

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 5927 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****Sd/-****and****HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

SONALBA NAVALSINH VAGHELA

Versus

STATE OF GUJARAT

Appearance:

MR. ZUBIN BHARDA WITH MR. NISHIT P.GANDHI AND MR. VIPUL B.SUNDESHA, ADVOCATES for the Petitioner.

MR. CHINTAN DAVE, AGP for the Respondent(s) No. 1

MR. NIRAL R.MEHTA, ADVOCATE for the Respondent(s) No. 2

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 08/07/2021

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs :

“(A) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions quashing and setting aside the election results dated 08.03.2021 and 02.03.2021 pertaining to 17-Pimpan Electoral Division of the Sanand Taluka Panchayat so far as it declares deceased Lilaben Vikrambhai Thakore as the elected candidate from 17-Pimpan Electoral Division of the Sanand Taluka Panchayat and further be pleased to direct respondent authorities to declare petitioner as the elected candidate from 17-Pimpan Electoral Division of the Sanand Taluka Panchayat;

(B) During pendency and final disposal of the present petition, Your Lordships may be pleased to stay further operation of election results dated 08.03.2021 and 02.03.2021 pertaining to 17-Pimpan Electoral Division of the Sanand Taluka Panchayat so far as it declares deceased Lilaben Vikrambhai Thakore as the elected candidate from 17-Pimpan Electoral Division of the Sanand Taluka Panchayat and further be pleased to direct respondent authorities to declare petitioner as the elected candidate from 17-Pimpan Electoral Division of the Sanand Taluka Panchayat

(C) Pass any such other and/or further orders that may be thought just and proper, in the facts and circumstances of the present case.”

2. A nice and interesting question arises in this case out of the dust and fume of election process.

3. One Lilaben Vikrambhai Thakore (since deceased) and the writ-applicant herein contested the election to the 17-Pimpan Electoral Division of the Sanand Taluka Panchayat. Late Lilaben was an independent candidate, whereas the writ-applicant herein was nominated by a political party, viz. the Bharatiya Janata Party. The polling took place on 28th February 2021. The counting was scheduled on 2nd March 2021. Lilaben Vikrambhai Thakore passed away on 1st March 2021, i.e. a day prior to the scheduled counting. The Election Officer proceeded with the counting of the votes on 2nd March 2021 and declared Lilaben as the winner. Lilaben Thakore secured 2163 votes, whereas the writ-applicant herein secured 1409 votes. Although Lilaben secured the highest votes, yet the Election Officer was not able to give effect to the result of the election with respect to the 17-Pimpan Electoral Division of the Sanand Taluka Panchayat on account of the death of Lilaben Thakore.

4. It is the case of the writ-applicant that as Lilaben Thakore was an independent candidate and the writ-applicant being nominated by a political party, the writ-applicant should have been declared the winner having secured the second highest votes.

5. It is the case of the writ-applicant that the husband of late Lilaben, namely Vikrambhai Ishwarbhai Thakore, had already

informed the Election Officer in writing on 1st March 2021, i.e. a day before the counting, that his wife Lilaben had passed away. In such circumstances, according to the writ-applicant the Election Officer should not have counted the votes secured by late Lilaben and even if the Election Officer thought fit to count the votes of late Lilaben, those should have been set apart and he should have declared the writ-applicant as the winner having secured the second highest votes.

6. It appears from the materials on record that the writ-applicant herein preferred an application dated 2nd March 2021 addressed to the Returning Officer and Mamlatdar, Sanand, Ahmedabad, stating as under :

*“To,
The Returning Officer & Mamlatdar
Sanand, Ahmedabad.*

*Sub : To Declare the applicant as Elected Candidate
(winner) in 17-Pimpan Taluka Panchayat Seat.*

Respected Sir,

I have been declared candidate under the Bhartiya Janta Party for the Seat of 17-Pimpan Taluka Panchayat. In the particular seat the another candidate from the National Congress Party and also one Lilaben Vikrambhai Thakore has filed as Independent Candidate. On 28.2.2021 the polling was done under your observation.

On 1.3.2021, Lilaben Vikrambhai Thakoree as independent candidate has expired which was informed to you.

On 2.3.2021, Lilaben Vikrambhai Thakoree the independent candidate secured the 2163 votes and the applicant secured 1409 votes. As result as the independent candidate declared returned candidate (elected).

Therefore, in view of result, as elected candidate has expired and second highest votes secured by the applicant therefore the applicant may declared as elected candidate in as per the provision of law.”

7. To the aforesaid, the Returning Officer replied vide letter dated 2nd March 2021 as under :

*“To,
Shri Sonalba Navalsinh Waghela
Candidate, 17-Pimpan Electoral Division,
Sanand Taluka Panchayat*

Subject : Sanand Taluka Panchayat Election-2021

Reference: Your letter dated 02.03.2021

On the captioned subject, it is to inform you that the counting of votes for the Sanand Taluka Panchayat Election-

2021 has been completed on 02.03.2021, wherein for the 17-Pimpan Electoral Division of the Sanand Taluka Panchayat seat, the contesting candidate Lilaben Vikrambhai Thakore has been declared to be the winner as an independent candidate. The said Lilaben Vikrambhai Thakore, who was declared as the winner, has passed away on 01.07.2021. It was communicated in writing through her election agent. Therefore, a detailed report with respect to the same has been sent to the State Election Commission office as well as to the District Collector (Municipalities Division), Collector Office, Ahmedabad. Further, as per your submission, there is no provision under the Gujarat Panchayats Elections Rules, 1994, to declare a candidate who obtained the second highest votes in the election to be the winner. Therefore, no action is required to be taken on your application, which shall be taken note of.

सत्यमेव जयते
Returning Officer

Sanand Taluka Panchayat
Constituency and Mamlatdar,
Sanand”

8. It also appears that the Returning Officer sought for the opinion of the State Election Commission vide letter dated 1st March 2021, which reads thus :

“To,
The State Election Commissioner
and District Collector (Municipalities Division)
Collector Office, Ahmedabad.

*Subject : Taluka Panchayat General Election-2021
Seeking opinion on account of death of a
contesting candidate for 17-Pimpan*

Respected Sir,

On the captioned subject, it is respectfully submitted that the election to the Sanand Taluka Panchayat General Election-2021 took place on 28.02.2021. The counting of votes and the result thereof is scheduled on 02.03.2021. A detailed report about the accidental death of Lilaben Vikrambhai Thakore, resident of Soyla, Taluka Sanand, District Ahmedabad, a contesting candidate for the 17-Pimpan constituency of the Sanand Taluka Panchayat, as well as her original death certificate bearing no.D202120075688 has been received by this office on 01.03.2021 through her election agent.

Therefore, an opinion is sought for as regards the counting of votes as well as the result scheduled tomorrow, i.e. on 02.03.2021.

Returning Officer

*Sanand Taluka Panchayat
Constitutency and Mamlatdar,
Sanand”*

9. As neither the Election Officer nor the State Election Commission did anything in the matter and more particularly as

the writ-applicant was not declared the winner, the writ-applicant has come up with the present writ-application.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

10. Mr.Bharda, the learned counsel assisted by Mr.Nishit Gandhi and Mr.Vipul Sundesha, the two learned advocates appearing for the writ-applicant, vehemently submitted that the respondent no.3 committed a serious error on the date of the counting, i.e. 2nd March 2021, in taking into consideration the votes secured by late Lilaben Thakore.

11. Mr.Bharda invited the attention of this Court to Section 28 of the Gujarat Panchayats Act, 1993. Section 28 of the Act 1993 talks about the person qualified to vote and be elected. According to Mr.Bharda, since Lilaben was an independent candidate it was not obligatory on the part of the Returning Officer to countermand the entire election. It is only if a candidate duly nominated by any recognized or registered political party dies that the election has to be countermanded so as to give that political party an opportunity to nominate any other candidate.

12. Mr.Bharda would argue that in view of the provisions of Section 28 of the Act, 1993, only the voters who are not disqualified under the law are qualified to be elected. As Lilaben Thakore got disqualified due to her death, her votes could not have been counted, and as her votes could not have been

counted, the writ-applicant having secured 1409 votes (second highest) should have been declared as the winner. In other words, the argument proceeds on the logic that once the candidate dies, it is as good as saying that such candidate does not figure in the voters' list, and if that be so, then he is not qualified to be elected. This is the principal argument of the learned counsel appearing for the writ-applicant.

13. Mr.Bharda would submit that the State Election Commission could not have shown the name of Lilaben as the winner in the Form No.31A [rule 63(3) of the Gujarat Panchayats Elections Rules, 1994].

14. In such circumstances referred to above, Mr.Bharda prays that there being merit in his writ-application, the same be allowed and his client may be declared as the winner from the 17-Pimpan Electoral Division of the Sanand Taluka Panchayat.

SUBMISSION ON BEHALF OF THE STATE ELECTION COMMISSION :

15. Mr.Mehta, the learned advocate appearing for the State Election Commission, at the outset raised a preliminary objection as regards the maintainability of this writ-application in view of the bar of Section 243-O of the Constitution of India. Mr.Mehta would submit that in view of clause (b) of Article 243, the election result of the 17-Pimpan Electoral Division of the Sanand Taluka Panchayat cannot be called in question except through an election petition.

16. Mr.Mehta would submit that without prejudice to his aforesaid preliminary contention as regards the maintainability of the writ-application, even otherwise on merits also the writ-applicant has no case.

17. Mr.Mehta further submitted that there is no other option now but to declare a bye-election. According to Mr.Mehta, the Returning Officer could not be said to have committed any error in counting the votes secured by late Lilaben Thakore as those votes could not be said to be invalid. According to Mr.Mehta, on the date of the polling, Lilaben was very much alive. According to Mr.Mehta, the Returning Officer could not have ignored the votes secured by Lilaben Thakore.

18. In such circumstances referred to above, Mr.Mehta prays that there being no merit in the present writ-application, the same be rejected.

19. Mr.Bharda, in rejoinder to the preliminary objection raised on behalf of the State Election Commission as regards the maintainability of the present writ-application, submitted that the issue raised in the present writ-application do not relate to any challenge to the election in real sense. In other words, according to Mr.Bharda, if it is the case of the writ-applicant that the votes polled in favour of late Lilaben Thakore should be declared to be invalid and the votes polled in favour of the remaining candidates should be counted and the result should be declared, then in such circumstances, the bar of Article 243O

of the Constitution would not come into play. He would submit that a writ-application could be said to be not tenable in the event the reliefs sought for are one touching the subjects as mentioned in the Article 243-O of the Constitution. He would submit that in any event, the jurisdiction of the writ court is not absolutely alien to even an election dispute in certain situations like the one on hand. In this regard, Mr.Bharda seeks to rely on a decision of the Supreme Court in the case of K.Venkatachalam vs. A.Swamickan, reported in (1999) 4 SCC 526. In such circumstances, Mr.Bharda prays that he should not be non-suited at this stage because he has even otherwise lost the limitation to file an election petition.

SUBMISSIONS ON BEHALF OF THE STATE :

20. Mr.Chintan Dave, the learned AGP appearing for the State, submitted that the claim put forward by the writ-applicant is not tenable in law. The only option now is to declare a bye-election.

MAINTAINABILITY OF THE WRIT-APPLICATION :

21. We appropriately set out Article 243-O of the Constitution of India. Article 243-O reads thus :

*“243-O. Bar to interference by courts in electoral matters.-
Notwithstanding anything in this Constitution--*

(a) *the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court;*

(b) *no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.”*

22. We are not much impressed with the preliminary objection raised on behalf of the State Election Commission as regards the maintainability of the present writ-application. As held by the Supreme Court in the case of Harnek Singh vs. Charan Singh and others, reported in (2005) 8 SCC 383, that although Article 243-O of the Constitution mandates that all election disputes must be determined only by way of an election petition, yet this by itself may not *per se* bar the judicial review, which is the basic structure of the Constitution. It is altogether a different thing to say that ordinarily such jurisdiction would not be exercised. There is a fine distinction between 'writ petition *per se* not maintainable' and 'writ petition relating to election ordinarily should not be entertained'.

23. We may also look into the decision relied upon by Mr. Bharda in support of his submission that the writ-application is maintainable. In *K. Venkatachalam (supra)*, the Supreme Court, after discussing all its earlier decisions on the question of maintainability of a writ-application under Article 226 of the

Constitution of India *vis-a-vis* Article 329(b) thereof, concluded as a statement of law in paragraph-27 among others as follows :

“Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?”

24. Thus, in view of the aforesaid, we overrule the preliminary objection and proceed to consider the matter on merits.

ANALYSIS :

25. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the pivotal question that falls for our consideration is, whether a candidate

nominated by a political party and who secured the second highest number of votes in a panchayat election be declared a winner if the candidate (independent) who secured the maximum number of votes dies in the period between the polling and the counting of votes ?

26. Section 2(10) of the Act defines the term 'general election' which means the election held under the Gujarat Panchayats Act, 1993 (for short, 'the Act') for the constitution or the reconstitution of a panchayat after the expiry of its term or otherwise.

27. Section 2(16) of the Act defines the term 'work prescribed' which means prescribed by rules.

28. Section 15(1) of the Act provides that the election of members to a panchayat shall be held on such date as the State Election Commission may appoint in this behalf.

29. Section 15(2) of the Act provides that such election shall be conducted in the prescribed manner.

30. Section 15(3) of the Act provides that the superintendence, directions and control of the conduct of such election shall be vested in the State Election Commission.

31. Section 15(4) of the Act provides that the names of the elected members shall be published in the prescribed manner by the State Election Commission.

32. The aforesaid is indicative of the fact that every step including the publication of the names of the elected members absolutely vests in the State Election Commission.

33. We quote Section 28 of the Act upon which reliance has been placed on behalf of the writ-applicant. Section 28 reads thus :

“28. Person qualified to vote and be elected.-- (1) Every person whose name is in the list of voters shall, unless disqualified under this Act or any other law for the time being in force, be qualified to vote at the election of a member for the electoral division to which such list pertains.

(2) (a) Every person who has attained the age of twenty one years and whose name is in the list of voters shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected from any electoral division.

(b) No person whose name is not entered in the list of voters for the village, shall be qualified to be elected from any electoral division thereof.

(3) Subject to any disqualification incurred by a person, the list of voters shall be conclusive evidence for the purpose of determining under this section whether any person is or is

not qualified to vote, or as the case may be, to be elected at any election.”

34. Section 274 of the Act empowers the State Government to frame rules for carrying out the purposes of the Act by way of a notification in the Official Gazette.

35. In exercise of the powers conferred by sub-section (5) of Section 274 read with sub-section (2) of Section 15, the Government of Gujarat has framed the Gujarat Panchayats Elections Rules, 1994. Rule 2(1)(f) of the said Rules defines the term ‘election’ which means an election to elect a member or members.... Rule 2(1)(g) of the said Rules defines the term ‘election commission’ which means the State Election Commission. Part IV of the said Rules prescribes the procedure regarding the elections. Rules 9(1) and 9(2) respectively are clear in its language and Rules 10 to 22 respectively prescribe the procedure to be followed and the functions to be carried out and the authority which such officers may possess under the control of the Election Commission including the directions to be followed in this behalf.

36. In the event a candidate set up by any recognized political party dies and if a report of his death is received before the publication of the list of the contesting candidates under Rule 18 of the said Rules or if a contesting candidate dies and the report of his/her death is received before the commencement of the poll, the Returning Officer shall, after verifying the fact of the death of the candidate, countermand the poll and report the fact

to the Election Commission in accordance with Rule 23 of the Rules and all the proceedings with reference to the election shall be commenced afresh in all respects as if it was a new election. The third proviso to this Rule prescribes that if a candidate dies before the commencement of the poll, the provisions shall apply *mutatis mutandis*. We quote Rule 23 of the Rules thus :

“23. Death of a candidate before poll.-- If a candidate set up by recognised political party whose nomination has been found valid under rule 15 and who has not withdrawn his candidature under rule 17 dies and a report of his death is received before the publication of the list of contesting candidates under rule 18 or if a contesting candidate dies and the report of his death is received before the commencement of poll, the returning officer shall, after verifying the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission and all proceedings with the reference to the election shall be commenced a new in all respects as if it was a new election :

Provided that no further nomination shall be necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll :

Provided further that a person who has given a notice of withdrawal of his candidature under rule 16 before the countermanding of the poll shall be eligible for being nominated as a candidate for the election after such countermanding:

Provided also that in an election of a village panchayat, if a candidate whose nomination has been found valid under rule 15 and who has not withdrawn his candidature under rule 17, dies before the commencement of a poll, the above provision shall apply mutatis mutandis to such election.”

37. The aforesaid Rule 23 do not envisage and/or prescribe as to what to do in the event of a death of an independent candidate after the commencement of the poll and before the declaration and publication of the names of the elected members including the publication of the result.

38. The provisions contained in Rule 60(7) of the Rules prescribe that after the completion of the counting, the Returning Officer shall record in the result sheet in Form No.27 the total number of votes polled by each candidate and announce the same. Rule 60(7) reads thus :

“(7) After the completion of counting the returning officer shall record in the result sheet in Form 27 the total number of votes polled by each candidate and announce the same.”

39. Rule 61(5) prescribes that after the total number of votes polled by each candidate has been announced under sub-rule (7) of Rule 60, or sub-rule (4), the Returning Officer shall complete and sign the result sheet in Form No.27 and no application for a recount would be entertained.

40. As provided in Section 15, the election has to be held on such date as the State Election Commission may appoint in that behalf. The election has to be conducted in a prescribed manner and under the superintendence, directions and control of the State Election Commission. The officers appointed by the Election Commission under Rule 5 as defined by Rule 2(1)(m) would conduct the election. The general duties of the Returning Officers are prescribed by Rule 6, and upon submissions of the total number of votes polled by each candidate, the same shall have to be recorded in the result sheet in Form No.27. At that stage, the death of a candidate securing highest number of votes if reported, the Returning Officer is under an obligation to report the death of the candidate to the State Election Commission as intended in Rule 63. It is pertinent to note that under Rule 63, the Returning Officer can be directed by the State Election Commission not to declare the result of the election without the permission of the Commission. It is also noteworthy that the reporting of death of a candidate securing highest votes has to be submitted by the Returning Officer to the State Election Commission after filling up of the Form No.27 seeking permission to conclude the remaining procedure under Rules 61, 62 and 63 respectively. Thereafter, for the declaration and publication of the result, the Returning Officer has to seek guidance from the State Election Commission, and in the absence of any contrary directions, he may then proceed for the preparation and filing of the Form No.28. It is only thereafter that the State Election Commission shall publish the names of the elected members under sub-section (4) of Section 15, as prescribed by sub-rule (3) of Rule 63 of the Rules. However, if a

person who is declared as elected is dead, then no such declaration as per the Form No.28 can be made, and in such circumstances, the Election Commission would be left with no other choice except not to make any such declaration under Rule 63.

41. It is not in dispute that, in the case on hand, before the declaration of the result in the Form No.28, the information of the death of Lilaben Thakore had been received by the Returning Officer and the same was notified to the State Election Commission. The State Election Commission, thereafter, would be within its discretion whether to declare the result or to countermand the election, and the decision in that behalf of the State Election Commission would be final.

42. It is well-settled that the statutory authority cannot do what is not provided in the statute expressly. In other words, it cannot exercise inherent power like a civil court to meet and mitigate any thorny situation so as to reach to a logical conclusion. If such a power is imagined, it would lead to giving charter of taking arbitrary and capricious action inviting violence of Article 14 of the Constitution of India.

43. What is observed and discussed as above is supported by a decision of the Supreme Court in the case of Jitu Patnaik vs. Sanatan Mohakud, reported in (2012) 4 SCC 194. In paragraph 25 of the report, Justice R.M.Lodha (as His Lordship then was), while examining Section 38 of the Representation of the People Act, 1951, has observed as follows:

“25. There is no doubt that only living persons can offer themselves or be offered as candidates for membership of Parliament or State Legislatures. However, once nomination has been filed by a candidate and on scrutiny his candidature is found proper and before the expiry of the period of the withdrawal, he has not withdrawn his candidature and his name is included in the list of validly nominated candidates prepared under Section 38 of the 1951 Act and Rule 11 of the 1961 Rules, if death of a contesting candidate as defined in Section 38 takes place, the consequences following the death of such contesting candidate have to be found from electoral law contained in the 1951 Act or the Rules framed thereunder.”

44. Before proceeding further to examine the merits of the argument addressed on behalf of the writ-applicant, it will be useful to note that the right to vote or to stand as a candidate for election is neither a fundamental nor a civil right. In England also it has never been recognised as a Common Law Right. In this connection, we may usefully refer to the following observations made in the case of *Jyoti Basu and others vs. Debi Ghosal and others*, reported in AIR 1982 SC 983 which read as under :

“The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in N.P.Ponnuswami

vs. Returning Officer, Namakkal Constituency, (1952) SCR 218 : AIR 1952 SC 64 and Jagan Nath vs. Jaswant Singh, AIR 1954 SC 210. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. 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.”

45. The case of the writ-applicant, therefore, must be examined in the aforesaid background.

46. Rule 15 of the Rules provides for the scrutiny of the nomination papers, which reads thus :

“15. Scrutiny of nomination papers.- One of the date fixed for the scrutiny of nomination under clause (b) of sub rule (2) of rule 9, 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 stand 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 other than those which have been rejected by the returning officer under the proviso to sub-rule (2) or under sub-rule (6) of rule 12.

(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 paper on any of the following grounds, namely.

(a) on the date fixed for scrutiny of nominations the candidate is either not qualified or disqualified for being chosen to fill the seat under the Act or any other law for the time being in force: or

(b) that the prosper is disqualified subscribing a nomination paper; or from

(c) that there has been a failure to comply with any of the provisions of rules 12 or 13; or

(d) that the candidate or the prosper or any seconder is not identical with the person whose electoral number is given in the nomination paper as number of such candidate or prosper or a seconder, as the case may be; or

(e) that the signature of the candidate or any proposer [or any seconder] on the nomination paper is not genuine or has been obtained by fraud.

(3) Nothing contained in clauses (b), (c) or (d) of sub-rule 92 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 technical defect which is not a substantial character.”

47. Rule 17 of the Rules provides for the notice of withdrawal of candidature, which reads thus :

“17. Notice of withdrawal of candidature.- (1) Any candidate may withdraw his candidature by a notice in writing in Form 6 subscribed by him and delivered before three O'clock in the afternoon on the day fixed under clause (c) of sub-rule (2) of rule 9 to the returning officer either by such candidate in person or by his proposer or by his election agent who has been authorised in this behalf in writing, by such candidate:

Provided that a notice of withdrawal shall not be accepted by the returning officer unless the scrutiny of nominations is completed.

(2) No person who has given a notice of withdrawal of his candidature under sub-rule (1) shall be allowed to cancel the notice.

(3) The returning officer shall on being satisfied as to the genuineness of the notice of withdrawal and the identity of the person delivering it, cause the notice to be affixed at some conspicuous place in his office. Before affixing the notice, he shall note thereon the date and time at which it was delivered to him.”

48. Rule 18 of the Rules provides for the publication of the list of contesting candidates and their symbols, which reads thus :

“18. List of contesting candidates and their symbols.- (1) Immediately after the expiry of the period within which candidature may be withdrawn under rule 17, the returning officer shall prepare a list of contesting candidates, that is to any candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the said period, such list shall be in Form 7 and shall indicate the symbol allotted to each candidate under rule 11, according to his choice or, as the

case may be, assigned to him by the returning officer in pursuance of sub-rule (3) and he shall classify the names of the candidates as,--

(i) candidate of recognized national political parties:

(ii) candidate of registered political parties, other than those mentioned in clause (i):

(iii) other candidates. The names of candidates shall be arranged in the list in the Gujarati alphabetical order in the manner in which they are given in the list validity nominated candidates where two or more candidates bear the same name, they shall be distinguished by the addition of their occupation or residence or in such other manner as the returning officer deems fit. The returning officer shall cause a copy of the list to be affixed in some conspicuous place in his office and shall also supply a copy thereof to each of the contesting candidates.

(2) The returning officer shall also send a copy of the list to the Election Commission.

(3) If more than one candidates show their preference for one and the same symbol, the Returning Officer shall decide by lot to which of those candidates the symbols shall be assigned. The decision of the returning officer in assigning any symbol to a candidate under this sub rule shall be final.

(4) *Every candidate or his election agent shall forthwith be informed of the symbol allotted to the candidate and be supplied with a specimen thereof by the returning officer,*

Explanation.- For the purpose of this rule and for rule 23 "recognised political party" means a political party recognised by the Election Commission of India, under the Election Symbol (Reservation and Allotment) Order, 1968."

49. The perusal of Rule 15 referred to above would indicate that it provides for the mechanism for decision making process for the reception, rejection of nomination papers, preparation and publication of the list of candidates having filed valid nomination. After the publication of the list by way of affixation, one can withdraw from such contest under Rule 17 of the Rules referred to above.

50. From the aforesaid, it is abundantly clear that once the date of withdrawal of the nomination expires and the list is published, the election has to be held with this list and the Election Officer has no power to delete the name under any circumstances from the list of the contesting candidates.

51. In the case on hand, even if Lilaben Thakore had passed away a day before the date of the polling, her name could not have been struck off from the ballot paper. However, here is a case in which, on the date of the polling, Lilaben Thakore was very much alive and she passed away a day before the counting

of the votes. In such circumstances, we are of the view that the votes cast in favour of Lilaben Thakore cannot be said to be invalid only because on the date of the counting Lilaben Thakore was dead and gone.

52. In the aforesaid context, we may now look into Part VIIA of the Rules. This chapter is of counting of votes recorded in the electronic voting machine. However, before that, we quote Rule 63, which reads thus :

“63. Declaration and publication of result.-- (1) When the counting of votes has been completed, the Returning Officer shall in absence of any direction by the Election Commission to the contrary, forthwith declare the result of the election in Form 28 by affixing a signed copy of the result in that form on the Notice Board in his office. He shall also send a copy of the same to--

(a) the Election Commission;

(b) the Secretary to Government, Panchayats and Rural Housing Department;

(c) the Development Commissioner;

(d) the District Election Officer;

(e) the District Panchayat;

(f) the Taluka Panchayat;

(g) the Village Panchayat in respect of Village Panchayat election of a Sarpanch.

(2) The copy sent to the district panchayat taluka, panchayat and village panchayat shall be displayed on the notice board in panchayat office.

(3) As soon as the declaration of the result in Form 12 or Form 28 is received from the Returning Officer, the Election Commission shall publish the name or names of elected member or members as the case may be, under sub-rule (4) of section 15 in Form 29, 30 or 31 as may be appropriate by affixing a signed copy thereof on the notice board in its office.

(4) The Election Commission shall also send a copy of the result so affixed to –

(a) the Secretary to Government, Panchayats and Rural Housing Department.

(b) the Development Commissioner.

(c) the District Election Officer.

(d) the District Panchayat.

(e) the Taluka Panchayat.

(f) the village panchayat in respect of village panchayat election or, election of a sarpanch.

(5) (a) If any person is elected from more than one electoral division of the same panchayat or elected both as a member and Sarpanch of the same village panchayat he shall, by giving a notice in writing signed by him and deliver to the Returning Officer within fifteen days from the date of the publication of the result of such election, choose for which of these electoral divisions he shall serve or as the case may be, choose to be member or Sarpanch. On such choice having been made the remaining seat, seats. offices or offices shall be become vacant.

(b) Any intimation given under clause (a) shall be final and irrevocable.

(c) If such person does not make the choice referred to in clause (a), then –

(i) in the case where such person is elected from more than one electoral division of the same Panchayat, he shall be deemed to have been elected from that electoral division from which he has obtained the largest number of votes and the other seat or seats shall become vacant :-

(ii) in the case where such person is elected both as a member and a Sarpanch of the same village panchayat, he shall be deemed to have been elected as a Sarpanch and the seat or seats shall become vacant.”

53. The Form No.27 is a final result sheet, which reads thus :

“Form no.27
[See rule 58(10) and 60(7)]
Final Result Sheet

General/Bye Election of District Panchayat Electoral Division No..... Name..... General/Bye-Election of Taluka Panchayats Electoral Division No..... Name..... Election of Village..... Panchayat Ward No..... Election of Sarpanch of..... Village Panchayat.

PART-I

Total number of voters in the Electoral Division.....
Total number of voters recorded in the polling station.....

Total No. of Polling Station	Total Votes received from ballot box	No. of tendered votes
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		

Returning Officers
....District / Taluka Panchayat
Electoral Division No.....
Name..... and
Designation.....
Electoral Division No.....
Name..... and
Designation.

PART-II

No. of valid and rejected votes polled for each candidate in each round

No. of candidate	Name of candidate	Number of votes recorded by postal ballot paper	No. of valid votes polled for each candidate	
			1 st round	2 nd round
1	2	3	4	5

No. of valid votes polled for each candidate			Total No. of valid votes (Total No.4 to 8)	Total No. of voting of valid votes (Total No. of Col. 3 + 9)
3 rd round	4 th round	5 th round		
6	7	8	9	10

Total No. of Valid Votes.....

Total No. of Rejected Votes.....

Total No. of Valid and Rejected Votes.....

Place :

Date :

*Returning Officers
....District / Taluka Panchayat*

*Panchayat Electoral Division No.....
Name and Designation.....
Village Panchayat and Designation”*

54. We shall now look into the provisions from Rule 64A upto Rule 64D. The same read thus :

“64A. Scrutiny and inspection of voting machines.--(1) The returning officer may have the control units of the voting machines used at more than one polling station taken up for scrutiny and inspection and votes recorded in such units counted simultaneously.

(2) Before the votes recorded in any control unit of a voting machine are counted under sub-rule (1), the candidate or his election agent or his counting agent present at the counting table shall be allowed to inspect the paper seal and such other vital seals as might have been affixed on the unit and to satisfy themselves that the seals are intact.

(3) The returning officer shall satisfy himself that none of the voting machines has, in fact, been tampered with.

(4) Where the returning officer is of the view that any voting machine has been tampered with, he shall not count the

votes recorded in that machine and shall follow the procedure laid down in rule 49 or 54-T or 59 as may be applicable in respect of the polling station where that machine was used.”

“64B. Counting of votes.--(1) After the returning officer is satisfied that the voting machine has, in fact, not been tempered with, he shall have the votes recorded therein, counted by pressing the appropriate button marked "Result" provided in the control unit whereby the total votes polled and votes polled by each candidate shall be displayed in respect of each such candidate on the display panel provided for the purpose in the unit.

(2) As the votes polled by each candidate are displayed on the control unit, the returning officer shall --

(i) the number of such votes separately in respect of each candidate in Part II of Form 23B;

(ii) Complete Part II of Form 23B in other respects and signed by the counting supervisor and also by the candidates or their election agents or their counting agents present; and

(iii) make corresponding entries in a result sheet in Form 27A or the form prescribed by the State Election Commission and the particulars so entered in the result sheet announced.”

64C . Sealing of voting machines.--(1) After the result of voting recorded in a control unit has been ascertained candidate-wise and entered in Part II of Form 23B and Form 27A or the form prescribed by the State Election Commission, the returning officer shall reseal the unit with his seal and the seals of such of the candidates or their election agents present, and who desire to affix their seals thereon to ensure that the result of voting recorded in the unit is not obliterated and the unit retains the memory of such result.

(2) The control unit so sealed shall be kept in specially prepared boxes on which the returning officer shall record the following particulars, namely:--

(a) the number and name of the electoral division of the panchayat office of the sarpanch of the village panchayat;

(b) the particulars of polling station or stations where the control unit has been used;

(c) the serial number of the control unit;

(d) date of poll; and

(e) date of counting.”

64D. Other provisions of PART VII apply.-- (1) The provisions of rules 55 to 58 and 61 to 64 in PART VII shall apply mutatis mutandis in relation to counting of votes and declaration of result when voting has been recorded by voting machine and any reference to ‘ballot paper’ or ‘ballot box’ shall be construed as including a reference to such ‘votes recorded on voting machine’ or ‘electronic voting machine’ respectively.

(2) Any reference to any rule in this part shall be construed as reference to the corresponding rule of these rules.”

55. It would appear from the aforesaid that by a mechanized process the result of election automatically surfaces in the machine itself if the button is pressed. In such mechanized system, it is not possible, or rather, permissible to segregate the valid and invalid votes. We are, therefore, of the view that neither the Act nor the Rules provide any scope either expressly or by necessary implication for rejection of the votes cast in favour of a

deceased candidate on account of her death occurred after the polling and before the counting of the votes.

56. We are of the view that not only technically but even officially the deceased person having secured the highest valid votes under the provision of law has to be declared to have been elected, but the result would be a notional one.

57. As noted above, after the declaration of the result, the next step to be taken by virtue of Rule 60(7) is to fill up the Form No.27. It is only thereafter that the Form No.28 would be filled up as envisaged under Rule 63(1) of the Rules. However, as noted above, if a candidate who has emerged to be the winner is dead, then no such declaration can be made as per the Form No.28. In light of this, the completion of counting and recording in the result sheet in the Form No.27, by necessary implication, cannot be assigned the meaning of declaration of result, as it is merely a final result sheet. The declaration of final result is, in the last, under Rule 63. In such circumstances, the language deployed in Rule 63 assumes significance *“(1) when the counting of votes has been completed, the returning officer shall, in the absence of any directions by the Election Commission to the contrary, forthwith declare the result of the election in the Form No.28 by affixing a signed copy of the result in that form on the notice board of his office....”*

58. In our opinion, if a candidate, after the poll and before the declaration of the result, dies, then naturally he/she will not be able to fill the seat by reason of his/her death and the only

remedy left would be to have a bye-election within the stipulated period of time. We find it extremely difficult to take the view that as Lilaben Thakore was an independent candidate the election could not have been countermanded and her votes should not have been taken into consideration for the purpose of declaration of the result and the writ-applicant, having secured the second highest votes, should have been declared as the winner. The argument of Section 28 of the Act is also of no avail to the writ-applicant. We fail to understand how Section 28 of the Act helps the writ-applicant in getting herself declared as a winner.

LAW IN AMERICA :

59. We have some interesting legal material in support of our aforesaid view. Mr. Alvin Jaeger, the Secretary of State of North Dakota, in his capacity as the Chief Election Officer, addressed a letter to the North Dakota Attorney General Mr. Wayne Stenehjem, to clarify three key questions relating to the election process. The questions posed for the opinion of the learned Attorney General were :

- (1) What will be the result or effect of the votes that are cast for the deceased candidate ?
- (2) If the deceased candidate receives a number of votes that would be sufficient to elect the candidate, may the candidate be declared to have been elected, and if so, whether the vacancy deemed to have been existed ?

(3) If a vacancy does exist, then what would be the process for filling the vacant post ?

60. The learned Attorney General answered the first question as under :

“You first ask what the result or effect will be of the votes that are cast for the deceased candidate. The death or disqualification of a candidate, unfortunately, occurs from time to time and has been addressed by the courts of this country several times throughout history. In a majority of states, the “American” rule is followed in the determination of whether votes cast for a deceased or disqualified candidate are to be counted. The “American” rule holds that 1) the purpose of an election is to carry out the will of the people; 2) votes for a deceased or disqualified candidate represent a choice by qualified voters among the options presented on the ballot; 3) to disregard such votes, especially when they constitute a majority or plurality of the voters, is to frustrate the popular will; so therefore 4) votes for deceased and disqualified candidates should be counted like any other votes, and if the “candidate” in question would have won the election, the result is a vacancy in the office.

The ‘English’ rule, by contrast, is that a candidate who has died is ineligible to serve and therefore a vote for a deceased candidate is a wasted vote and a nullity. The Pennsylvania Supreme Court described the ‘English’ rule as follows:

“It is “repugnant to the principle of majority rule, which is the cornerstone of orderly government. The principles of popular government require that votes cast for a dead man as a candidate for public office shall not be considered mere nullities, but that they shall be regarded as expressions by the voters that they prefer the office to be declared temporarily vacant until it can be filled in the manner prescribed by law rather than that a person whom they voted against and who represents opposing policies should fill it for a full term.””

The North Dakota Supreme Court, in Woll v. Jensen, rejected the ‘English’ rule saying, “where the disqualification is known, the party receiving the minority vote will be entitled to the office, and this on the theory that the voters have willfully thrown away their votes and that the office should not go begging on that account”.

A 1999 Attorney General’s opinion from Washington State explained “the rationale for the ‘American’ rule is the desire to recognize political realities and to carry into effect the public will”. I agree with that opinion when it says:

“An election is a choice among two or more known candidates in which the voters decide both which candidate they prefer and which candidates they do not prefer. Candidates decide whether to seek an office and voters decide how to vote based on an

assessment of the range of candidates on the ballot. If one of the candidates dies, the choice available to the voters is suddenly altered.... Where [substituting another candidate] is not possible, leaving the deceased candidate's name on the ballot allows the voters a choice they otherwise would not have. Some voters might prefer "someone else" over the remaining names on the ballot and would prefer to cast their votes for a vacancy. Counting the votes for the deceased candidate honors this choice and helps assure that the people will be governed by those who represent the popular will. Other solutions reduce the choice available to the voter and reduce the chance that the election results will actually reflect the public will.

The North Dakota Supreme Court, in Woll v. Jensen, explained in a case where voters knew that one candidate did not meet the qualifications for the office, but won anyway, that the "American" rule seems to be that no intention to throw away the vote can be imputed, but that rather the vote for the disqualified candidate must be considered as a protest against the qualified person, and especially should this be the case where there are only two candidates. To disregard the votes cast for a candidate would disenfranchise the voters of the state in violation of Art. 2 § 1 of the North Dakota Constitution. It is my opinion that the "American" rule has been adopted by a majority of the states, including North Dakota, and thus, the votes cast for the deceased candidate should be counted.

61. The second question was answered as under :

“The ‘American’ rule, as discussed above, provides a remedy in situations such as the one at hand, where a candidate dies or otherwise cannot fulfill the eligibility criteria for the particular office. The Oklahoma Supreme Court found that the constitutional requirement [to be a qualified elector of the respective district did not void the votes for a deceased judicial candidate. The court explained that the constitutional eligibility requirement simply prevented a disqualified (or, in this case, deceased) candidate from taking office – not from remaining on the ballot. The deceased candidate fulfilled the constitutional requirements for candidacy from the time he was put on the ballot until his death.

After an election, the canvassing board “determines who has received the highest number of votes for a particular office”. The candidate or candidates to be elected for each office receiving the highest number of votes must be duly elected to the office. This is a purely ministerial duty, and “the canvassing board has no authority to set itself up as judge of the qualifications of the candidates and issue a certificate to someone other than the highest vote-getter.”

However, in the event a candidate dies or is otherwise unable to serve, the duties of the respective office may not be discharged. At that point “if any person elected to any

state, district, county, or other political subdivision office fails to qualify and enter upon the duties of such office within the time fixed by law, such office must be deemed vacant and must be filled by appointment as provided by law.”

Thus, it is my opinion that pursuant to state law and the ‘American’ rule, votes cast for a deceased candidate must be counted. In the event the deceased candidate receives the majority of the votes, the candidate is elected. However, if the prevailing candidate has died, the candidate is no longer qualified, and a vacancy would exist.”

62. The third question was answered as under :

“The North Dakota State Constitution provides that “the legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.” The legislative assembly has done so, and the process is set forth in N.D.C.C. § 16.1-13-10. Upon the application of state law and the ‘American’ rule, it is my opinion that this would be the appropriate method to fill a vacancy.”

63. We have quoted the entire legal opinion of the learned Attorney General keeping in mind, or rather, considering that in the said opinion the learned Attorney General has discussed important case-law in the form of judgments of the North Dakota Supreme Court, Oklahoma Supreme Court, Pennsylvania

Supreme Court, etc. The opinion talks about the 'English' rule as compared to the 'American' rule in the determination of the question, whether the votes cast for a deceased or a disqualified candidate are to be counted or not? The 'English' rule is that a candidate who has died is ineligible to serve and, therefore, a vote for a deceased candidate is a wasted vote and a nullity. On the other hand, the 'American' rule holds that : (i) the purpose of an election is to carry out a will of the people; (ii) votes for a deceased candidate represent a choice by the qualified voters among the options presented on the ballot; (iii) to disregard such votes, especially when they constitute a majority or plurality of the voters, is to frustrate the popular will; so, therefore, (iv) votes for the deceased should be counted like any other votes, and if the 'candidate' in question would have won the election, the result is a vacancy in the office. The 'American' rule that the principles of popular government rule that the votes cast for a dead man as a candidate for the public office shall not be considered mere nullity but that they shall be regarded as the expression by the voters that they preferred the office to be declared temporarily vacant until it can be filled in the manner prescribed by law rather than that a person whom they voted against, is more appealing and is in consonance with the entire scheme of the Act as well as the Rules. The 'American' rule referred to by us takes care of the situation wherein on the date of the polling itself the candidate is dead but the name of such candidate figures in the ballot paper and still people voted for such candidate. Here is a case wherein Lilaben Thakore was alive on the date of the polling, and in such circumstances, the only alternative now is to go for a bye-election.

64. We find it extremely difficult to take the view that the writ-applicant should be declared as the winner of the election having secured the second highest votes. In fact, none of the rules discussed above say anything in this regard. The only option now left for the State Election Commission is to give a bye-election in accordance with law.

65. We are dealing with an important facet of democratic activity. The rules have to be interpreted in a pragmatic and practical manner, consistent with the larger objective and actual difficulties faced in the conduct of election.

66. For the foregoing reasons, this writ-application fails and is hereby rejected.

67. The State Election Commission shall now proceed further to give a bye-election in accordance with law so far as the 17-Pimpan Electoral Division of the Sanand Taluka Panchayat is concerned.

(J. B. PARDIWALA, J.)

(VAIBHAVI D. NANAVATI, J.)

/MOINUDDIN