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RESERVED

Case :- ELECTION PETITION No. - 17 of 2019

Petitioner :- Tej Bahadur

Respondent :- Narendra Modi

Counsel for Petitioner :- In Person, Dharmendra Singh, Tej Bahadur (In Person)

Counsel for Respondent :- K.R. Singh, -, Dheeraj Jain, Dr. Santosh Jain

Hon'ble Manoj Kumar Gupta, J.

1. By means of the present petition, filed under Section 80, 80-A and 100 of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act'), the petitioner has called in question the election of the respondent to the 17th Lok Sabha from 77th Parliamentary Constituency (Varanasi), held in April - May 2019. The petitioner has sought a declaration to the effect that the election of the respondent be declared void and the order passed by the Returning Officer dated 1.5.2019, rejecting his nomination, be set aside. He has also made a prayer for taking action against the Returning Officer for misuse of official powers by invoking Section 123(2), read with Section 134 of the Act.

2. The petition was entertained by this court and notice was issued to the respondent, calling for his reply. In response thereto, the respondent entered appearance. An application was filed by him under Order 6 Rule 16 C.P.C.

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and Order VII Rule 11 C.P.C., read with Section 86(1) of the Act, praying for striking off paragraphs-4 to 28 of the petition and also for dismissing the same by exercising power under Order VII Rule 11 C.P.C., as it discloses no cause of action and also for the reason that the petitioner has no locus standi to file the same. The petitioner filed a reply to the said application by way of a counter affidavit. Thereafter, Sri Shailendra, learned Senior Counsel for the petitioner, assisted by Sri Dharmendra Singh, and Sri Satya Pal Jain, learned Senior Advocate for the respondent, assisted by Sri Dheeraj Jain, Sri K.R. Singh and Dr. Santosh Jain, were heard at length on the said application.

3. The case set up by the petitioner is that he filed his nomination for the election as an independent candidate on 24.4.2019. Subsequently, he filed another nomination as official candidate of Samajwadi Party on 29.4.2019, the last date for filing of nomination. He was issued a checklist by Returning Officer on the same date at 1:43 p.m., without raising any objection in regard to the nomination papers. On 30.4.2019, the date fixed for scrutiny, he received a notice from the Returning Officer at 3:03 p.m., followed by another notice on the same date, at 6:15 p.m., alleging that the petitioner had not filed certificate from the Election Commission to the effect that he had not been

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dismissed from the service of Government of India, on ground of corruption or disloyalty to the State, albeit, a period of five years had not expired from the date of his dismissal on the date of filing of the nominations, in terms of Section 9, read with Section 33(3) of the Act. The petitioner claims to have responded to the said notice by filing his dismissal order dated 19.4.2017, before the Returning Officer, pointing out that although he was dismissed from service of Government of India, but the dismissal was not on the ground of corruption or disloyalty to the State. It is also asserted that after receipt of second notice, he approached the Election Commission of India on the same day, by making an application be registered post and also be sending the same by E-mail, requesting it to issue the certificate contemplated under Section 9(2) of the Act. It is also asserted that on the next date, i.e. 1.5.2019, his Power of Attorney submitted application by hand in the office of the Election Commission of India at 9:00 a.m., but the certificate was not made available to him. His nomination paper was rejected on 1.5.2019 at 11:00 a.m. It is also alleged that till the filing of the election petition, he had not been informed about the fate of his application. He claims to have filed a writ petition, bearing number 646 of 2019, before the Supreme Court,

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under Article 32 of the Constitution of India, challenging the order of Returning Officer dated 1.5.2019, but which was rejected by the Supreme Court by order dated 9.5.2019, declining to entertain the same. It is asserted that News Channel ABP telecasted a programme on 16.5.2019 mentioning that the nomination of the petitioner was rejected on extraneous considerations and under pressure. The Returning Officer, as well as the Central Observer Praveen Kumar had not acted fairly, but in a partisan manner, in rejecting the nomination of the petitioner. The petitioner initially also impleaded the District Election Officer and the Election Observer, as party-respondents to the election petition, alleging that they did not discharge their functions objectively and action be taken against them for misusing their official powers by invoking Section 134 of the Act. However, on the very first date of hearing of the election petition, he got their names deleted from the array of parties. The petitioner has prayed for declaring the election of respondent to be void on the ground that his nomination was improperly rejected; that nomination of the respondent was wrongly accepted; and on account of misuse of official powers by the Returning Officer and the Central Observer.

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4. It is clear from the facts stated in the election petition that the petitioner was in service of Government of India (Border Security Force) and was dismissed on 19.4.2017. On 24.4.2019, as well as on 29.4.2019, the two dates on which two different sets of nominations were filed, the period of five years had not elapsed, since the dismissal of the petitioner from service. It is also an admitted fact that along with his nomination papers, the petitioner did not file any certificate from the Election Commission of India to the effect that he had not been dismissed on ground of corruption or disloyalty to the State.

5. The application filed by the respondent under Order VII Rule 11 C.P.C is primarily on the ground that the petitioner whose nomination was rejected, could not claim himself to be a candidate at the election, nor he was elector from the parliamentary constituency from where he filed his nomination and therefore, in view of Section 81 of the Act, he is not competent to file the election petition. It has also been alleged that the election petition is devoid of material facts, nor discloses any cause of action. The averments made are wholly vague and does not raise any triable issue for consideration by this court. It is also the case of the respondent that the pleadings are frivolous, vexatious, unnecessary, irrelevant and are of such nature

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which would prejudice and delay the fair trial of the election petition. Consequently, paragraphs-4 to 28 of the election petition are liable to be struck off. The allegations regarding wrongful acceptance of the nomination papers of the respondent is devoid of material particulars. Moreover, the allegation of alleged corrupt practice against officials of Election Commission of India, without stating any basis for the same and without giving any supporting facts or particulars, do not call for any detailed trial. The pleadings made in this regard without furnishing material facts and particulars, being frivolous and vexatious, are liable to be struck off, in exercise of power under Order 6 Rule 16 C.P.C.

6. The petitioner filed a counter affidavit to the said application and asserted that since he was not dismissed on the ground of corruption or disloyalty to the State, therefore, he would not fall within the ambit of Section 9 and 33 of the Act. There is presumption that every nomination paper is valid, unless the contrary is prima facie obvious, or has been made out. In case of doubt as to validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination should be held to be valid. The Returning Officer has misused his power in rejecting the nominations of the

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petitioner. It has been denied that the averments made in the election petition are vague or that the election petition does not disclose any cause of action; or that, he has no locus to file the election petition.

7. Counsel for the petitioner has raised objection against the maintainability of the application filed by the respondent on the ground that it contains two prayers i.e., one for striking off the pleadings of the election petition in exercise of power under Order 6 Rule 16 CPC and the other for rejection of the petition under Order VII Rule 11 CPC. He has placed reliance on Rule 28 of the General Rule Civil, which provides that separate application should be made in regard to distinct matter in contending that the application should be rejected for the said reason.

8. The objection does not have any force. Both the prayers are interlinked with each other and relate to the same subject matter. The contention of the respondents is that the pleadings in the election petition are wholly vague, frivolous and vexatious, therefore, such pleadings should be struck off. The application goes on to mention that once the pleadings, as contained in paragraphs 4 to 28 of the election petition are struck off, apart from the fact that the petitioner has no locus to file the instant election petition, it will also be bereft of any cause of

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action. Even otherwise, the power under Order 6 Rule 16 CPC as well as Order VII Rule 11 CPC could be exercised by the Court even suo moto without any application from the rival side.

9. It is next submitted that the petitioner has controverted the averments made in the application by filing counter affidavit but the respondent has failed to file any affidavit in rebuttal, therefore the averments made in the counter affidavit should be taken to be true. Accordingly, the application deserves to be rejected. The argument is wholly misconceived in as much as both the prayers contained in the application filed by the respondent have to be decided on basis of assertions made in the election petition and not on basis of the stand taken by the petitioner in the counter affidavit.

10. It is next urged that the affidavit filed in support of the application having been sworn before Notary Public, New Delhi, does not comply with the requirement of Rule 11 of Ch. XV-A of the Allahabad High Court Rules. Ch. XV-A of the Allahabad High Court Rules regulates the filing of election petition and its trial before this Court. Rule 11 stipulates that an application shall ordinarily be accompanied by an affidavit. It also provides that subject to the proviso to sub-section (1) of Section 83 of the Act,

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the provisions of Ch. IV as to affidavits shall apply to proceedings under this Chapter. The provision does not postulates filing of affidavit alongwith every application. Since the power to reject election petition under Order VII Rule 11 could be exercised even suo moto, therefore, the application even unsupported by an affidavit would suffice. Moreover, the provisions of Ch. IV which relates to affidavits and Oath Commissioner, particularly, Rule 5 thereof, on which emphasis was laid by learned counsel for the petitioner, does not make it imperative that the affidavit filed in support of the application could only be sworn before Oath Commissioner appointed by this Court. It only speaks of duty of the Oath Commissioner that he shall not allow an affidavit to be sworn before him, unless it complies with the provisions of the said Chapter. Thus, the objection has no force.

11. Coming to the merits, the first issue which requires to be answered is whether an election petition filed under Section 81 of the Act could be dismissed, exercising power under Order VII Rule 11 C.P.C.

12. Article 329(b) of the Constitution of India provides that “no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented

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to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature”.

13. In **Jyoti Basu & Others vs. Debi Ghoshal & Others, AIR 1982 SC 983**, the Supreme Court has held that right to elect, right to be elected and right to dispute an election, are not fundamental rights, but pure and simple statutory rights. *“Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket.”*

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14. The above first principle of election law was reiterated by the Supreme Court in **Sunil Kumar Kori vs. Gopal Das Kabra, (2016) 10 SCC 467**, observing that an election petition is not an action at common law, nor in equity, but statutory in nature.

15. On 12th May 1950, the Parliament enacted the Representation of the People Act, 1950, providing for allocation of seats in and the delimitation of constituencies for the purpose of election to, the House of the People and the Legislatures of States, the qualifications of voters at such elections, the preparation of electoral rolls, the manner of filling seats in the Council of States to be filled by representatives of Union Territories, and matters connected therewith. In quick succession, on 17.7.1951, the Parliament enacted the Representation of the People Act, 1951, providing for the conduct of elections of 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 with such elections.

16. Section 80 of the Act stipulates that no election shall be called in question, except by an election petition,

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presented in accordance with the provisions of this part. Section 81 of the Act relates to presentation of election petition; Section 82 specifies the person who have to be joined in an election petition; Section 83 prescribes for the contents of an election petition and it reads thus: -

83. Contents of petition.—(1) *An election petition-*

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

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; 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:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

17. Section 86 relates to the trial of election petition by High Court and Section 87 embodies the procedure to be followed by High Court in trying an election petition and reads thus: -

87. Procedure before the High Court.—(1) *Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in*

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accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

18. Section 87 of the Act thus makes applicable, as nearly as may be, the procedure provided under the Code of Civil Procedure to election petition. Consequently, Order VII Rule 11 C.P.C. applies to an election petition, filed under the Act. Order VII Rule 11 C.P.C. reads thus: -

11. Rejection of plaint — *The plaint shall be rejected in the following cases:—*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law :

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that

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the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

19. In **Azhar Hussain vs. Rajiv Gandhi, AIR 1986 SC 1253**, the Supreme Court, after considering a catena of previous decisions on the point, held that an election petition could be dismissed summarily in exercise of power under Order VII Rule 11 C.P.C., if it does not furnish a cause of action. It would be advantageous to quote: -

“11. In view of this pronouncement there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers under the Code of Civil Procedure can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with. This”

“12. Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of

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Damocle need not be kept hanging over his head unnecessarily without point or purpose."

20. The Supreme Court, in **Madiraju Venkata Ramana Raju vs Peddireddigari Ramachandra Reddy, (2018)**

14 SCC 1, explained the difference in scope between Order VII Rule 11 C.P.C. and Order 14 Rule 2 C.P.C. and thereafter held that an application under Order 7 Rule 11 CPC deserves consideration at the threshold -

"24. Ordinarily, an application for rejection of election petition in limine, purportedly under Order VII Rule 11 for non-disclosure of cause of action, ought to proceed at the threshold. For, it has to be considered only on the basis of institutional defects in the election petition in reference to the grounds specified in clauses (a) to (f) of Rule 11. Indeed, non-disclosure of cause of action is covered by clause (a) therein. Concededly, Order VII of the CPC generally deals with the institution of a plaint. It delineates the requirements regarding the particulars to be contained in the plaint, relief to be specifically stated, for relief to be founded on separate grounds, procedure on admitting plaint, and includes return of plaint. The rejection of plaint follows the procedure on admitting plaint or even before admitting the same, if the court on presentation of the plaint is of the view that the same does not fulfill the statutory and institutional requirements referred to in clauses (a) to (f) of Rule 11. The power bestowed in the court in terms of Rule 11 may also be exercised by the court on a formal application moved by the defendant after being served with the summons to appear before the Court. Be that as it may, the application under Order VII Rule 11 deserves consideration at the threshold."

"45. In Kuldeep Singh Pathania (supra), the decision of the High Court which is similar to one under consideration (namely the impugned judgment) had accepted the explanation offered by the respondents and meticulously dealt with it to conclude that the petition did not disclose any cause of action since it

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*lacked material facts. The High Court passed that order purportedly in exercise of power under Order XIV Rule 2. This Court pointed out the distinction between an order under Order VII Rule 11 to reject the election petition in limine for non disclosure of cause of action and an order under Order XIV Rule 2 for disposal of the petition on a preliminary issue. In that case, the order passed by the High Court was relatable only to Order VII Rule 11. This Court adverted to the decisions in *Mayar (H.K.) Ltd. and Ors. Vs. Owners and Parties Vessel M.V. Fortune Express and Ors.* 40 and *Virendra Nath Gautam Vs. Satpal Singh and Ors.*,⁴¹ and explicated that under Order VII Rule 11(a), only the pleadings of the plaintiff-petitioner can be looked at as a threshold issue. Whereas, entire pleadings of both sides can be looked into for considering the preliminary issue under Order XIV Rule 2. Neither the written statement nor the averments or case pleaded by the opposite party can be taken into account for answering the threshold issue for rejection of election petition in terms of Order VII Rule 11 (a) of the Act.*

46. Whether the material facts as asserted by the appellant can stand the test of trial and whether the appellant would be able to (2006) 3 SCC 100 (2007) 3 SCC 617 bring home the grounds for declaring the election of respondent No.1 to be void, is not a matter to be debated at this stage. Suffice it to observe that the averments in the concerned paragraphs of the election petition, by no standard can be said to be frivolous and vexatious as such. The High Court committed manifest error in entering into the tenability of the facts and grounds urged in support thereof by the appellant on merit, as is evident from the cogitation in paragraphs 16 to 22 of the impugned judgment.”

21. Again in **Ashraf Kokkur vs, K.V Abdul Khader, (2015) 1 SCC 29**, heavily relied upon by learned counsel for the election petitioner, the Supreme Court defined the limits of enquiry under Order VII Rule 11 C.P.C. as under: -

“22. After all, the inquiry under Order VII Rule 11(a) CPC is only as to whether the facts as pleaded

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disclose a cause of action and not complete cause of action. The limited inquiry is only to see whether the petition should be thrown out at the threshold. In an election petition, the requirement under Section 83 of the RP Act is to provide a precise and concise statement of material facts. The expression 'material facts' plainly means facts pertaining to the subject matter and which are relied on by the election petitioner. If the party does not prove those facts, he fails at the trial (see Philipps v. Philipps and others, (1878) LR 4 QBD 127 (CA); Mohan Rawale v. Damodar Tatyaba, (1994) 2 SCC 392."

22. Thus, it is clear that an election petition, which does not disclose 'a cause of action', has to be dismissed at the threshold. 'Cause of action' invests the person with right to sue. When a person has no interest at all, or no sufficient interest to support a particular legal claim or action, he will have no locus standi to sue. Locus to maintain action in court of law, is threshold test, an integral part of cause of action, entitling a person to the relief claimed. Bereft of locus, no action, however sacrosanct, could survive. Thus, a plaint filed by a person having no locus to maintain the claim is but to be rejected. In the words of Justice V.R. Krishnaiyer (**T. Arivandandam vs. T.V. Satyapal (1977) 4 SCC 467**) "*if on a meaningful-not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, it should be nipped in the bud at the first hearing*".

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Order VII Rule 11 C.P.C. is a tool in the hand of courts to keep irresponsible law suits out of its bounds.

23. A claim which is destined to fail should be throttled at its very inception. This is exactly the purpose of investing courts with the power to reject plaint itself. No doubt, while exercising the power under Order VII Rule 11 C.P.C., only assertions made in the plaint/petition have to be seen. If the facts stated can stand the test of trial, then whether or not plaintiff will be able to prove his case, is not a matter to be debated at this stage. On the other hand, if the case stated in the plaint, even if taken to be correct, do not disclose any cause of action, or locus in favour of the plaintiff, it is duty of the court to nip into bud such a litigation. Keeping the above broad principles in mind, I now proceed to examine the issue as to whether the petitioner has locus to maintain the instant election petition, or not.

24. The main thrust of the argument of learned counsel for the respondent is that the petitioner is neither an elector, nor a candidate at the election which he seeks to question, therefore, in view of Section 81 of the Act, he cannot maintain the election petition. To wit, once the petitioner is not entitled to maintain the election petition, he also would have no cause of action. Consequently, the

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petition is liable to be rejected under Order VII Rule 11 C.P.C., read with Section 81 of the Act. Relevant part of Section 81 reads thus: -

81. Presentation of petitions.—*(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.*

25. Thus, an election petition, calling in question an election, could be filed only by (i) an elector and/or (ii) by any candidate at such election. The Explanation defines the 'elector' as a person *who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.*

26. The petitioner is enrolled as an elector from Bhiwani, Mahendragarh Parliamentary Constituency, Haryana (as per Form 26, Para 2, page 50 of the petition). He does not claim to be elector from Parliamentary Constituency, Varanasi, the election of which is sought to be challenged. He is thus not covered by the definition of 'elector'. He however, claims to be a 'candidate' at such election and on its strength asserts his locus to maintain the instant petition.

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27. The word 'candidate' is defined by Section 79(b) thus :-

“(b) “candidate” means a person who has been or claims to have been duly nominated as a candidate at any election;

28. For being a candidate at an election one has to file nomination in the prescribed manner. The procedure for nomination of candidate is provided under Part V. Ch.1. Section 30 empowers the Election Commission to issue notification in the Official Gazette specifying last dates for making nominations, for scrutiny, for withdrawal of candidature, the date of polling and the date before which election shall be completed. Section 32 stipulates that :-

“32. Nomination of candidates for election - Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act or under the provisions of the Government of Union Territories Act, 1963 (20 of 1963), as the case may be.”

29. Section 33 (so much as is relevant) reads thus :-

“33. Presentation of nomination paper and requirements for a valid nomination - (1) On or before the date appointed under clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours eleven o'clock in the forenoon and three o'clock in the after noon deliver to the returning officer at the place specified in this behalf in the notice issued under Section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

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Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency:

Provided further that no nomination paper shall be delivered to the Returning Officer on a day which is a public holiday.

Provided also that in the case of a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to 'an elector of the constituency as proposer' shall be construed as a reference to ten per cent of the electors of the constituency or ten such electors, whichever is less, as proposers."

(1-A).....

(2) In a constituency where any seat is reserved, a candidate shall not be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(3) Where the candidate is a person who, having held any office referred to in Section 9, has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls :

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll

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or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

(6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same constituency.

(7).....”

30. Section 33-A makes it obligatory for a candidate to furnish information regarding his criminal antecedents etc. and reads thus :-

“33-A. Right to information.—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) or section 33, also furnish the information as to whether -

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(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 and sentenced to imprisonment for one year or more.

(2) The candidate of his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form very fine the information specified in sub-section (1).”

31. Section 34 relates to deposit of certain amount in Government Treasury and provides as follows :-

“34. Deposits.—(1) A candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited,—

(a) in the case of an election from a Parliamentary constituency, 4 a sum of twenty-five thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of twelve thousand five hundred rupees; and

(b) in the case of an election from an Assembly or Council constituency, a sum of ten thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of five thousand rupees :

Provided that where a candidate has been nominated by more than one nomination paper for election in the same constituency, not more than one deposit shall be required of him under this sub-section.

(2) Any sum required to be deposited under sub-section (1) shall not be deemed to have been deposited under that sub-section unless at the time of delivery of the nomination paper under sub-section (1) or, as the case may be, sub-section (1A) of section 33 the candidate has either deposited or caused to

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be deposited that sum with the returning officer in cash or enclosed with the nomination paper a receipt showing that the said sum has been deposited by him or on his behalf in the Reserve Bank of India or in a Government Treasury."

32. Section 35 deals with the notice of nomination and the time and place for their scrutiny. Section 36 deals with scrutiny of nominations. It embodies the entire procedure to be followed during nomination, power of the Returning Officer to decide objections against the nominations, the manner of holding enquiry, and grounds on which nomination could be rejected. Section 36 reads thus :-

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:—*

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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) Nothing contained in 11 clause (b) or clause (c) of sub-section (2) shall be deemed to authorise the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

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

(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.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is

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an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinised and decisions accepting or ejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board."

33. It is an admitted fact that the petitioner was in service of Union of India (B.S.F.) and was dismissed from service on 19.4.2017. The nomination of the petitioner, upon scrutiny was rejected by the Returning Officer by order dated 1.5.2017 on the ground that it was not accompanied by the certificate of the Election Commission that his dismissal from service was not on the ground of disloyalty to State or corruption as required by Section 33 (3) of the Act. Relevant part from the order of the Returning Officer reads thus :

"In view of all relevant provisions of Representation of Peoples Act, 1951, Hand book of the Returning Officer and judgement in Sundar Lal vs. Sampat Lal, AIR 1963 Raj. 226 it is clear that if a person is dismissed from the government service and five years have not elapsed then such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

In this case, Shri Tej Bahadur has stated that he has been dismissed from the government service on 19th April, 2017. 5 years has not elapsed, but his nomination paper is neither accompanied by

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certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State nor he has been able to produce any such certificate by 11 AM of 1st May, 2019 as prescribed in notice. Therefore, nomination paper of Shri Tej Bahadur is liable to be rejected and accordingly Nomination Paper No.-09/HP/2019/RO submitted by him is hereby rejected."

Thus, the issue for consideration is whether the petitioner whose nomination was rejected could claim to be a candidate at the election in question.

34. One of the contentions of learned counsel for the petitioner was that once the nomination form was accepted on 30.4.2019, followed by issuance of check list, without pointing out any defect, the nomination could not have been rejected during scrutiny, as there is a presumption that the nomination was validly made. In support of his submission, he placed reliance upon **Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil, (2009) 13 SCC 131** and **Ramesh Rout v. Rabindra Nath Rout, 2012(1) SCC 762**. Alternatively, it is contended that the ground for rejection of the nomination is untenable, in as much as the petitioner was never dismissed from service for corruption or disloyalty, consequently neither Section 9 nor Section 33(3) would get attracted.

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35. Section 36(2) enjoins the Returning Officer to reject nomination paper suo moto or on objection, inter alia on the grounds that there has been a failure to comply with any of the provisions of section 33 of the Act. The power to reject the nomination of any candidate or nomination paper is circumscribed by sub-section (4). The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. The nomination of the petitioner, as noted above, has been rejected on the ground of non compliance of sub-section (3) of Section 33, which reads thus :-

“(3) Where the candidate is a person who, having held any office referred to in section 9 has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

36. Section 9 of the Act speaks of a person who had held office under the Government of India or under the Government of any State and it reads thus :-

“9. Disqualification for dismissal for corruption or disloyalty. —(1) A person who having held an office under the Government of India or under the Government of any State has been dismissed for corruption or for disloyalty to the State shall be disqualified for a period of five years from the date of such dismissal.

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(2) For the purposes of sub-section (1), a certificate issued by the Election Commission to the effect that a person having held office under the Government of India or under the Government of a State, has or has not been dismissed for corruption or for disloyalty to the State shall be conclusive proof of the fact:

Provided that no certificate to the effect that a person has been dismissed for corruption or for disloyalty to the State shall be issued unless an opportunity of being heard has been given to the said person."

37. A conjoint reading of the above two provisions would show that the certificate of the Election Commission is essential where (i) the person filing the nomination had held any office referred to in Section 9, i.e., Under Government of India or under Government of any State. (ii) who has been dismissed from service and (iii) a period of five years has not elapsed since his dismissal.

38. Indisputably, and as is admitted in para 4, 16 and 25 of the petition, the petitioner was dismissed while serving under the Government of India and period of five years had also not elapsed since then; thus all the three ingredients get attracted to the case of the petitioner. However, the petitioner claims that his dismissal was not on ground of disloyalty or corruption. He is not covered by Section 9 which prescribe a disqualification from contesting the election, as he was not dismissed on ground of corruption or disloyalty while in government service. Consequently, Section 33(3) would also not get attracted

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nor was he required in law to file any certificate from the Election Commission. In support of his contention, he has placed reliance upon the judgement of Andhra Pradesh High Court in **M. Narasappa v. M. Krishna Reddy, MANU/AP/0258/ 1984**. In the said case, the election of the returned candidate was challenged on the ground that his nomination was wrongly accepted by the Returning Officer despite the fact that his nomination was not accompanied by the certificate of Election Commission that he was not dismissed from service on ground of corruption or disloyalty. The returned candidate was dismissed within preceding five years of filing of the nomination. The court itself went into the charges levelled against the returned candidate and held that the dismissal was not on ground of corruption. He was not disqualified under Section 9 from contesting the election. Consequently, Section 33(3) will not apply. Here I would like to refer to one more decision taking a diametrically opposite view by the Rajasthan High Court in **Sundar Lal v. Sampat Lal, AIR 1963 Raj. 226** relied upon by learned counsel for the respondent. In that case, the Court took the view that once certificate of Election Commission is not filed, the Returning Officer was not competent to examine whether dismissal was on ground of corruption or

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disloyalty to the State and was justified in rejecting the nomination.

39. The crucial ingredient of Section 33(3) as noted above, is holding of office referred to in Section 9 and the fact that period of five years had not elapsed since dismissal of such person. As soon as a person is covered by the ingredients of Section 33, he is required to file certificate from the Election Commission.

40. Although Section 33(3) makes a reference to Section 9 but it does not control the operation of said provision. In as much as, Section 9 is an independent provision stipulating the consequences flowing out of dismissal of a person from service referred to in the said Section. Such a person stands disqualified to contest election for a period of five years from the date of dismissal. Sub-section (2) of Section 9 makes the Election Commission final arbiter in such matters. The certificate of the Election Commission is conclusive proof of the fact that the person was not dismissed from service on ground of corruption or disloyalty to the State. Whether a person is dismissed from service on ground of disloyalty or corruption has to be decided by the Election Commission and not by the Returning Officer. He cannot even examine its correctness, if challenged before him. The reference to Section 9 is for

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adopting the description of office covered under the said provision and nothing more. If it is accepted that certificate from Election Commission is required to be filed only if a person falls under Section 9, it would render Section 33(3) otiose. A person admitting that he is covered under Section 9 is already disqualified. It is only when the person claims that he was not dismissed on ground of disloyalty or corruption that occasion arises for filing the certificate of the Election Commission.

41. A Constitution Bench of the Supreme Court in **S.M. Banerji v. Sri Krishna Agarwal, AIR 1960 SCC 368**, after considering Section 9(3) and Section 33(3) summarised the legal position thus :-

“The foregoing provisions, so far relevant to the present enquiry, may be summarised thus: If a candidate has been dismissed from Government service and a period of five years has not elapsed since dismissal-, he will have to file along with the nomination paper a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State. If it has not been done, the Returning Officer, either suo motu or on objections raised by the opposite party, has to reject the nomination. If the nomination paper does not disclose any such defect and if the Returning Officer has no knowledge of that fact, he has no option but to accept the nomination. The Returning Officer may improperly accept a nomination paper though it discloses the said defect and though an objection is raised to its reception on that ground. Section 100(1) (d)(i) of the Act deals with improper acceptance of

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any nomination and s. 100(1)(d)(iv) permits an attack on the ground, among others, of non-compliance with the provisions of the Act”.

(emphasis supplied)

42. A person covered by Section 33(3) cannot ask the Returning Officer to ascertain that he was not dismissed from service on ground of disloyalty or corruption and accept his nomination, as the Returning Officer is not competent to go into the said issue. He is to be governed by the certificate issued by the Election Commission. The object behind the provision is to minimize points of disputes before the Returning Officer. The law obligates a person covered by Section 33 (3) to file certificate of Election Commission in support of his claim. If he fails to do so, the consequences provided under Section 36(2) will ensue. The Returning Officer would be left with no option but to reject the nomination of such a person. The rejection would not be for the reason that the person is disqualified under Section 9 from contesting the election but for the reason that he has failed to comply with the mandatory procedural requirements of a valid nomination. He has failed to file the certificate of the Election Commission required of him by Section 33 (3) of the Act. Even a Court of law, if approached by such a person, will not embark on any enquiry as to whether he is

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covered under Section 9 or not. The enquiry will remain confined to ascertainment of the fact as to whether the person is covered by Section 33 or not and if the answer is in affirmative, then action of the Returning Officer has to be upheld. For the foregoing reasons, I am unable to subscribe to the view taken by the Andhra Pradesh High Court in **M. Narasappa**.

43. The power of the Returning Officer regarding acceptance/ rejection of nomination and when acceptance of nomination would be valid, has been dealt with by the Supreme Court in **Durga Shankar Mehta v. Raghuraj Singh, AIR 1954 SC 520** holding thus :-

" If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning-Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. This would be apparent from section 36, subsection (7) of the Act . . .".

44. Sub-section (4) of Section 33 provides that on presentation of a nomination paper, the Returning Officer

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is enjoined with the duty to satisfy himself¹⁻⁵⁸ that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls. The proviso embodies the principle of overlooking irregularities which are not of substantial nature. Thus a misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer shall be overlooked.

45. It follows that if on face of the nomination paper, no defect of substantial nature is evident, the Returning Officer is bound to receive the nomination form. For instance, in the present case, the petitioner, in the second nomination filed on 29.4.2019 mentioned 'No' while reply to the query contained in Clause (6) of Part III-A of form 2-A (Nomination Paper) as to whether the candidate was dismissed for corruption or disloyalty while holding office under the Government of India or Government of any State? However, when upon scrutiny on 30.4.2019, it transpired that in the other nomination filed by him on 24 April 2019, he mentioned 'Yes' against the same query and disclosed the date of his dismissal as 19.4.2017, he was issued two notices dated 30.4.2019 mentioning about different recitals in the two nominations submitted by him.

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The notice also specifically records that from the material placed on record by the petitioner himself, it is evident that he was dismissed from service of Government of India within preceding five years. He was therefore, required to submit certificate of the Election Commission to prove that he was not dismissed from service on ground of disloyalty or corruption as required under Section 33(3) of the Act. He was given time up to 11 AM on 1.5.2019, i.e., the following day to furnish such certificate from the Election Commission to enable the Returning Officer to take decision on his nomination papers.

46. Section 36(2) specifically invests the Returning Officer with power to examine the nomination papers and hold enquiry upon objection or on his own motion. In fact, once any defect is discovered by the Returning Officer while examining the nomination papers at the stage of scrutiny, he is under bounden duty to hold a summary enquiry and decide the objection. The only limitation is that in case the objection is from the Returning Officer or any other person, the candidate concerned has to be given time to rebut the objection, before decision is taken. The statutory scheme does not postulate any estoppel against raising of objection to the validity of nomination during scrutiny on the ground that at the time of receipt of

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nomination paper, no objection was raised. In fact, the very object of fixing a date, time and place for scrutiny, and investing the Returning Officer with power to decide all objections, would stand nullified if the argument of learned counsel for the petitioner is accepted that if nomination papers had been received during the first stage, without any objection, no objection can be raised during scrutiny.

47. I now proceed to consider the judgement of Supreme Court in **Uttamrao Shivdas (Supra)** on which heavy reliance has been placed by learned counsel for the petitioner in contending that there is presumption in law regarding validity of nomination. In the said case, the Returning Officer had overruled the objection against the nomination regarding genuineness of signature of the Proposers. This was done at the stage of scrutiny, after examining the proposers. The High Court, in election petition, only examined the correctness of the decision making process on part of the Returning Officer and not the decision itself. In that context, the Supreme Court held that the High Court while deciding election petition acts as a Court of original jurisdiction and not appellate authority and is therefore competent to examine the correctness of the decision of the Returning Officer. The Supreme Court

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while so holding, considered para 5 and 6 of Handbook for Returning Officer issued by the Election Commission. The paragraph on which much emphasis has been laid by counsel for the petitioner reads thus :-

“24. 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

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comparatively more liberal overlooking minor technical or clerical errors rather than strict in your scrutiny of the nomination papers."

48. These instructions, instead of bringing home the submission urged by learned counsel for the petitioner, on the contrary, lays down exactly the opposite. A duty is cast upon Returning Officer to satisfy himself that nomination is valid in law, even if no objection is raised. It is only in cases where there is reasonable doubt about the validity /invalidity of a nomination paper that the benefit should go to the candidate for reasons mentioned in instruction No.6. These instructions, nor anything laid by the Supreme Court in the said judgement, in any manner, advance the argument of learned counsel for the petitioner.

49. Now coming to the second judgement in **Ramesh Rout (Supra)**, I would first like to briefly allude to the facts of that case. The election of Ramesh Rout as member of Legislative Assembly was under challenge by the respondent Ramendra Pratap Singh on the ground that his nomination was wrongly rejected by the Returning Officer. He filed his nomination as candidate of a recognised party (BJD). He was issued a check list under signature of Returning Officer in which no deficiency nor defect was pointed out. However, on the day of scrutiny, the Returning Officer rejected the nomination on the ground

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that Form A & Form B duly signed in ink by the authorised officer of the political party had not been filed, but only the photocopies.

50. The Supreme Court while examining the rival contentions held that the requirement laid down in para 13 of the Election Symbols (Reservation and Allotment) Order, 1968 regarding Form A and B being signed in ink by the officer bearer of the recognised political party is mandatory in nature. Non compliance thereof would tantamount to non compliance of Section 33 and would entail dismissal of the nomination paper :-

“We are unable to accept the submission of Mr. K.K. Venugopal that para 13 of the 1968 Order cannot be read into Rule 4. Non-compliance of requirements of para 13 of the 1968 Order, in our view, is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected under Section 36(2)(b) as it tantamounts to non-compliance of the provisions of Section 33, namely, the nomination paper having not been completed in the prescribed form.”

51. The Supreme Court thereafter proceeded to consider the issue on merits and held that where the check list issued by the Returning Officer certifies that Form A & B were duly filed, it lead to presumption that the documents prescribed in Para 13 had been duly filed. The Supreme Court clarified that the presumption of all requirement having been complied with, is rebuttable one. It was held

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in the facts of that case that the rival candidate failed to rebut the presumption that original Form A & B were not filed. The relevant observations are as follows :-

“61. As a matter of fact, to obviate unnecessary dispute about presentation of nomination paper by a candidate, the Commission in the handbook has provided for guidelines pertaining to check list. Accordingly, a check list is required to be prepared duly certified by the Returning Officer that all documents have been received. Such check list is signed by the Returning Officer as well as by the candidate. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption.

62. In the present case, the check list (Ex.11), Form 3-A (Ext. 42/F) and the list of the nominated candidates checklist (Ext. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination paper. The question is whether this presumption has been rebutted by the returned candidate? We do not think so. The oral evidence of the returned candidate (RW-1) and his witness (RW-2) is not of much help insofar as this aspect is concerned. The Returning Officer has not stated firmly and with certainty in his evidence that the proposed candidate had not filed Form-A and Form-B signed in ink by the authorised person of the BJD. Rather he stated that had it come to his notice that the original Form-A and Form-B duly signed in ink were not filed along with the nomination paper by the proposed candidate, he would have made an endorsement to that effect in the checklist.”

52. The check list issued by the Returning Officer without pointing out any deficiency thus raises a rebuttable and

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not conclusive presumption in favour of the candidate filing the nomination papers. The Returning Officer or the other rival candidates are not precluded from raising objections to the validity of the nomination once the check list had been issued. No doubt, in view of presumption regarding validity of the nomination papers, it would be the burden of the person raising objection to prove the defect by leading cogent evidence. Where there is doubt, the decision should lean in favour of the person filing the nomination in view of para 6 of the Handbook for Returning Officer. The contention that once the check list was duly issued without pointing out any objection, the Returning Officer was precluded at the state of scrutiny from raising any objection even if it goes to the root of the controversy, cannot be accepted. The Returning Officer would be within his power to point out defect during course of scrutiny and reject the nomination if it fails to comply with the mandatory procedure laid down for filing of nomination or if candidate is found to be disqualified.

53. The alternative submission, which forms the anchor sheet of the case of the petitioner was that even if he has not been actually nominated as a candidate, but he would definitely fall in the category of a candidate who claims to have been duly nominated under the second part of the

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definition of 'candidate'. Therefore, he would still have locus to maintain the election petition. It is contended that a wrong rejection of the nomination itself is an issue which falls for determination in the Election Petition, so it could not be thrown out on the ground that he was not duly nominated.

54. No doubt, the definition of 'candidate' in Section 79(b) also includes a person who 'claims to have been duly nominated'. The said phrase has been subject matter of interpretation by the Supreme Court in number of judgments. A Constitution Bench of Supreme Court in **Charan Lal Sahu v. Dr. APJ Abdul Kalam and others, (2003) 1 SCC 609** had the occasion to consider the phrase in reference to election on the post of President of India. Section 13(a) of the Presidents and Vice-Presidents Election Act, 1952 defines a 'candidate' to mean a person who has been or claims to have been duly nominated as a candidate at an election. Thus, it is similarly worded. Section 14-A of the said Act entitles a candidate or twenty or more electors to question the election by filing election petition before the Supreme Court. In that case also, the locus of the petitioner to challenge the election of president was challenged on the ground that he had not been a candidate nor could be regarded as nominated or

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duly nominated, as his nomination was rejected by the Returning Officer for not complying with Section 5-B of the said Act, which reads thus: -

"5-B. (1) ... deliver to the Returning Officer at the place specified in this behalf in the public notice issued under Section 5 a nomination paper completed in the prescribed form and subscribed by the candidate as assenting to the nomination, and

(a) in the case of Presidential election, also by at least fifty electors as proposers and at least fifty electors as seconders;

(b) in the case of Vice-Presidential election, also by at least twenty electors as proposers and at least twenty electors as seconders:

Provided that no nomination paper shall be presented to the Returning Officer on a day which is a public holiday."

55. The Supreme Court quoted with approval three previous decisions on the point, holding that if a person fails to comply with the procedure laid down in Section 5-B, he would not fall within the definition of candidate as he can neither be a candidate, nor can claim to be nominated at such election. It has been held *"that in the matters of claim to candidacy, a person who claims to have been duly nominated is at par with a person who, in fact, was duly nominated. But, the claim to have been duly nominated cannot be made by a person whose nomination paper does not comply with the mandatory requirement of Section 5-B of the Act"*.

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56. It is worthwhile to quote in extenso from the law report where earlier judgments of the Supreme Court were considered: -

*"16. Nomination paper of the petitioner was rejected on the ground that it was not proposed and seconded by the requisite numbers of proposers and seconders. This point was examined exhaustively by this Court in the case of very petitioner now before us against the former President Neelam Sanjeeva Reddy reported in **Charan Lal Sahu Vs. Neelam Sanjeeva Reddy, 1978 (2) SCC 500** and it was held that:*

"12. The result of a careful consideration by us of the provisions mentioned above is that we think that, the procedure or manner for questioning the Presidential election having been laid down, the petitioner must come within the four corners of that procedure in order to have a locus standi to challenge the Presidential election and to be able to maintain this petition. If he neither is nor can claim to be a candidate, on assertions made by him in his petition itself, he would be lacking the right to question the election of Shri Neelam Sanjeeva Reddy as Presidential of India. The effect of the provision of Sections 14 (1), 14 (2) and 14 (3) and 14A (1) of the Act, read with Order XXXIX, Rules 2 and 5 of the Rules of this Court, is that the petition before us is barred because the petitioner has not got the required locus standi to maintain it."

*17. Again in **Charan Lal Sahu Vs. Giani Zail Singh, 1984 (1) SCC 390**, the point raised by the petitioner on the second limb of Section 13 (a) of the Act defining the candidate to mean; "claims to have been duly nominated as a candidate" was rejected. Rejecting the said contention this Court observed:*

"11. The petitioners, however, contend that even if it is held that they were not duly nominated as candidates, their petitions cannot be dismissed on that ground since they "claim to have been duly nominated". It is true that, in the matter of claim to candidacy, a person who claims to have been duly nominated is on par with a person who, in fact, was duly nominated.

46.

But, the claim to have been duly nominated cannot be made by a person whose nomination paper does not comply with the mandatory requirements of Section 5-B (1)(a) of the Act. That is to say, a person whose nomination paper, admittedly, was not subscribed by the requisite number of electors as proposers and seconders cannot claim that he was duly nominated. Such a claim can only be made by a person who can show that his nomination paper conformed to the provisions of Section 5-B and yet it was rejected, that is, wrongly rejected by the Returning Officer. To illustrate, if the Returning Officer rejects a nomination paper on the ground that one of the ten subscribers who had proposed the nomination is not an elector, the petitioner can claim to have been duly nominated if he proves that the said proposer was in fact an 'elector'.

12. Thus, the occasion for a person to make a claim that he was duly nominated can arise only if his nomination paper complies with the statutory requirements which govern the filing of nomination papers and not otherwise. The claim that he was 'duly' nominated necessarily implies and involves the claim that his nomination paper conformed to the requirements of the statute. Therefore, a contestant whose nomination paper is not subscribed by at least ten electors as proposers and ten electors as seconders, as required by Section 5-B (1)(a) of the Act, cannot claim to have been duly nominated, any more than a contestant who had not subscribed his assent to his own nomination can. The claim of a contestant that he was duly nominated must arise out of his compliance with the provisions of the Act. It cannot arise out of the violation of the Act. Otherwise, a person who had not filed any nomination paper at all but who had only informed the Returning Officer orally that he desired to contest the election could also contend that he "claims to have been duly nominated as a candidate".

18. The question regarding locus standi was examined for the third time in the election petition filed by the petitioner in **Charan Lal Sahu Vs. K.R.**

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Narayanan & Ors., 1998 (1) SCC 56, it was again reiterated that:

"24. In view of the decisions referred to above, it must be held that neither of the petitioners was a "candidate" as the said expression is defined in Section 2 (d) of the Act since neither of them had been duly nominated nor could he claim to have been nominated as a candidate inasmuch as the nomination papers filed by both of them did not comply with the mandatory requirements of Section 5 B (1)(a) of the Act and the nomination paper of Petitioner 2 was filed without complying with the requirements of Section 5 B (2) of the Act. On that view it must be held that neither of the petitioners has the locus standi to maintain the petition."

The Supreme Court concluded by holding thus: -

"19. In view of the authoritative pronouncements of this Court the petitioner cannot be regarded as a person who had been nominated or can claim to have been duly nominated as candidate at the election in question. His nomination papers were thus rightly rejected by the returning officer and the petition on his behalf is, therefore, not maintainable."

(emphasis supplied)

57. In **Mithilesh Kumar Sinha v. Returning Officer for Presidential Election and others, 1993 Supp (4) SCC 386**, the Supreme Court, while interpreting the same rule in relation to presidential election observed that a person cannot claim to have been duly nominated as a candidate at the election unless he had complied with the mandatory requirements of Section 5-B and Section 5-C. The challenge to the presidential election by Mithilesh Kumar Sinha was not entertained on the ground that he

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had failed to comply with the mandatory requirements of a valid nomination, consequently, cannot claim to be a candidate at such election. The relevant observations are as follows :-

“30. To be entitled to present an election petition calling in question an election, the petitioner should have been a 'candidate' at such election within the meaning of Section 13(a) for which he should have been "duly nominated as a candidate" and this he cannot claim unless the mandatory requirements of Section 5-B(1)(a) and Section 5-C were complied by him. Where on undisputed facts there was non-compliance of any of these mandatory requirements for a valid nomination, the petitioner was not a 'candidate' within the meaning of Section 13(a) and, therefore, not competent according to Section 14-A to present the petition.

31. It is also settled by the decisions of this Court that in order to have the requisite locus standi as a 'candidate' within the meaning of Section 13(a) for being entitled to present such an election petition in accordance with Section 14-A of the Act the petitioner must be duly nominated as a candidate in accordance with Section 5-B(1)(a) and Section 5-C. Unless it is so the petitioner cannot even claim to have been duly nominated as a candidate at the election as required by Section 13(a). The above conclusion in respect of the nomination paper of the petitioner, Mithilesh Kumar Sinha, from the facts set out by him in the petition, stated by him at the hearing and evident from the documents filed by him makes it clear that the petitioner, Mithilesh Kumar Sinha, has no locus standi to challenge the election of the returned candidate, Dr. Shanker Dayal Sharma as he is not competent to present the election petition in accordance with Section 14-A of the Act read with Order 39 Rule 7 of Supreme Court Rules.”

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58. Again, in **Devendra Patel vs. Ram Pal Singh & Others, 2013 (10) SCC 80**, the Supreme Court reiterated the law laid down in **Mithlesh Kumar** as under: -

“7. In our opinion, in view of the admitted position that Jaswant Singh's nomination was rejected as he was disqualified, he cannot be considered to be duly nominated as a candidate at the election. Learned counsel for the appellant submits that his contention is founded on the expression “claims to have been duly nominated as a candidate at any election” in Section 79(b) of the 1951 Act. The expression “claims to have been duly nominated as a candidate” would not take within its fold a person whose nomination has been rejected as being disqualified. Such person cannot claim to be duly nominated as a candidate when he is not qualified to contest election. In view of this position, Jaswant Singh is not covered by the expression 'candidate' in either of the two categories within the meaning of Section 79(b).”

59. This Court, in **Hari Kishan Lal vs. Atal Bihari Bajpai, AIR 2003 All 128** ruled that the person filing election petition if not a “duly nominated candidate”, will have “no locus standi to file an election petition”. In the said case, the nomination of the election petitioner was rejected for not filing proforma affidavit as per directions of the Election Commission dated 28.8.1997 and despite time being granted to him by the Returning Officer. The court held that requirement of filing affidavit was mandatory and non-filing of the same will result in disqualification of the petitioner. Such a person, being not a duly nominated candidate, cannot maintain election petition. The relevant observations are -

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“43. The disqualifications are prescribed under Article 102 of the Constitution of India read with Section 8 of the Representation of the People Act, the manner of determination of the disqualification is not provided either by Article 102 of the Constitution of India or by Section 8 of the Act and in the absence of any positive requirement for filing of an affidavit, the Returning Officer while exercising powers under Section 36 will have to act on the basis of merely a declaration made in the nomination paper. The necessity for issuing the directions by the Election Commission is in order to give effect to the provisions of Article 102(e) of the Constitution of India and Section 8 of the Act as a person so disqualified cannot be permitted to contest an election. The petitioner whom sufficient time was given for filing the affidavit has chosen not to file the affidavit as required by the Election Commission and it was a willful defiance on his part and it cannot be said that he was a duly nominated candidate and has locus standi to file an election petition. The Returning Officer has only observed the direction issued by the Election Commission for which he was legally under an obligation. The contention of Sri R.N. Trivedi, Additional Solicitor General of India that the petitioner is not a duly nominated candidate and has no right to maintain the petition has force.

As the petitioner was not a duly nominated candidate under the provisions of the Representation of the People Act and the Constitution of India, he has no locus standi to file the instant Election Petition. It is accordingly rejected at the preliminary stage.”

(emphasis supplied)

60. It is no more res integra that a person can claim to be duly nominated only if his nomination paper complies with the statutory requirements, which govern the filing of the election petition. As noted above, the Supreme Court in **Jyoti Basu (supra)** had held long back that no one has fundamental right to file an election petition. It is also not

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a right conferred under common law. An election petition can be filed only by the person permitted by statute and strictly in consonance with the requirements thereof, else it would call for outright rejection.

61. Learned counsel for the petitioner tried to distinguish these judgments by contending that therein the nomination was rejected because of procedural irregularity in filing of the same. However, in case of the petitioner, the issue as to whether petitioner was dismissed from service on ground of disloyalty or corruption and whether the Returning Officer was justified in rejecting the nomination do not fall in the realm of procedure, but invades his right to file election petition, therefore has to be decided by this court after full fledged trial. The petition cannot be thrown out at the threshold.

62. It is noteworthy that the requirement of filing certificate of the Election Commission is contained in Section 33, which deals with the procedure relating to presentation of nomination papers and requirements of a valid nomination. Like Section 5-B of the Act, Section 33 also contains a provision for filing of election petition by the candidate or by a specified number of electors. Sub-Section (2), (3), (5) stipulates various other requirements to be complied with while filing the nomination papers.

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Section 33-A and 34 are also part of the procedure relating to filing of nomination. Section 36(2)(b) enjoins upon the Returning Officer to reject the nomination if it does not comply with Section 33 or 34 of the Act.

63. Section 33, apposite to note, makes use of deeming clause at more than one place -

(i) a candidate shall not be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(ii) Where the candidate is a person who, having held any office referred to in 2 [section 9] has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

64. The word 'deemed' embodies a rule of evidence. The object of these provisions is to reduce dispute relating to qualification of the person filing nomination. It presumes existence of certain facts which may possibly be true, but not necessarily always. The manner in which the presumption could be falsified is specified in the statute itself. Thus, in case of a reserved seat, even if a candidate belongs to one of the reserved class, but fails to make

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declaration, specifying his caste or tribe, he is presumed not qualified to be chosen to fill that post. Likewise, when a candidate was dismissed from Government service within five years of filing of the nomination, he is under obligation to file certificate from the Election Commission that his dismissal was not on ground of disloyalty or corruption, failing which, he will be presumed to be not duly nominated. Concededly, in the instant case, the petitioner was dismissed from service of Government of India on 19.4.2017. He filed his nominations on 24.4.2017 and 29.4.2019. The period of five years had not elapsed by that time. Resultantly, the nomination were not in consonance with the statutory requirements. The petitioner cannot therefore claim to have been duly nominated.

65. Learned counsel for the petitioner has heavily placed reliance upon **Nandiesha Reddy vs Mrs. Kavitha Mahesh, 2011 (7) SCC 721**, while submitting that in the said case, the Supreme Court held an election petition to be maintainable, even if filed by a person whose nomination form was returned. It was urged that the petitioner's case is on a much better footing. In that case, the Returning Officer refused to accept the nomination form on the ground that it was not subscribed by required

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number of electors. The Returning Office did not wait for date of scrutiny to arrive, gave no time to meet the objections, nor held the enquiry envisaged by Section 33(2), (5) and (6) of the Act. In the said backdrop, the Supreme Court held as follows: -

“23. From a plain reading of the aforesaid provision it is evident that an election petition calling in question any election can be presented by any candidate at such election. Candidate, in our opinion, would not be only such person whose nomination form has been accepted for scrutiny or whose name appears in the list of validly nominated candidate, that is to say, candidates whose nominations have been found valid. Here, in the present case, the Election Petitioner's plea is that the Returning Officer declined to accept the nomination paper.

24. We are of the opinion that when a nomination paper is presented it is the bounden duty of the Returning Officer to receive the nomination, peruse it, point out the defects, if any, and allow the candidate to rectify the defects and when the defects are not removed then alone the question of rejection of nomination would arise. Any other view, in our opinion, will lead to grave consequences and the Returning Officers may start refusing to accept the nomination at the threshold which may ensure victory to a particular candidate at the election. This is fraught with danger, difficult to fathom.”

66. However, the law laid down in the said case would not apply to the facts of the instant case, where the Returning Officer has rejected the nomination during scrutiny after putting the petitioner to notice.

67. This narrows down the controversy to the last submission as to whether the procedure adopted by the

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Returning Officer in rejecting the nomination was faulty and invalid. It is submitted that the petitioner should have been given at least 24 hours time, or till the end of next working day, to meet the objections.

68. Indisputably, on the date of scrutiny, i.e. 30.4.2019, when it transpired that the petitioner was in service of Government of India and was dismissed within preceeding five years, but certificate from Election Commission that he was not dismissed on ground of corruption or disloyalty, was not filed along with the nomination, he was issued two notices on the same date, granting time upto 11 a.m. the following day to meet the shortcoming. Since the objection was raised by the Returning Officer himself and also by a third person, therefore as provided under proviso to Section 36(5), it was necessary to grant time to the petitioner to rebut it by not later than the next day. In strict consonance with the legislative mandate, time was granted to the petitioner to meet the objection by 11 a.m. on the next date, i.e. 1.5.2019. The contention that he should have been granted at least 24 hours time or till the end of next working day, does not have force. The provision only stipulates that time to rebut shall be allowed, which shall not be later than the next day, following the date fixed for scrutiny. It would not mean

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that for fulfilling the requirement of the said provision, time till end of next working day has to be granted. The Returning Officer has also to take decision on the same date to which proceedings have been adjourned. For taking decision, he will also need time, as when nomination is rejected, he has to record brief reasons for such rejection. The provision has to be interpreted to advance the election scheme. Every step has to be taken with full promptitude to ensure completion of the election process in time. The principles of natural justice are applicable to the extent specifically provided. The petitioner cannot claim right to be dealt with more liberally if it is not permissible under the scheme of the statute.

69. In **Rakesh Kumar vs. Sunil Kumar, (1999) 2 SCC 489**, on which heavy reliance was placed by counsel for the petitioner, the Returning Officer refused to adjourn scrutiny to the next day, inspite of candidate making request for time to meet the objections raised against him. The Returning Officer harboured under wrong impression that he was not empowered to adjourn the scrutiny to the next day. In that context, the Supreme Court held as follows: -

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“20. Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time not later than the next day. This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of the proviso to Section 36(5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play.

21. The Returning Officer would have been justified in rejecting the nomination paper of the respondent, had the respondent either not sought an opportunity to rebut the objection raised by the Returning Officer or was unable to rebut the objection within the time allowed by the returning officer. Since, the respondent, had by his written application (supra), filed at the time of scrutiny of the nomination papers itself claimed to be the official candidate set up by BJP, which claim was not disputed by any one else during the scrutiny, and had sought time of 24 hours to provide relevant material in support of his submission, it was obligatory on the part of the Returning Officer to allow time to him to rebut the objection, suo motu, raised by the Returning Officer. He could have given him any time to do so within 24 hours but to deny him such an opportunity, in the facts and circumstances of the case, was neither fair nor proper or justified. It was expected of the Returning Officer to adjourn the scrutiny of the nomination paper to enable the respondent to meet the objection. The use of the expression not later than the next day but one following the date fixed for scrutiny under proviso to sub-section (5) of Section 36 of the Act un-mistakably shows that the Returning Officer has been vested with the discretion to fix time

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to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the returned candidate and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer.”

70. The Supreme Court nowhere held that time till the end of next working day or 24 hours time should be granted to meet the objection. It only held that the Returning Officer could have given any time to do so “within 24 hours”. I thus find no force in the submission that the procedure adopted by the Returning Officer was in manner faulty or contrary to the statutory scheme.

71. As a result of above discussion, it is clear that the petitioner is neither an elector nor a candidate at the election which he seeks to challenge and would therefore have no locus to file election petition. It is accordingly dismissed, but without any order as to costs.

Order Date : 06.12.2019

skv/Jaideep

(Manoj Kumar Gupta, J.)