinion this application can be disposed of on a narrower issue and without deciding whether or not the petitioner has made the alleged corrupt practices as a part of the cause of action on the basis of which the reliefs in the Election Petition have been prayed for. I will assume for the purpose of which order that the petitioner has alleged corrupt practices on the part of the Respondent."

Noticing that the election was challenged in terms of Section 100(1)(c) and (d)(iv) of the Act, it was opined that the election petition was maintainable on the aforementioned grounds.

It was, however, observed:

> "Before parting with this order it is necessary to refer to the fact that Mr. Aney reiterated that the petitioner, for the purpose of this petition, does not allege any corrupt practice by or on behalf of the respondent. Thus at the trial, the petitioner shall not seek to raise or frame any issue in this regard. It will not be necessary for the respondent in his written statement to deal with any corrupt practice including those alleged in the writ petition or in Exhibits H, I and J to the Election Petition. This logically follows from paragraph No.28 of the election petition and Mr. Aney's statement that it is the decision making process/the manner in which the Returning Officer has come to his decision that is under challenge and the sole basis on which the election petition is based. It is further clarified that all contentions with respect to the grounds on which the Election Petition is found are kept open including the grounds of non-joinder of necessary parties as well as the ground that by merely by even successfully challenging the decision making process adopted by the Returning Officer the election is not liable to be set aside."

13. Respondent filed his written statement thereafter. The learned Judge of the High Court framed the following issues in the election petition:

> "1. Whether the Petitioner proves that his nomination for election to the Local Authorities Constituency, Solapur of the Maharashtra Legislative Council Biennial Elections 2003 was improperly rejected by the Returning Officer?
>
> 2. Whether the Returning Officer committed breach of the provisions of Sub-section (1) of Section 36 of the Representation of the People Act, 1951 by entertaining Petitioner's two proposers namely; Sau. Jaymala Purnanand Mhetre and Sharif Mohammad Badshah Sutar personally at the time and place of scrutiny of the nomination and by further accepting and relying on their affidavits and written complaints, as alleged by the petitioner?
>
> 3. Whether the enquiry conducted by the Returning Officer resulting into the rejection of the Petitioner's nomination for the election in question was not in accordance with the provisions of sub-section (2) of Section 36 of the Representation of the People Act, 1951, as alleged by the petitioner?
>
> 4. Whether the Petitioner proves that result of the election in question, in so far as it concerns the returned candidate i.e. Respondent, herein, has been materially affected by non-compliance with the

provisions of Sub-sections (1) and (2) of Section 36 of the Representation of the People Act, 1951?

5. Whether the election of the Respondent as member of the Maharashtra Legislative Council from the Local Authorities Constituency, Solapur and the Maharashtra Legislative Council Biennial Election, 2003 is void and liable to be set aside on the grounds provided under clause (c) of sub-section (1) of Section 100 or both of the Representation of the People Act, 1951?

6. What order is the Petitioner entitled to, if any?"

14. Appellant thereafter affirmed an affidavit in lieu of his examination-in-chief; paragraph 3 whereof reads as under:

"…I say that the ten electors of the said constituency i.e. Arun Balasaheb Killedar, Pandurang Vitthal Taad, Maksuud A. Rahim Bhagwan, Anna Damodar Raut, Vijay Soma Khavatode, Dhananjay Appasaheb Koli, Sharif Mohammad Badshah Sutar, Sau. Jaymala Purnanand Mhetre, Dattatrya Balasaheb Kambale and Sau Indrabai Bapu Metkari whose names have been mentioned by me in paragraph five of Election Petition had agreed to stand as prosposers on my request, including the two electros mentioned at Sr. No.7 and 8 i.e. Sharif Mohammed

Badshah Sutar and Sou. Jaymala Purnanad Mhetre. I say that accordingly all the said ten electors and one Ratan Govind Pandir came to residence of Arun Balasaheb Killedar at Mangalvedha as per my request around 10.11 am to 10.30 am on 14.11.2003. I say that around 10.00 am to 10.30 am. I myself was present at the residence of said Arun Balasaheb Killedar along with Ratan Govind Pandit and the said ten proposers and some other supporters. I say that I first signed the nomination paper in prescribed form and thereafter all the said ten proposers including the proposers at Sr.No.7 and 8 mentioned in paragraph five of Election Petition also signed in my presence and in presence of each other including in presence of Ratan Govind Pandit and other persons. The said Ratan Govind Pandit is real brother of Sou. Jaymala Purnanand Mhetre. I have already filed a copy of the said nomination paper on record along with petition at Exhibit 'B'. I have also caused to call for the original of said nomination paper through summons from office of the Returning Officer. The officer from the office of Returning Officer has already produced on record the said nomination listed at Sr.No.2 in the list produced along with documents. I have seen the original from the record. I identify my signatures on it and signatures of all ten proposers. I say that Sharif Mohammed Badshah Sutar and Sou. Jaymala Purnanand Mhetre have signed on said nomination paper at Sr.No.7 and 8 respectively in the column provided in the nomination for signatures of the proposers. I also identify their signatures. I say that the contents of nomination paper are true and correct. The said nomination paper be exhibited and read in evidence."

15. An objection was raised thereto by the respondent contending that in view of the concession made by the counsel of the appellant that the election petition was limited to the challenge to the decision making process of the returning officer, it is impermissible in law to allow him to raise a contention that the signatures of proposer Nos. 7 and 8 were in fact genuine. The said objection was upheld by the High Court by reason of an order dated 26.11.2007 holding that the appellant was bound by the concession made by his counsel. The said concession was sought to be withdrawn on the premise that it had wrongly been made. Appellant was given liberty to file an appropriate application for withdrawal thereof.

16. In terms of the liberty so granted, the appellant filed an application, which was marked as Application No. 2 of 2008. However, the said application was allowed to be withdrawn by an order dated 24.04.2008 as was requested by the counsel appearing on behalf of the appellant reserving his right to raise the same in an appeal that may be filed before this Court.

17. Appellant thereafter intended to adduce evidence that the said proposers were in the camp of the respondent. An objection raised in that

regard by the respondent, however, was overruled, subject to the clarifications made by the learned Judge in his order dated 24.06.2008.

18. Appellant thereafter was cross-examined. By reason of the impugned judgment, the High Court dismissed the said election petition opining that the returning officer had not committed any error in his decision making process in rejecting the said nomination paper.

19. Appellant has, thus, filed this appeal under Section 116A of the Act.

20. Mr. K.V. Viswanathan, learned senior counsel appearing on behalf of the appellant would urge:

(i) The Returning Officer in rejecting the nomination paper committed a manifest error of law insofar as he failed to take into consideration the purport and object of Section 36(2) of the Act as also the guidelines issued by the Election Commission of India contained in the 'Handbook for Returning Officers'.

(ii) The returning officer in his order having not taken into consideration the affidavits affirmed on behalf of the appellant misdirected himself in law; as the same were relevant for the purpose of determination of the issue.

(iii) In any event, the High Court committed a serious error insofar as it did not grant any opportunity to the appellant to adduce evidence in support of his contention that the nomination papers were in fact signed by the said proposers and only at a later point of time, they were won over.

21. Mr. L. Nageshwar Rao, learned senior counsel appearing on behalf of the respondent, on the other hand, would urge:

(i) The Returning Officer granted sufficient opportunity to the appellant herein not only to adduce evidence but also in acceding to his request to call for the records of the Municipal Council and, in any event, he cannot be said to have committed any error in his decision making process.

(ii) Keeping in view the statutory mandate contained in Section 36(5) of the Act read with the proviso appended thereto, as no adjournment could be granted, he was bound to dispose of the objection of the respondent promptly.

(iii) The High Court cannot be said to have committed any error of law in holding that the statement made by the proposers before the authority coupled with their affidavits could have been given primacy over the affidavits affirmed on behalf of the appellant.

(iv) Keeping in view the grounds raised in the election petition, viz., the scope of enquiry being summary in nature and limited, the returning officer had exceeded his jurisdiction in allowing the proposers to file affidavits and documents, it does not lie in the appellant now to contend that the affidavits filed on his behalf should also have been taken into consideration.

(v) The issues having been framed strictly in terms of the pleadings of the parties and no specific issue with regard to the genuineness or otherwise of the signatures of the proposers having been raised in the written statement, the High Court cannot be said to have committed any error in passing the impugned judgment.

22. The Act was enacted for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection therewith.

The term "sign" has been defined in Section 2(i) of the Act to mean "in relation to a person who is unable to write his name means authenticate in such manner as may be prescribed".

Part V of the Act provides for conduct of elections. Section 30 mandates the Election Commission to issue a notification appointing dates of nominations, etc. Section 31 provides for public notice of election. Qualification of a person for nomination of a candidate is provided for in Section 32. Section 33 details the mode and manner in which a nomination is to be filed. Section 35 empowers the returning officer to inform the person, who is delivering the nomination papers, the date, time and place

fixed for the scrutiny of nominations. Section 36 of the Act provides for scrutiny of nominations. Sub-sections (1), (2) and (5) thereof read as under:

> "36 - Scrutiny of nominations
> (1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.
> (2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds :--
> (a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:--
> Articles 84, 102, 173 and 191,.
> Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or
> (b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or
> (c) that the signature of the candidate or the proposer on the nomination paper is not genuine.]

> (3) *** ***
> (4) *** ***
> (5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:
> Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned."

Sub-section (6) of Section 36 mandates that the returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and in any event an order of rejection is passed, he is required to record in writing a brief statement of his reasons therefor.

23. Indisputably, the Election Commission of India has issued a Handbook for Returning Officers (for short "the Handbook"). We are concerned with Chapter VI of the Handbook. Paragraph 1 of the said Chapter provides for scrutiny of nominations by the returning officer. Paragraph 2 provides for restriction of entry of persons at the scrutiny.

Paragraph 4 mandates that all nomination papers were to be scrutinized by the returning officer. Paragraph 5 provides for objections and summary enquiry, stating:

> "5. Even if no objection has been raised to a nomination paper, you have to satisfy yourself that the nomination paper is valid in law. If any objection is raised to any nomination paper, you will have to hold a summary inquiry to decide the same and to treat the nomination paper to be either valid or invalid. Record your decision in each case giving brief reasons particularly where an objection has been raised or where you reject the nomination paper. The objector may be supplied with a certified copy of your decision accepting the nomination paper of a candidate after overruling the objections raised by him, if he applies for it. Your decision may be challenged later in an election petition and so your brief statement of reasons should be recorded at this time."

There exists a presumption of validity, as adumbrated in paragraph 6 thereof. It reads, thus:

> "6. There is a presumption that every nomination paper is valid unless the contrary is prima facie obvious or has been made out. In case of a reasonable doubt as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Remember that when ever a candidate's nomination paper has been improperly rejected and he is prevented thereby from contesting the election, there is a

> legal presumption that the result of the election has been materially affected by such improper rejection and the election will, therefore, be set aside. There is no such legal presumption necessarily in the converse case where a candidate's nomination has been improperly accepted. It is always safer, therefore, to be comparatively more liberal overlooking minor technical or clerical errors rather than strict in your scrutiny of the nomination papers."

Paragraph 7 makes the scrutiny of the nomination by the returning officer a quasi-judicial duty. It reads as under:

> "7. While holding the scrutiny of nomination paper, you are performing an important quasi-judicial function. You have, therefore, to discharge this duty with complete judicial detachment and in accordance with highest judicial standards. You must not allow any personal or political predilections to interfere with the procedure that you follow or the decisions you take in any case, fairness, impartiality and equal dealing with all candidates are expected of you by law. You must also depart yourself in such a manner that it would appear to all concerned that you are following this high code of conduct. Even if a candidate or his agent is difficult or cantankerous, you must exercise courtesy and patience. But at the same time you have to be firm so that your task may be accomplished in a prompt, orderly and business like manner."

24. Before the High Court, the parties had raised a large number of issues. The High Court, however, proceeded on the basis, keeping in view the aforementioned purported concession made by the learned counsel on behalf of the appellant, that the standard for interference therewith will be the same as comes within the purview of the power of judicial review of the High Court. In that view of the matter, the High Court opined:

(i) The extent of reasons and the depth of consideration to be reflected in the order passed by a returning officer accepting or rejecting the nomination paper must of necessity depend upon the nature of the proceeding.

(ii) As a decision is required to be rendered within a period of one or two days, no illegality was committed by the returning officer to take up the matter relating to scrutiny of nomination papers at 3.45 p.m. on the same day.

(iii) The returning officer even, in view of the differences in two sets of signatures, albeit slight, could have rejected the appellant's nomination.

(iv) When the proposers appeared before him, the returning officer was well within his right to adopt the approach of relying on the

statements made before him by them in preference to the affidavits of the parties.

It was observed:

> "75. While I intend dismissing the petition, I wish to make it expressly clear that my decision to dismiss this petition ought not to be construed as my having disbelieved the Petitioner's case on facts at all. In other words, this judgment ought not to be construed as my having disbelieved the Petitioner's case that the said two proposers had in fact signed his nomination papers or my having believed the Respondent's case or the case of the said two proposers that they had not signed the Petitioner's nomination forms."

25. Before adverting to the respective contentions, we may place on record that a fair statement made by Mr. Nageshwar Rao that Issue No. 1 framed by the High Court could have been held to have covered the genuineness or otherwise of the signatures of the proposers. The learned counsel, however, as noticed hereinbefore, would contend that keeping in view the concession made by the learned counsel on behalf of the appellant, the High Court could not have gone thereinto.

26. In our opinion, the following questions arise for our consideration:

(i) Whether the High Court was correct in confining itself to the 'decision making process' on the part of the Returning Officer while determining the genuineness of signatures of the two proposers?

(ii) Whether the Returning Officer having shifted the onus of proof upon the appellant committed an error in its decision making process?

(iii) Whether the purported concession was wrong and in any event, by reason thereof, the appellant was precluded from adducing any evidence in regard to the genuineness of the signatures of the proposer Nos. 7 and 8, to which he was otherwise entitled to?

27. Section 100 of the Act provides for the grounds for declaring election to be void inter alia in a case where a nomination has been improperly rejected. Improper rejection of a nomination, on a plain reading of the aforementioned provision, in our opinion, would not mean that for the said purpose an election petitioner can only show an error in the decision making process by a Returning Officer but also the correctness of the said decision. Indisputably, there exists a distinction between a decision making process

adopted by a statutory authority and the merit of the decision. Whereas in the former, the court would apply the standard of judicial review, in the latter, it may enter into the merit of the matter. Even in applying the standard of judicial review, we are of the opinion that the scope thereof having been expanded in recent times, viz., other than, (i) illegality, (ii) irrationality and (iii) procedural impropriety, an error of fact touching the merit of the decision vis-à-vis the decision making process would also come within the purview of the power of judicial review.

In Cholan Roadways Ltd. v. G. Thirugnanasambandam [(2005) 3 SCC 241], this Court observed:

> "34. … It is now well settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of res ipsa loquitur which was relevant for the purpose of this case and, thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not germane for determining the issue, namely, that the passengers of the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the correct standard of proof in relation to a domestic enquiry, which is "preponderance of

> probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out.
> 35. Errors of fact can also be a subject-matter of judicial review. (See E. v. Secy. of State for the Home Deptt.) Reference in this connection may also be made to an interesting article by Paul P. Craig, Q.C. titled "Judicial Review, Appeal and Factual Error" published in 2004 Public Law, p.788."

In S.N. Chandrashekar v. State of Karnataka [(2006) 3 SCC 208], this Court observed:

> "33. It is now well known that the concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reason) inconsistent, unintelligible or substantially inadequate. (See de Smith's Judicial Review of Administrative Action, 5th Edn., p. 286.)
> 34. The Authority, therefore, posed unto itself a wrong question. What, therefore, was necessary to be considered by BDA was whether the ingredients contained in Section 14-A of the Act were fulfilled and whether the requirements of the proviso appended thereto are satisfied. If the same had not been satisfied, the requirements of the law must be held to have not been satisfied. If there had been no proper application of mind as regards the requirements of law, the State and the Planning Authority must be held to have misdirected themselves in law which would vitiate the impugned judgment.

[See also Indian Airlines Ltd. v. Prabha D. Kanan (2006) 11 SCC 67 and Meerut Development Authority v. Association of Management Studies & Anr. 2009 (6) SCALE 49]

28. The Returning Officer is a statutory authority. While exercising his power under Section 36 of the Act, he exercises a quasi-judicial power. For the said purpose, the statute mandates him to take a decision. A duty of substantial significance is cast on him. As in the present case, by his order the fulcrum of the democratic process, viz., election can be set at naught. Improper rejection of nomination paper, in the instant case, may lead a party not to enter into the fray of elections. It is also now a trite law that once a finding is arrived at by the Election Tribunal that the order of rejecting the nomination was improper which would take within its umbrage not only the decision making process but also the merit of the decision, no further question is required to be gone into. The Tribunal had no other option but to set aside the election of the winning candidate.

In N.T. Veluswami Thevar v. G. Raja Nainar and Ors. [1959 Supp (1) SCR 623], this Court held:

> "…Under Section 32 of the Act, any person may be nominated as a candidate for election if he is duly qualified under the provisions of the Constitution and the Act. Section 36(2) authorises the Returning Officer to reject any nomination paper on the ground that he is either not qualified, that is, under Sections 3 to 7 of the Act, or is disqualified under the provisions referred to therein. If there are no grounds for rejecting a nomination paper under Section 36(2), then it has to be accepted, and the name of the candidate is to be included in a list. Vide Section 36(8). Then, we come to Section 100(l)(c) and Section 100(l)(d)(i), which provide a remedy to persons who are aggrieved by an order improperly rejecting or improperly accepting any nomination. In the context, it appears to us that the improper rejection or acceptance must have reference to Section 36(2), and that the rejection of a nomination paper of a candidate who is qualified to be chosen for election and who does not suffer from any of the disqualifications mentioned in Section 36(2) would be improper within Section 100(l)(c), and that, likewise, acceptance of a nomination paper of a candidate who is not qualified or who is disqualified will equally be improper under Section 100(l)(d)(i)."

In Birad Mal Singhvi v. Anand Purohit [1988 Supp SCC 604], this Court held:

> "…The Returning Officer placing reliance on the entries contained in the public document i.e. the electoral roll, rejected the nomination paper of the two candidates on the ground that Hukmi Chand and Suraj Prakash Joshi were not qualified to contest the election. In the absence of any material before the returning officer, the Returning Officer was not wrong in taking the entries in the electoral roll into consideration and acting on them. But his decision is not final. In an election petition it is open to an election petitioner to place cogent evidence before the High Court to show that the candidate whose nomination paper was rejected had in fact attained the age of 25 years on the relevant date. It is open to the High Court to take a final decision in the matter notwithstanding the order of the Returning Officer rejecting the nomination paper. If on the basis of the material placed before the High Court it is proved that the candidate whose nomination paper had been rejected was qualified to contest the election it is open to the High Court to set aside the election. Enquiry during scrutiny is summary in nature as there is no scope for any elaborate enquiry at that stage. Therefore it is open to a party to place fresh or additional material before the High Court to show that the returning officer's order rejecting the nomination paper was improper. It should be borne in mind that the proceedings in an election petition are not in the nature of appeal against the order of the returning officer. It is an original proceeding. In the instant case it was open to the respondent election petitioner to place material before the High Court to show that the two candidates were qualified and their nomination paper was improperly rejected."

[See also Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673]

In Pothula Rama Rao v. Pendyala Venkata Krishna Rao [(2007) 11 SCC 1], this Court held:

> "8. If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to sub-section (1) of Section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination was subscribed by ten proposers who were electors of the constituency and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognised political party by issue of a valid B-Form and that his nomination was signed by an elector of the constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action."

29. While exercising his quasi-judicial power, in terms of the provisions of the Act, it was incumbent upon the Returning Officer to follow the instructions contained in the Handbook. It provides for:

(i) opportunity to be given to candidate to rebut the objections by placing sufficient materials on record:

(ii) A presumption of validity of such nomination paper.

30. Indisputably, the said instructions are binding being statutory in nature. [See Rakesh Kumar v. Sunil Kumar (1999) 2 SCC 489]

31. When there exists a presumption in favour of a party, it is for the other party to adduce evidence.

32. At this juncture, the order passed by the returning officer may be noticed which was in the following terms:

> "1) The disputed proposers have physically appeared before me and they have also submitted affidavits in which they stated that they have not signed any nomination paper of Shri Jankar U.S. The signatures as shown in the said nomination

paper of Shri Jankar U.S. are forged and not genuine.

2) Another contention of defendant i.e. Shri Jankar U.S. is that specimen signatures of the disputed proposers shall be called for and examined. The specimen signatures were accordingly called for from the Municipal Council of Mangalwedha. They were compared with the signatures in the nomination paper. As there were subtle differences in these two sets of signatures of each of these disputed proposers, it was not possible to arrive at a conclusion on this basis. All the disputed proposers have appeared before me and filed their affidavits. They were explained and warned about the consequences of filing a wrong affidavit. As the disputed proposers have physically appeared before me in person and filed affidavits saying that the signatures in nomination paper are forged, there is no reason to set aside their affidavits. The proceeding before the Returning Officer is in the nature of a summary enquiry as per Section 36(2) of the Representation of People Act, 1951. The defendant Shri Jankar U.S. could not produce any evidence which would have conclusively proved that the disputed proposers had originally signed but changed their mind later on. The point made by the defendant that the disputed proposers had initially proposed the name but changed their mind later on cannot be considered for want of unambiguous and conclusive proof.

Based on the above discussion, I am of the opinion that the onus of proof now lies on the defendant. But, the defendant could not furnish such an evidence. Therefore, I have come to the conclusion that the signatures of the disputed

> proposers in the nomination form of defendant Shri Jankar U.S. are not genuine and thereby it will have to be rejected u/s 36(2)(c) of the Representation of the People Act, 1951."

33. Before the returning officer, two sets of signatures were available. He could not have, on his own showing, arrived at any conclusion on that basis, particularly when prima facie he did not find the signatures of the concerned proposers to be discrepant on the basis of the naked eye comparison of their admitted signatures and the ones appearing in the registers of the Municipal Council. While, as indicated hereinbefore, he proceeded on the basis that the said proposers were appearing before him and filed their affidavits, indisputably affidavits had not only been filed by five others including the appellant but also by the brother of the proposer No. 8. The evidence before the returning officer, therefore, was by way of affidavits affirmed by the parties. Appellant not only affirmed an affidavit denying and disputing the contents filed by the said proposers but also brought on record the affidavits filed by other proposes who testified to the effect that they had signed in their presence. Even the returning officer, ex facie, did not find any

difference in their signatures in the nomination paper and signatures contained in the attendance sheets of Mangalwedha Municipal Council.

34. On the aforementioned premise, it was obligatory on the part of the returning officer to draw a presumption. He proceeded on the basis that it was for the appellant to produce any evidence which would be conclusive proof that the proposer Nos. 7 and 8 had changed their mind later on. It was, to our mind, an irrelevant question.

35. The presumption of correctness of the nomination paper being statutory in nature, as intention of the Parliament as also the Election Commission was that even if somebody had filed an improper nomination, but for which he can be given benefit of doubt being a possible subject matter of an election petition where the question would be gone into in details, it was for the respondent herein to prove that the nomination paper prima facie did not contain the signatures of the proposers and, thus, were liable to be rejected.

36. We must, however, notice another aspect of the matter: A quasi-judicial authority while deciding an issue of fact may not insist upon a conclusive proof. While doing so, he has to form a prima facie view. Indisputably, however, in terms of sub-section (5) of Section 36 in Handbook for Returning Officers, if any objection is raised then while holding the summary inquiry in the matter of taking a decision on the objection as to whether the same is valid or not, he is not only required to record his brief decision for the same but further in case of doubt the benefit must go to the candidate and the nomination paper should be held to be valid although his view may be prima facie a plausible view or otherwise bona fide.

37. In an election petition, the High court, therefore, was required to consider whether he had wrongly shifted the onus in view of S.N. Chandrashekar (supra), which would come within the purview of an error apparent on the face of the record. It is of some significance to note that in De Smith's Judicial Review [Harry Woolf, et. al. (Eds.), De Smith's Judicial Review, 6th Edition, London: Sweet & Maxwell, 2007, Para 11-056] it is stated as under:

"Our view is that mistake of fact in and of itself renders a decision irrational or unreasonable. In general it is right that courts do leave the assessment of fact to public authorities which are primarily suited to gathering and assessing the evidence. Review must not become appeal. On the other hand it should be presumed that Parliament intended public authorities rationally to relate the evidence and their reasoning to the decision which they are charged with making. The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration; or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision upon any evidence. In this limited context material error of fact has always been a recognized ground for judicial intervention. Since E, however, the circumstances in which a decision of the primary decision-maker may be impugned on fact has been somewhat curtailed. In *Shaheen v. Secretary of State for the Home Department, [2005] EWCA Civ 1294,* Brooke L.J. for the Court of Appeal, was unwilling to reopen the decision of the primary decision-maker taken on a mistaken belief that there was no evidence to refute a material fact. He suggested the following possible summary of the situation to date :

> '(i) Proof or admission that the tribunal of fact misapprehended a potentially decisive element of the evidence before it discloses an error of law (as held in the *E case*, [2004] Q.B. 1044)
>
> (ii) Proof of admission of a subsequently discovered fact permits an appellate

> court to set aside a decision for fraud, provided that it was potentially decisive and it can be shown that the defendant was responsible for its concealment.
>
> (iii) The emergence of any other class of new fact, whether contested or not, has either to be processed (within the Immigration Rules in that case) or simply lived with, as Lord Wilberforce explained in the *Ampthill Peerage case [1977] A.C. 547*... In any other case, finality prevails'."

38. Evidence by way of an affidavit is one of the modes of proving a question of fact both under the Code of Civil Procedure as also under the Code of Criminal Procedure besides other special statutes recognizing the same.

39. The Returning Officer, thus, while exercising his quasi judicial function could have appreciated the evidence brought on record by the parties by way of affidavits. A wrong question posed, leads to a wrong answer, which is a misdirection in law. [See Cholan Roadways Ltd. (supra)]

40. In an election petition, the High Court acts as a Court of original jurisdiction and the election petition is a civil trial and the jurisdiction in

such a trial, stricto sensu cannot be said to be appellate in nature. Clearly, the High Court acted illegally in treating its power only as an appellate authority and not as an original authority for it only proceeded to try and determine as to whether or not the decision making process is legal. That approach of the High court in our considered opinion was illegal and unjustified. The High court was duty bound to treat the matter on merits by framing issues and thereafter calling for production of evidence in support of their respective cases. The High court should have examined the veracity of the rival claims based on the evidence produced by the parties and should have tested the correctness of the affidavits. The opinion of the hand writing expert in that regard would have been sufficient and on the basis of the same it could be possible for the High court to decide the entire lis between the parties. The High Court despite being the Court of original jurisdiction acted as a court of appellate jurisdiction and dismissed the petition without allowing the parties to produce evidence in support of their contention. As the matter has not been adjudicated on merits, we set aside the judgment and order passed by the High Court and remit the matter to the High Court to proceed in accordance with law and decide the dispute raised in the election petition in accordance with law as expeditiously as possible and at least

within a period of six months from today. Since it is an election petition and is required to be decided within a period of six months, the High Court should make an endeavour to complete the trial within a period of six months from today, if necessary by holding a day to day trial.

41. However, a statutory right of a party to file an election petition cannot and, in our opinion, for all intent and purport, should not be denied only on the basis of a wrong concession made by a counsel. We have noticed hereinbefore the order dated 25.11.2004 passed in Application No. 1 of 2004 in Election Petition No. 1 of 2004. Therein, a contention was raised that the election petition was not based on corrupt practices. The concession, if any, was confined only to the said question, by reason thereof, a right vested in a suitor by reason of a statute could not have been taken away. [See M.P. Gopalakrishnan Nair and Another v. State of Kerala and Others (2005) 11 SCC 45, para 53]

42. In view of our findings aforementioned, we are of the opinion that the impugned judgment cannot be sustained, which is set aside accordingly and the matter is remitted to the High Court for consideration of the matter

afresh. The appeal is allowed with the aforementioned directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

…….J.
[S.B. Sinha]

..…….J.
[Dr. Mukundakam Sharma]

New Delhi;
May 15, 2009