

defendant, the one seeking to fix liability on the other, and the other to avoid that liability. Even if the award is subsequently made upon the consent of the parties, it does not occur to me that it stands in any respects in a different position to a confession of judgment in the suit itself, and the decree that is passed in either case would seemingly stand upon the same footing. * * * * *

(6) Therefore, the approach has to be whether the decree, that followed, was a decree in a suit; and it cannot be denied that the decree, that followed, was in a suit. It is the decree that put an end to the suit; and, therefore, the provisions of section 11 of the Court-fees Act come into play.

(7) For the reasons recorded above, the objection prevails and is allowed. The plaintiff is allowed one month's time to make good the Court-fees. There will be no order as to costs.

PREM CHAND JAIN, J.—I agree.

R.N.M.

FULL BENCH

Before Harbans Singh, D. K. Mahajan and Shamsheer Bahadur, JJ.

KUNDAN SINGH,—*Petitioner*

versus

KABUL SINGH AND OTHERS,—*Respondents*

Election Petition No. 1 of 1968

February 6, 1969

Representation of the People Act (XLIII of 1950 as amended by Act XLVII of 1966)—S. 23(2) and 23(3)—Representation of People Act (XLIII of 1951)—S. 62—Qualified voter's name not included in the electoral roll—Application for inclusion made before the relevant date—Order including the name passed after the date of nominations for the election—Such order being opposed to section 23(3)—Whether without jurisdiction and non est or only illegal or irregular—S. 23—Provisions of—Whether mandatory.

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Held, by majority (Shamsher Bahadur and Harbans Singh, JJ., Mahajan, J. Contra)—that an application for inclusion of the name of a qualified voter in the electoral roll may be presented any time before the final date of nominations, but no order for inclusion can be made after that date. The electoral roll which assumes finality on the day of nominations could have been subjected, up till then, to all the alterations, amendments, inclusions and deletions envisaged in sections 22 and 23 of the Representation of the People Act, 1950. An order passed by the appropriate authority after the date of nominations is inherently without jurisdiction and carries with it the dead-weight of this infirmity. This conclusion cannot be evaded on the ground that the electoral registration officer being rightly seized of the application made by the voter for inclusion of his name in the electoral roll, had the jurisdiction to pass an order up till the date of polling even after the date of nominations. No doubt there is no time-limit for making an application except by implication that it should be filed before the date of nominations, but what is provided for is that the direction for inclusion cannot be given after the date of nominations. The order of inclusion of the name of the voter in so far as it transgresses the statutory bounds of time becomes tainted with an irremediable defect and is therefore void. The acceptance of the position that the corrections in the electoral roll could be made right up till the time of election would re-introduce a confusion which the Parliament in its wisdom thought it fit to eliminate by repealing section 23 of the Act of 1950 by Act XLVII of 1966, and making a provision in sub-section (3) of the substituted section 23, placing a time limit on the order which may have been passed by the Electoral Registration Officer. Hence an order of inclusion of voter's name in the electoral roll which is opposed to section 23(3) of the Act is void and *non est*.

Held, that the rule embodied in sub-section (3) of section 23 of the Act goes to the root of the matter and it cannot be broken. The breach of the mandatory requirement which the Parliament has deliberately adopted to replace the undefined time-limit, could not be said to be a mere breach of a directory rule whose non-compliance could be overlooked.

Held, by (Mahajan, J. Contra)—that the inclusion of the name of a qualified voter in the electoral roll against the provision of section 23(3) of the 1950 Act cannot be without jurisdiction but is only illegal. Every illegal order is not an order without jurisdiction. The application for inclusion of the name having been made before the relevant date, the Registration Electoral Officer has the jurisdiction to entertain it and decide it, and the mere fact that he defers his decision will not oust his jurisdiction. Only those votes are void which fall within the ambit of section 62 of the Representation of People Act, 1951. The name of a voter may be brought on the electoral roll illegally, but once the name has been brought, he is entitled to vote in view of section 62(1) of the 1951 Act. Sub-sections (2), (3), (4) and (5) of section 62 to the 1951 Act are an exception to sub-section (1). Even if the name of a person is entered in the electoral roll,

he cannot vote, if the provisions of sub-sections (2), (3), (4) and (5) apply to him. It is of considerable significance that sub-section (2) refers to section 16 of the 1950 Act, but not to section 23. If the intention of the Legislature was that a person, whose name is entered in the electoral roll in opposition to section 23 of the 1950 Act was not entitled to vote, this would have been so mentioned in section 62 of the 1951 Act. Hence all that can be said is that where the provision of section 23 of the 1950 Act have not been followed, there has been illegality in the preparation of the electoral roll, but every illegality cannot lead to the conclusion that what has been done has been done without jurisdiction.

Held, that the provisions of section 23 of the 1950 Act are directory and not mandatory. If the provisions had been mandatory, section 23 would have found mention in section 62 of the 1951 Act. Courts must assume that the authorities prohibited to do a thing will not do it. But if they do it, the violation of prohibition may be such that it does not, in any manner, either confer a right or take away a right of a person who did not possess it or possessed it. Although the language of a statute may be mandatory, yet keeping in view the purpose of the Act and the object achieved, the word "shall" can be read as "may".

Case referred by the Hon'ble Mr. Justice D. K. Mahajan, on 23rd January, 1969 to a Full Bench for decision of the important questions of law involved in the case. The Full Bench consisting of the Hon'ble Mr. Justice Harbans Singh, the Hon'ble Mr. Justice D. K. Mahajan and the Hon'ble Mr. Justice Shamsher Bahadur, decided on 6th February, 1969 the questions referred to and returned the case to the Single Bench for decision on merit.

Election Petition under Section 97 read with Section 101 of the Representation of the People Act, 1951 praying that the election of the returned candidate—Shri Kabul Singh, respondent No. 1, from the Hoshiarpur Local Authorities Constituency to the Punjab Legislative Council, be declared void and Kundan Singh Petitioner be declared duly elected in his place.

S. S. BEDI, AND S. S. KANG, ADVOCATES, for the Petitioner.

A. S. SARHADI, AND N. S. BHATIA, ADVOCATES, for Respondent No. 1.

MALUK SINGH, ADVOCATE, for Respondent No. 3.

ORDER, DATED JANUARY 23, 1969.

MAHAJAN, J.—At the election to the Punjab Legislative Council held in April, 1968, 5 candidates contested the election from Hoshiarpur Local Authorities Constituency. The last date for the filing of the nomination papers was 12th of March, 1968. The date

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for the scrutiny of these papers was 13th of March, 1968; and the last date of withdrawal was 16th of March, 1968. The actual polling took place on the 7th of April, 1968; and the result was declared on the 8th of April, 1968. The candidates, who contested the election, were—Kundan Singh, petitioner; Kabal Singh, respondent No. 1; Didar Singh, respondent No. 2, Mian Mohinder Singh, respondent No. 3 and Bhagat Singh, respondent No. 4. Kabal Singh, respondent No. 1 was declared elected. This led to the present petition by Kundan Singh on the 13th of May, 1968, to this Court, for an order declaring the election of Kabal Singh void and for an order that Kundan Singh be declared duly elected. On the 2nd of August, 1968, Kabal Singh filed a Recriminatory Petition under section 97 read with section 101 of the Representation of the People Act, 1951.

(2) The principal grounds set up by Kundan Singh, in support of his petition, are:—

- (1) That Shri Hari Singh was not included in the list of voters till the last date for filing the nomination papers and, therefore, he was not entitled to vote at the election to the Hoshiarpur Local Authorities Constituency. His name was ordered to be put on the electoral roll on the 5th of April, 1968, about two days before the polling day, the intimation of which was received by Kundan Singh on the 7th of April, 1968. Hari Singh was, therefore, issued the ballot-paper illegally. He cast his vote at Bhunga Polling Station, first preference being Shri Kabal Singh. That the casting of vote by him has resulted in non-compliance with the Representation of the People Act, 1951, and the rules made thereunder with the result that the result of the election, so far as it concerns the returned candidate, has been materially affected. His vote should have been rejected as void.
- (2) That Shri Harcharan Singh and Smt. Shashi Kanta, who were electors in the Constituency, were carried by Karnail Singh, Polling Agent of respondent No. 1, Kabal Singh, from their house in Darapur, in Car No. CH-333, procured by the said Karnail Singh and Giani Kartar Singh, Agents of Kabal Singh, to the Polling Station. At the instance of Karnail Singh, the Presiding Officer, Shri Suvinderjit Singh, issued the ballot-paper

to Harcharan Singh in the car. Harcharan Singh marked the same in the presence of his wife, Shri Karnail Singh, Polling Agents and the driver of the car, giving his first preference vote to respondent No. 1. He handed over the ballot-paper to the Presiding Officer outside the Polling Station for being inserted in the ballot-box and it was so inserted by the Presiding Officer. The procedure adopted for the polling of vote of Dr. Harcharan Singh is against the provisions of the Representation of the People Act and the rules made thereunder; and, therefore, this vote should not have been counted in favour of respondent No. 1, Kabal Singh; and the counting of the same in his favour has materially affected the result of the election so far as it concerns the returned candidate.

(3) That the Returning Officer improperly rejected 5 votes polled by the petitioner and improperly accepted 2 votes polled by the respondent. The illegal rejection and the illegal acceptance of the aforesaid votes has materially affected the result of the election in so far as the returned candidate is concerned.

(4) That car No. CH-333 belonging to Giani Kartar Singh was freely used by respondent No. 1, Kabal Singh, for the purpose of his election campaign during the course of election. That this car was used to convey two electors, Dr. Harcharan Singh and his wife from their residence to the polling station; and, therefore, Kabal Singh is guilty of the corrupt practice under section 123(5) of the Representation of the People Act.

(5) That the agent of the respondent, namely, Kabal Singh, committed the corrupt practice under section 123(5) in the interest of the returned candidate, which has materially affected the result of the election; so far as it concerns the returned candidate.

(3) These contentions have been refuted by respondent No. 1, Kabal Singh.

(4) In the Recriminatory Petition filed by Kabal Singh, the following grounds of attack have been levelled by Kabal Singh

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against certain votes alleged to have been polled in favour of Kundan Singh:—

- (1) That the following votes have been illegally taken into account so far as Kundan Singh is concerned. They should not have been counted in his favour for the following reasons:—
 - (i) That the vote of Tarsem Singh, son of Waryam Singh, at serial No. 4 of Voters' List of Panchayat Samiti, Tanda, polled in favour of Kundan Singh was void inasmuch as Tarsem Singh was in Government service and had been appointed as Special Assistant to Dr. Jagjit Singh, Finance Minister on 28th November, 1967, and had ceased to be a member of the Panchayat Samiti, Tanda, under section 6(b) of the Punjab Samitis and Zila Parishads Act, 1961. His vote accordingly was void and could not be counted in favour of Kundan Singh.
 - (ii) That Harjinder Singh was not a voter in the Constituency on the date of the nomination. He had made no application under rule 17 framed under the Representation of the People Act, 1951. His name was illegally entered in electoral roll of Panchayat Samiti, Balachaur, at serial No. 25, on the 16th of March, 1968. Therefore, this vote is also void and liable to be ruled out of consideration. The same was polled in favour of Kundan Singh; and, therefore, should have been deducted from the votes polled in his favour.
 - (iii) That Shri Balwant Singh was not a voter. His name was got entered by Ch. Kartar Singh, Minister, at serial No. 25 on 2nd April, 1968, without any application. He also cast his first preference vote in favour of Kundan Singh. This vote was also void and should have been deducted from the number of votes polled in favour of Kundan Singh.
 - (iv) That Ch. J. S. Sehgal, Executive Engineer, Tanda, in his capacity as such was the member of the Notified Area Committee, of Talwara and was enrolled at

serial No. 13. He had been transferred from the post of the Executive Engineer from Talwara and had been relieved of his charge. Therefore, he had ceased to be a voter. The vote cast by him at the instance of Dr. Jagjit Singh, Finance Minister and Mahant Ram Parkash is void and cannot be counted in favour of Kundan Singh.

(2) That Kundan Singh committed the corrupt practice of undue influence, as provided in section 123(2) of the Representation of the People Act, inasmuch as—

- (i) That, with his consent and at his instance, Dr. Jagjit Singh Finance Minister, brought to bear undue influence on Tarsem Singh;
- (ii) That, with the consent and at the instance of Ch. Kartar Singh, Minister, Co-operation, Harjinder Singh was forced and pressurized to vote for Kundan Singh;
- (iii) That, with the consent of Kundan Singh and at his instance, Ch. Kartar Singh, Minister, Co-operation, pressurized Balwant Singh to vote for him; and
- (iv) That, with the consent of Kundan Singh, and at his instance, Dr. Jagjit Singh and Mahant Ram Parkash, Ministers, pressurized J. S. Sehgal to vote for him.

There are similar allegations made *vis-a-vis* a number of other persons and incidents; and it is not necessary to enumerate them.

- (3) That Kundan Singh committed the corrupt practice of procuring a vehicle for the free conveyance of the electors and thus committed the corrupt practice, as enumerated in section 123(5). The electors conveyed were J. S. Sehgal and Tarsem Singh.
- (4) That the Returning Officer rejected 5 votes validly polled in favour of Kabal Singh, whereas he accepted 3 votes, polled in favour of Kundan Singh which should have been rejected.

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These allegations are denied by Kundan Singh.

(5) On the pleadings of the parties, the following issues were framed in the Election Petition and the Recriminatory Petition:—

I. *Issues in the Election Petition—*

- (1) whether allegation in para 4(a) pertaining to the vote of Hari Singh is correct and the vote was void and was polled in favour of respondent No. 1 in violation of the Rules and has materially affected the result of the election of respondent No. 1;
- (2) whether allegations in para 4(b) of the petition in relation to the casting of vote by Harcharan Singh are correct and the vote has been polled in favour of respondent No. 1, or there has been any non-compliance of the rules? If, so, has it materially affected the election of respondent No. 1;
- (3) whether the vote cast by Shri Harcharan Singh was procured by corrupt practice in the interest of respondent No. 1 by his Agent as mentioned in para 4(b); and if so, has it materially affected the election of respondent No. 1;
- (4) whether votes mentioned in para 4(c)(i), (ii) and (iii) were improperly received as alleged; and if so, with what effect?
- (5) whether votes mentioned in para 4(d)(i) and (ii) were improperly rejected as alleged; and if so, with what effect;
- (6) whether on the basis of allegations made in paragraphs 4(c) and (d), the petitioner would be entitled to the inspection of the ballot-papers;
- (7) whether respondent is guilty of corrupt practice as alleged in para 4(e) and (f); and
- (8) to what relief the petitioner is entitled?"

II. *Issues in the recriminatory petition —*

- (1) whether persons mentioned in para 8(i) to 8(iv) of the recriminatory petition were not entitled to vote, their votes being null and void and as such these four votes are liable to rejection out of the votes polled in favour of the respondent, if they have voted for respondent No. 1;

- (2) that respondent No 1 (Election Petitioner) committed the Corrupt practice of undue influence, as alleged in para 9(i) to (iv) of the recriminatory petition; and if so, with what effect;
- (3) whether respondent No 1 (Election Petitioner) committed corrupt practice of bribery and undue influence as alleged in para 12 on averments given in paras 10 and 11 of the recriminatory petition; and if so, with what effect;
- (4) whether respondent No 1 (Election Petitioner) committed corrupt practice and bribery as alleged in para 13 of the recriminatory petition and if so, with what effect;
- (5) whether respondent No. 1 committed corrupt practice of undue influence as alleged in para 14 of the recriminatory petition; and if so, with what effect;
- (6) whether respondent No 1 (Election Petitioner) committed corrupt practice under section 123(5) of the Representation of the People Act as alleged in paras (i) and (ii) of the recriminatory petition and if so, with what effect;
- (7) whether votes mentioned in para 17(i), (ii) and (iii) were improperly rejected as alleged; if so, with what effect;
- (8) whether votes mentioned in para 18(i) and (ii) were improperly accepted; and if so, with what effect; and
- (9) to what relief the recriminatory-petitioner is entitled ?”

Issue No. (1) :

(6) The learned counsel for the petitioner contends that Hari Singh could not cast his vote because his application for inclusion of his name in the Electoral Roll had not been decided before the last date for filing the nomination papers for the election of a Member to the Legislative Council from the Hoshiarpur Local Authorities Constituency. The argument is based on section 23(3) of the Representation of the People Act, 1950 (hereinafter called as the '1950 Act'); and it is maintained that the vote cast by Hari Singh is void; and if that vote is not taken into consideration, the election of

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the returned candidate would be materially affected. To put it in other words, the argument is, that after the last date of the filing of the nomination papers, the Electoral Registration Officer had no jurisdiction to correct the Electoral Roll and to include the name of a person, who is otherwise qualified to be included therein, in spite of the fact that such an elector had applied within the time allowed by law and for no fault of his, the application had not been decided before the date specified in section 23(3) of the 1950 Act. Thus it is maintained that the inclusion of the name of Hari Singh in the Electoral Roll was wholly without jurisdiction and thus *non est*.

(7) Mr. A. S. Sarhadi, who appears for the returned candidate, on the other hand, contends that the application to the relevant authority was made in accordance with law and within the period of limitation and his client should not be made to suffer because the authority did not decide the application within limitation. The learned counsel further urges that, in any case, the relevant authority was seized of the matter and had jurisdiction to decide it; and the decision even after the period of limitation will not be a decision without jurisdiction and, at best, such a decision may be illegal or irregular, but is not *non est*. Thus it would appear that the issue, that has to be settled, is a very narrow one:—

“Whether an order under section 23(2) in opposition to section 23(3) of the Representation of the People Act, 1950, is without jurisdiction and thus *non est*, or is an order with jurisdiction and is only illegal or irregular?”

(8) If the order is without jurisdiction, the effect would be that the inclusion of the name of Hari Singh would not be taken to have been made in the Electoral Roll. But if it is with jurisdiction, the inclusion of his name in the Electoral Roll will stay even though the order is illegal or irregular.

(9) Mr. Sarhadi further maintains that section 62 of the Representation of the People Act, 1951 (hereinafter referred to as the ‘1951 Act’) overrides the provisions of section 23 of the 1950 Act and even if the order is held to be without jurisdiction, it will be of no consequence because once the name of the applicant is brought upon the Electoral Roll and exists on the Roll on the date of the poll, the applicant has a right to cast his vote and objection can only be taken to that vote on the grounds specified in section 62 of the 1951 Act and none other.

(10) It may be mentioned that there is no dispute that Hari Singh was a Member of the Panchayat Samiti, Bhunga; and thus qualified to be enrolled as an elector in the Local Authorities Constituency. It is also not disputed that the application for the inclusion of the name under section 23 was made at the proper time and that the correction was made after the last date for nominations. The application was made on the 8th of March, 1968, and the last date for the filing of the nomination papers was 12th of March, 1968, and the order including the name of Hari Singh in the Electoral Roll was passed on the 5th of April, 1968, two days before the poll which was fixed for the 7th of April, 1968.

(11) In order to appreciate the controversy, it will be proper to refer to the various legal provisions on which the respective contentions of the learned counsel for the parties are based. The preparation of the Electoral Roll is confined to the Representation of the People Act, 1950. Section 14 defines 'Qualifying date' in the following terms:—

“ ‘Qualifying date’, in relation to the preparation or revision of every electoral roll under this Part, means the 1st day of January of the year in which it is so prepared or revised.”

(12) Section 15 provides for the preparation of the Electoral Roll and is in these terms:—

“*Electoral roll for every constituency.*—For every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of this Act under the superintendence, direction and control of the Election Commission.”

(13) Section 16 enumerates the disqualifications for registration as an elector. Sections 17 and 18 provides that no personnel shall be entitled to be registered in the Electoral Roll for more than one Constituency and in the same Constituency more than once. Section 19 provides that every person, who—

(a) is not less than twenty-one years of age on the qualifying date, and

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(b) is ordinarily resident in a Constituency, shall be entitled to be registered in the Electoral Roll for that Constituency. Section 21 provides for the preparation and revision of the Electoral Roll. Section 22 provides for the correction of entries in the Electoral Roll. Section 23, on which the main controversy has hinged, is in these terms:—

“Inclusion of names in electoral rolls.—(1) Any person whose name is not included in the electoral roll of a constituency may apply to the electoral registration officer for the inclusion of his name in that roll.

(2) The electoral registration officer shall, if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein:

Provided that if the applicant is registered in the electoral roll of any other constituency, the electoral registration officer shall inform the electoral registration officer of that other constituency and that officer shall, on receipt of the information, strike off the applicant's name from that roll.

(3) No amendment, transposition or deletion of any entry shall be made under section 22 and no direction for the inclusion of a name in the electoral roll of a constituency shall be given under this section, after the last date for making nominations for an election in that constituency or in the parliamentary constituency within which that constituency is comprised and before the completion of that election.”

(14) Section 24 provides for appeal. Section 27 relates to the Local Authorities Constituency; and its relevant part is reproduced below:—

“27. Preparation of electoral rolls for Council Constituencies:—

* * * * *

(2) For the purpose of elections to the Legislative Council of a State in any local authorities' constituency—

(a) the electorate shall consist of members of such local authorities exercising jurisdiction in any place or

area within the limits of that constituency as are specified in relation to that State in the Fourth Schedule;

- (b) every member of each such local authority within a local authorities' constituency shall be entitled to be registered in the electoral roll for that constituency;
- (c) the electoral registration officer for every local authorities' constituency shall maintain in his office in the prescribed manner and form the electoral roll for that constituency corrected up-to-date;
- (d) in order to enable the electoral registration officer to maintain the electoral roll corrected up-to-date, the chief executive officer of every local authority (by whatever designation such officer may be known) shall immediately inform the electoral registration officer about every change in the membership of that local authority; and the electoral registration officer shall, on receipt of the information, strike off from the electoral roll the names of persons who have ceased to be, and include therein the names of persons who have become, members of that local authority; and
- (e) the provisions of sections 15, 16, 18, 22 and 23 shall apply in relation to local authorities constituencies as they apply in relation to assembly constituencies.

(3)	*	*	*	*	*
(4)	*	*	*	*	*
(5)	*	*	*	*	*
(6)	*	*	*	*	**

(15) Section 30 bars the jurisdiction of the Civil Courts and reads thus:—

“Jurisdiction of civil courts barred.—No civil court shall have jurisdiction—

- (a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency; or

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(b) to question the legality of any action taken by or under the authority of an electoral registration officer, or of any decision given by any authority appointed under this Act for the revision of any such roll."

(16) The other provisions, which have to be noticed; are of the 1951 Act, namely, sections 2(e), 62 and 100; and they are reproduced below:—

"2. (a) * * * * *

(b) * * * * *

(c) * * * * *

(d) * * * * *

(e) 'elector', in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(g) * * * * *

(h) * * * * *

(i) * * * * *

62. *Right to vote*:—(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

- (4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void.
- (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

* * * * *

100. *Grounds for declaring election to be void.*—(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

- (a) * * * * *
- (b) * * * * *
- (c) * * * * *

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

- (i) * * * * *
- (ii) * * * * *

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

- (iv) * * * * *

(2) * * * * *

(17) After considering these various provisions, it appears to me that the sound view seems to be that the vote tendered by Hari Singh is not a void vote; and I tentatively base my opinion on two grounds:—

- (1) That it is a fundamental principle of law that a person entitled to relief under a Statute is not to suffer for the

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negligence of the officer entrusted with it when he fails in his duty. In the present case, the application was made within time and to the proper authority. There is no fault so far as the applicant is concerned. He has been disfranchised because of the negligence on the part of the officer concerned. Therefore, the penal consequences of such a negligence should not be visited on the applicant; and

- (2) That the various provisions in both the Acts have to be read so as to yield to a harmonious interpretation.

(18) Section 23(2) provides that if an application is made and the authority concerned is satisfied, it shall correct the Roll. Sub-section (3) should be read as an exception to sub-section (2), that is, it prevents the authority from correcting a roll, where an application has been filed after the date mentioned in sub-section (3) has expired but does not prevent it from doing so on an application filed within time, even if the order is passed after the time limit specified in sub-section (3). In other words, no application will be entertained after the last date for filing the nomination papers is over. This seems to be the intention of sub-section (3). But the difficulty arises whether this interpretation can be placed in view of the clear language of section 23(3).

(19) The principal contention of the learned counsel for the petitioner, that the order of the relevant authority under section 23 after the period prescribed in sub-section (3) will be without jurisdiction, has been met by Mr. Sarhadi by reference to the decision of the Supreme Court in *B. M. Ramaswamy v. B. M. Krishnamurthy and others* (1), and the decision of the Punjab and Haryana High Court in *Roop Lal Mehta v. Dhan Singh and others* (2), 1967 P.L.R. 618. (F.B.). In the Supreme Court decision, according to the learned counsel, a similar argument was repelled on the basis that the error was one of law and not of jurisdiction. In other words, only an illegality had been committed and the order was held not to be without jurisdiction and thus *non est*. The relevant part of the

(1) A.I.R. 1963 S.C. 458.

(2) I.L.R. (1968) 1 Pb. & Hry. 651 (F.B.)=1967 P.L.R. 618 (F.B.).

observations of the Supreme Court in this decision, on which Mr. Sarhadi relies, are quoted below:—

“Before considering the point raised, it will be convenient to clear the ground. Section 9 of the Act reads:

‘The electoral roll of the Mysore Legislative Assembly for the time being in force for such part of the constituency of the Assembly as is included in any Panchayat constituency shall, for the purpose of this Act, be deemed to be the list of voters for such Panchayat constituency. The Secretary of the Panchayat shall maintain in the prescribed manner a list of voters for each Panchayat constituency. Explanation.—For the purpose of this section, electoral roll shall mean an electoral roll prepared under the provisions of the Representation of the People Act, 1950 (Central Act XLIII of 1950) for the time being in force.’

Section 10 says,—

‘Every person whose name is in the list of voters of any Panchayat constituency shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected as a member of the Panchayat:’. Rule 3 of the Rules prescribed the mode of maintenance and custody of list of voters. It says, among other things, that the Secretary of the Panchayat shall maintain a list of voters for each Panchayat constituency, that he shall authenticate such list by affixing on it the seal of the Panchayat, and that he shall, from time to time, carry out in the authenticated copy of each such list, any corrections that may be made in the Electoral Roll of the Mysore Legislative Assembly and initial below each correction so made. It will be clear from the said provisions that the relevant part of the electoral Roll of the Mysore Legislative Assembly is deemed to be list of voters for the Panchayat constituency, and that the Secretary of the Panchayat has to maintain a duly-authenticated separate list of voters of the said constituency. The learned Munsiff held that, as the said

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authenticated list of panchayat voters was not produced before him, it was not established that the name of the appellant was included therein on the date of nomination. The learned Judges of the High Court did not accept the said finding on the ground that they did not agree with the reasoning given by the learned Munsiff, but unfortunately they have not given their reasons for differing from him. But a perusal of the election petition shows that the first respondent accepted in his petition that the name of the appellant was included in the said authenticated list on the date when he filed his nomination paper. Presumably because of that fact, the learned Judges of the High Court did not think fit to sustain the finding of the learned Munsiff. In view of the said admission in the petition, it cannot be expected of the appellant to summon the authenticated list to prove what has already been admitted.

* * * * *

It is not disputed that an application was filed before the registration officer for the inclusion of the appellant's name in the electoral roll; it is also common case that the electoral registration officer did not follow the procedure prescribed in R. 26 relating to the posting of the application in a conspicuous place and inviting objections to such application. It cannot, therefore, be denied that the inclusion of the name of the appellant in the electoral roll was clearly illegal. Under S. 30 of the Representation of the People Act, 1950, no civil court shall have jurisdiction to question the legality of any action taken by, or under the authority of, the electoral registration officer. The terms of the section are clear and the action of the electoral registration officer in including the name of the appellant in the electoral roll, though illegal, cannot be questioned in a civil court; but it could be rectified only in the manner prescribed by law, i.e., by preferring an appeal under R. 24(Sic-27?) of the Rules, or by resorting to any other appropriate remedy. But it was contended before the High Court that the action of the electoral registration officer was a nullity inasmuch as he made the order without giving notice as required by the Rules. We find it difficult to

say that the action of the electoral registration officer is a nullity. He has admittedly jurisdiction to entertain the application for inclusion of the appellant's name in the electoral roll and take such action as he deems fit. The non-compliance with the procedure prescribed does not affect his jurisdiction, though it may render his action illegal. Such non-compliance cannot make the officer's act *non est*, though his order may be liable to be set aside in appeal or by resorting to any other appropriate remedy.

The Act proceeds on the basis that the voters' list is final for the purpose of election. Under S. 10 of the Act, 'Every person whose name is in the list of voters of any Panchayat constituency shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected as a member of the Panchayat'. The disqualifications are enumerated in S. 11. If he was not disqualified in the present case, the finding is that there was no such disqualification—the appellant was certainly qualified to be elected as a member of the Panchayat. The Act confers a special jurisdiction on the Munsiff to set aside an election, and he can do so only for the reasons mentioned in S. 13(3) of the Act. The relevant provision is in S. 13(3)(A)(d)(1) which relates to the improper acceptance of any nomination. In view of S. 10 of the Act, it cannot be said that there is any improper acceptance of the nomination of the appellant, for, his name being in the list of voters, he is qualified to be elected as a member of the Panchayat. There is, therefore, no provision in the Act which enables the High Court to set aside the election on the ground that through the name of a candidate is in the list, it had been included therein illegally."

(20) The relevant part, on which Mr. Sarhadi relies so far as *Roop Lal Mehta's* case is concerned, may now be quoted:—

"Section 21 provides for the manner in which the electoral rolls are to be prepared and for their revision. Under

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section 22, the electoral registration officer for a constituency is empowered to correct entries in the electoral rolls of that constituency and under section 23 to include in the electoral rolls names which were wrongly omitted. However, after the last date for making nominations for an election in that constituency, there can be no amendment, transposition or deletion of any entry under section 22 nor any direction for the inclusion of a name in the electoral roll under section 23. Section 24 provides for appeals against the order of the electoral registration officer under section 22 or section 23. Under section 30, no civil court shall have jurisdiction to entertain or adjudicate upon any question whether any person is or not entitled to be registered in an electoral roll for a constituency.

* * * * *

Thus sub-section (1) of section 62 confers the right to vote on every person whose name is for the time being entered in the electoral roll of any constituency and sub-sections (2) to (5) are clearly in the nature of exceptions to the right conferred by sub-section (1). It is significant that there is nothing in section 62 to justify the view that the vote of a person whose name was on the electoral roll of the constituency and who as such was entitled to vote in the constituency shall be liable to challenge if at the hearing of the election petition it could be shown that he had not attained the age of 21 years on the qualifying date. Section 62 is on the face of it comprehensive in its scope and the disqualifications referred to in section 16 of the 1950 Act are mentioned in sub-section (2). On the basis of a bar to registration as given in section 17, there is prohibition in sub-section (3), that no person shall vote at a general election in more than one constituency of the same class, while the bar to registration as given in section 18 corresponds to the provisions in sub-section (4). In each of the cases mentioned in sub-sections (2), (3) and (4) the vote of the person concerned shall be void and is, therefore, liable to challenge in examination under section 100(1)(d)(iii) of the 1951 Act as being the reception of a vote which is void,

If the vote of a person, whose name is entered on the electoral roll but who was less than 21 years of age on the qualifying date, was also held to be void, there is no reason why a provision similar to sub-sections (2), (3) or (4) of section 62 could not have been added to that section as an exception to the right to vote given in sub-section (1) of section 62. If the Parliament had any such object in contemplation, one would expect that it would have added at the end of sub-section (2) some such words as 'or who does not fulfil the conditions as to registration as given in section 19 of the Representation of the People Act, 1950.'

(21) To my mind the scheme of the Act of 1950 is that if a person fulfils the conditions of registration as given in section 19 and is not disqualified for registration under section 16, and is also not shut out from registration by the provisions of sections 17 and 18, he has a right to have his name on the electoral rolls of the constituency. There are ample provisions in the succeeding sections of the Act of 1950 for making challenge to that entry to enable in proper cases correction of that entry either by the registration officer at his own motion or on an application made to him, viz., section 22, and from his decision appeal is also provided by section 24 but the final date for making the amendment, transposition or deletion of entries in the electoral roll is the last date for making nomination for an election in that constituency. Thereafter, the person whose name has been entered in the electoral roll becomes an elector in relation to that constituency as defined in clause (e) of section 2 of the 1951 Act and by sub-section (1) of section 62 is conferred the right to vote in that constituency subject, however, to the exceptions in sub-sections (2) to (5) of that section.

(22) So far as, therefore, the two Acts, viz., the Act of 1950 and the Act of 1951, are concerned, the position appears to be that after the electoral rolls have been finalised the vote of a person, whose name is on the electoral roll, cannot be challenged as being void on the ground that he was under 21 years of age on the qualifying date. If this position is not correct it would logically be open for the petitioner in an election petition to challenge the election of the returned candidate also on the ground that the names of a number of persons, who were qualified for being entered as voters in the electoral rolls of that constituency, were either through inadvertence

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or deliberately omitted from the electoral rolls when finalised and if their names had been so entered they would have swayed the balance against the returned candidate. Such a contention is on the face of it absurd and its acceptance would amount to rendering futile and indeed meaning less the elaborate provisions in the 1950 Act for registration of names on the electoral rolls, for their revision and for correction of entries in them. The entire process of the preparation of electoral rolls, which is a preliminary to the conduct of elections, would thereby become open for scrutiny in the election petition. That surely could not have been the intention of the Constitution makers or Parliament and, as already observed, there is nothing in either 1950 Act or in 1951 Act to indicate that such was the intention of the Parliament.

* * *

(23) Thus the contention is that the above decision applies to the facts of the present case. On the other hand, the learned counsel for the petitioner contends that this authority really supports his contention. His contention is that this decision really holds that it is the roll, which becomes final under section 23, which is the roll, on the basis of which the electors can cast their votes. The roll could not be amended in view of section 23(3) after the last date for the filing of the nomination papers was over and thus Hari Singh's name should not be treated as have been correctly entered in that roll and, therefore, Hari Singh could not cast his vote.

(24) Mr. Sarhadi has relied upon the decision of the Patna High Court in *Ramswaroop Prasad Yadav v. Jagat Kishore Prasad Narain Singh* (3) which, according to the learned counsel, concludes the matter. But I find that this decision was given at a time when sub-section (3) of section 23 was not in existence. The same is the case so far as the decisions in *Ghulam Mohiuddin v. Election Tribunal* (4) and *Ramdayal Ayodhyaprasad Gupta v. K. R. Patil and others* (5) are concerned, on which great reliance has been placed by Mr. Sarhadi.

(3) 17 E.L.R. 110.

(4) A.I.R. 1959 All. 357 (F.B.).

(5) 20 E.L.R. 13.

(25) As there is no direct authority on the point and the matter is not free from difficulty and is likely to arise again, I have thought it fit to refer this point to a Full Bench.

(26) As I had heard arguments on all the remaining issues, I have decided to dispose of them, so that as soon as the Full Bench decides the matter, the case of the petitioner gets concluded.—His Lordship then decided the remaining issues on facts.

JUDGMENT OF FULL BENCH, DATED FEBRUARY 6, 1969.

SHAMSHER BAHADUR, J.—(27) The single question emerging out of the order of reference of Mahajan, J., for determination of this Full Bench is whether the order for inclusion of the voter Hari Singh by the Electoral Registration Officer of 5th of April, 1968, falls within the ambit and scope of his authority when 12th March, 1968, was the last date for making nominations in view of the inhibition laid down in sub-section (3) of section 23 of the Representation of the People Act, 1950 (hereinafter called the Act), that “no direction for the inclusion of a name in the electoral roll of a constituency shall be given...after the last date for making nominations for an election in that constituency”?

(28) The facts giving rise to this reference have been fully set out in the referring order and only the following issue is left undisposed till the question is resolved by this Full Bench :—

“(1) Whether allegation in para 4(a) pertaining to the vote of Hari Singh is correct and the vote was void and was polled in favour of respondent No. 1 in violation of the Rules and has materially affected the result of the election of respondent No. 1 ?”

(29) There is no dispute on facts. A notification of the Punjab Government of 5th of March, 1968, called upon the Hoshiarpur Local Authorities Constituency to the Punjab Legislative Council to elect a member. The last date for filing nominations was 12th March, 1968. Scrutiny was to take place on 13th March, and the last date for withdrawal was 16th of March, 1968. The polling took place on 7th of April, 1968, and consequent on the counting which took place on 8th of April, 1968, the Deputy Commissioner of Hoshiarpur as the Returning Officer announced the result. The number of votes in the constituency is not very large as is clear

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from the votes cast. 22 votes having been rejected, the counting took place only with respect to the remaining 358 valid votes. Both the petitioner Kundan Singh and the returned candidate Kabul Singh, the first respondent, secured 169 first preference votes. The three other candidates, with whom we are not concerned, secured nominal number of such votes. In the second count, the first respondent got three votes and the petitioner two. The returned candidate having secured a lead of one vote was declared successful.

(30) The election is challenged by the petitioner Kundan Singh in his petition of 13th May, 1968, *inter alia*, on the ground that the name of Hari Singh which was not on the electoral roll on the day of nomination was brought on it on 5th of April, 1968, only two days before the election, and that the petitioner received intimation of it when the polling had started on the 7th of April, 1968. It is not disputed that the application by Hari Singh for bringing his name on the electoral roll was made on 8th of March, 1968, to the Chief Electoral Officer of Hoshiarpur, Local Bodies Constituency, his claim which has not been contested, being based on his associate membership of Panchayat Samiti, Bhunga. The application was forwarded to the Chief Electoral Officer who in turn sent it to the Electoral Registration Officer, who is the appropriate authority for passing orders on it. According to the evidence of Harbans Singh, Naib-Tehsildar (Election), the name of Hari Singh was brought on the voters' list (Exhibit P.W. 1/1) on the 5th of April, 1968. The inclusion was made soon after the appropriate authority received the intimation of notification of 21st of September, 1963, declaring this voter as an associate member. Reference to Exhibit P.W. 1/1 shows that the name of Hari Singh was included in the electoral roll in pursuance of the notification of 21st of September, 1963.

(31) The procedure for correction of entries in electoral rolls is embodied in section 22 of the Act under which :—

“If the electoral registration officer for a constituency.....is satisfied after such inquiry as he thinks fit that any entry in the electoral roll of the constituency—

- (a) is erroneous or defective in any particular,
- (b) should be transposed to another place in the roll on the ground that the person concerned has changed

his place of ordinary residence within the constituency, or

- (c) should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll,

he shall amend, transpose or delete the entry."

(32) As the crucial point turns on the construction to be placed on sub-section (3) of section 23 in its setting and context with regard to the other sub-sections, it would be well to set out first the contents of the section as it stood before the amendment. The section in both its amended and unamended forms, deals with the question of inclusion of names in electoral rolls and prior to 1966 it stood as follows :—

"23. Inclusion of names in electoral rolls :

- (1) Any person whose name is not included in the electoral roll of a constituency may apply in the manner hereinafter provided for the inclusion of his name in that roll.
- (2) Where an application under sub-section (1) is made at any time after the issue of a notification calling upon that constituency or the Parliamentary constituency within which that constituency is comprised to elect a member or members and before the completion of that election, it shall be made to the chief electoral officer; and in any other case, it shall be made to the electoral registration officer of that constituency.
- (3) The chief electoral officer or, as the case may be, the electoral registration officer shall, if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein:

Provided that if the applicant is registered in the electoral roll of any other constituency, the chief electoral officer or, as the case may be, the electoral registration officer shall inform the electoral registration

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officer of that constituency and that officer shall, on receipt of the information, strike off the applicant's name from that electoral roll."

(33) The section in its entirety has been substituted by the Representation of the People (Amendment) Act, 1966, Act No. 47 of 1966. Section 10 of the Amending Act is to this effect :—

"10. For section 23 of the 1950-Act, the following section shall be substituted, namely :—

23(1) Any person whose name is not included in the electoral roll of a constituency may apply to the electoral registration officer for the inclusion of his name in that roll.

(2) The electoral registration officer shall, if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein:

Provided that if the applicant is registered in the electoral roll of any other constituency, the electoral registration officer shall inform the electoral registration officer of that other constituency and that officer shall, on receipt of the information, strike off the applicant's name from that roll.

(3) No amendment, transposition or deletion of any entry shall be made under section 22 and no direction for the inclusion of a name in the electoral roll of a constituency shall be given under this section, after the last date for making nominations for an election in that constituency or in the parliamentary constituency within which that constituency is comprised and before the completion of that election."

(34) While sub-section (1) and the proviso to sub-section (3) of the unamended section 23 find place in the amended section, sub-section (2) which permitted the authority to make an order at any time "before the completion of that election" has been replaced by the new sub-section (3) under which an order of inclusion of a voter's name in the electoral roll has to be made on or before the last date for making nominations for an election in that constituency. While the contention on behalf of the petitioner is that the

inclusion of the name of Hari Singh by an order of 5th April, 1968, is void and inoperative being in contravention of the mandatory provisions of sub-section (3) of section 23 of the Act, it is the case of the respondents that the impugned order at the most is an illegality and cannot be questioned in election proceedings being an order still within the exercise of the jurisdiction of the Electoral Registration Officer. It is these respective contentions on which there is no direct authority that this Full Bench has to give a decision.

(35) In his very fair and lucid argument Mr. Bedi, for the petitioner, has invited us to hold that the electoral roll which could have been revised before Act No. 47 of 1966 right till the date of election has now been made unrevisable between the dates of nominations and the election. As stated in section 15 of the Act :—

“For every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of this Act under the superintendence, direction and control of the Election Commission.”

(36) Section 16 sets out the disqualifications for registration in an electoral roll, these principally being unsoundness of mind, non-citizenship and disabilities from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections. Under section 17 of the Act, “no person shall be entitled to be registered in the electoral roll for more than one constituency. Section 19 says that :—

“Subject to the foregoing provisions of this Part, every person who—

(a) is not less than twenty-one years of age on the qualifying date, and

(b) is ordinarily resident in a constituency,

shall be entitled to be registered in the electoral roll for that constituency.”

(37) An ‘elector’ under the provisions of the Representation of the People Act, 1951 (hereinafter called the 1951-Act) is defined in relation to a constituency to mean “a person whose name is entered

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in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act". The learned counsel has drawn our attention to rule 30 of the Registration of Electors Rules, 1960, relating to electoral rolls for Council Constituencies under which an application for correction of entries and inclusion of name in the electoral roll, if received by the chief electoral officer shall be referred to the electoral registration officer and if it is received directly by this authority, he shall refer "such application to the chief executive officer of the local authority concerned and on receipt of information in relation there from the chief executive officer, the electoral registration officer shall act in accordance with.....".

(38) It is the submission of Mr. Bedi that no ignorance could be pleaded of the plain requirement of sub-section (3) of section 23 of the Act that the order for inclusion has to be made up till the date of nominations. Hari Singh, if he was minded to exercise his vote should have forwarded his application to the proper authority in the first instance to enable the electoral registration officer on receiving the requisite information to pass an order for his inclusion before the date of nominations. It is not the case of either party that the electoral registration officer was guilty of neglect or negligence in the exercise of his duties. Like Hari Singh, he is also presumed to have knowledge about his limitations under the amended section 23. The authority however, has to go through the statutory procedure before making a direction to include the name of the applicant in the roll. It may be that Hari Singh had an undoubted right to be included in the electoral roll. It should, however, have been anticipated by him that the direction for inclusion of his name would involve time and even though the requisite information could not be obtained by the concerned authority before 3rd of April, 1968, the final order for his inclusion in the electoral roll being in contravention of a mandatory provision must be regarded as void and inoperative. It is submitted by Mr. Bedi that the power of inclusion of a name is at par with that of exclusion from the electoral roll under section 23 and cannot be exercised after the date fixed for filing of nominations. The electoral roll for the particular election, in other words, becomes final on the date of nominations. It is emphasised that the phrase "for the time being in force" in the definition of 'elector' under section 2(e) of 1951-Act takes account of such changes and is in consonance with

the amended provisions contained in section 23(3) of the Act. The mode of preparation prescribed in section 15 of the Act is the same as is provided under section 27 of the Act for a Council constituency. Under clause (d) of sub-section (2) of section 27, the electoral registration officer on whom the duty is cast to maintain the electoral roll corrected up-to-date, the chief executive officer of every local authority has immediately to inform "the electoral registration officer about every change in the membership of that local authority; and the electoral registration officer shall, on receipt of the information, strike off from the electoral roll the names of persons who have ceased to be, and include therein the names of persons who have become, members of that local authority". The petitioner chose of his own seeking to approach the chief electoral officer of the District and lengthened thereby the process for the application to reach the authority which was to deal with it. A calculated risk was taken in making an application which had to pass through a statutory procedure involving time and the ensuing responsibility for it must rest squarely on the shoulders of the applicant. It is true no doubt that the application for inclusion of name may be presented any time before the final date of nominations, but no order for inclusion can be made after that date. The electoral roll which assumes finality on the day of nominations, in this case 12th March, 1968, could have been subjected up till then to all the alterations, amendments, inclusions and deletions envisaged in sections 22 and 23 of the Act. An order passed by the appropriate authority after the date of nominations is **inherently** without jurisdiction and carries with it the dead-weight of this infirmity.

(39) This conclusion cannot be evaded on the ground that the electoral registration officer being rightly seized of the application made by Hari Singh for inclusion of his name in the electoral roll had the jurisdiction to pass an order uptill the date of polling even after the date of nominations. It is submitted on behalf of the respondents that the appropriate authority once having validly assumed jurisdiction cannot be said to have lost it on a particular date. With great respect to the counsel, this is not a legitimate approach to the problem. It is not a case of a break in the continuity of jurisdiction of the electoral registration officer but relates to the jurisdiction itself of that authority to pass an order after the 12th March, 1968, a power of which he has been specifically deprived by an Act of Parliament. To repeat, there is no time-limit for

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making an application except by implication that it should be filed before the date of nominations, but what is provided for is that the direction for inclusion cannot be given after the date of nominations.

(40) Much stress has been laid on behalf of the respondents by Mr. Sarhadi in his very forceful argument on section 62 of the 1951-Act dealing with the "right to vote". Section 62 is to this effect:—

"62. (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

(41) It is argued that the restrictions on the right to vote are cribbed, cabined and confined within the four corners of this section. No further disability can be imported in this section and if the electoral registration officer has failed to make the correction in time it is still open for the Court to see whether a voter who has cast his vote had actually a right to exercise it. Hari Singh does not suffer from any disability under the five sub-sections of section 62 and

consequently the impuged order of 5th April, 1968, was within the competence of the authority and does not suffer from want of jurisdiction. In support of this contention, Mr. Sarhadi has also asked us to hold that the amendment introduced by section 10 of Act 47 of 1966 in sub-section (3) of section 23 should be treated as one of a partial repeal and the following statement of the law in Craies on Statute Law (6th edition) at page 413 has been brought to our notice:—

“It must be born in mind that there is a difference in effect between repealing an entire Act and merely repealing a single clause in an Act. It may no doubt be said that, if a clause is repealed, this clause is to be taken as if it had never existed, but it cannot be said that where a particular clause in an Act is repealed, the whole Act must be read as if that clause had never been enacted. For every Act of Parliament is in the first instance to be looked at as an entirety Therefore a court of law is entitled to look at the repealed portion of an Act to see what is the meaning of what remains of the Act, otherwise this consequence would follow that an Act of Parliament, which at one time had one meaning, would by the repeal of some one clause in it have some other meaning”

(42) The learned counsel contends that the effect of clause (e) of sub-section (2) of section 27 of the Act that “the provisions of sections 15, 16, 18, 22 and 23 shall apply in relation to local authorities’ constituencies as they apply in relation to assembly constituencies” is that freedom to the registration authority to give its decision without the fetter of time is maintained. We think that these submissions are without any force. Section 23 of the Act has been entirely repealed and has been substituted altogether by a new provision which in so far as it imposes a fetter of time is utterly opposed to the unamended section. It is a case of total repeal of a part of the statute and the argument of the learned counsel to me appears to be wholly untenable.

(43) A Full Bench of this Court in *Roop Lal Mehta v. Dhan Singh and others* (2), has been relied by counsel for both parties in support of their respective contentions. The following passage at page 621 is referred to emphasise the force of Mr. Bedi’s

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argument about the true effect and significance of the amended section 23 of the Act:—

“Section 21 provides for the manner in which the electoral rolls are to be prepared and for their revision. Under section 22, the electoral registration officer for a constituency is empowered to correct entries in the electoral rolls of that constituency and under section 23 to include in the electoral rolls names which were wrongly omitted. However, after the last date for making nominations for an election in that constituency, there can be no amendment, transposition or deletion of any entry under section 22 nor any direction for the inclusion of a name in the electoral roll under section 23

(44) At another place, the learned Judge (S. B. Capoor, J.) who spoke for the Full Bench, at page 622 said this:—

“To my mind the scheme of the Act of 1950 is that if a person fulfils the conditions of registration as given in section 19 and is not disqualified for registration under section 16, and is also not shut out from registration by the provisions of sections 17 and 18, he has a right to have his name on the electoral rolls of the constituency. There are ample provisions in the succeeding sections of the Act of 1950 for making challenge to that entry to enable in proper cases correction of that entry either by the registration officer at his own motion or on an application made to him, viz., section 22, and from his decision appeal is also provided by section 24 but the final date for making the amendment, transposition or deletion of entries in the electoral roll is the last date for making nominations for an election in that constituency.”

(45) Mr. Sarhadi suggests that the Full Bench by implication had decided that the right to challenge an inclusion of a voter's name is restricted by the disqualifications embodied in sections 16 to 19. The final sentence in the aforesaid passage, however, negatives the suggestion of Mr. Sarhadi. It is true that a little later in the judgment the Full Bench observed that it was not the intention of the Parliament to throw the entire process of the preparation of electoral

rolls, which is a preliminary to the conduct of elections, open to scrutiny in election petitions. This observation, however, cannot be construed to mean that an order of the authority including a name in the electoral roll after the date of nominations becomes unassailable to attack in an election petition.

(46) A point was also made by the counsel for the parties regarding the power of the High Court to declare an election void on the ground that a voter's name had been wrongly included by the electoral registration officer. Section 100 of the 1951—Act enumerates the grounds on which a High Court can declare an election to be void. The relevant provision is to this effect:—

“..... if the High Court is of opinion—

(a) . . .

(b) . . .

(c) . . .

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) . . .

(ii) . . .

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) . . .

the High Court shall declare the election of the returned candidate to be void.”

(47) While Mr. Bedi submits that the vote cast by Hari Singh was invalid and void, Mr. Sarhadi contends that in absence of a definition of a ‘void vote’ there can be no inference that the concededly illegal order passed by the electoral registration officer resulted in the casting of such a vote. ‘Voter’ has been defined to be a person who for the time being is on the electoral roll and the option exercised by him in the election is a vote. “Void vote” is not a concept which is ambiguous and requires definition, nor can it be said that the word ‘void’ is such as is in need of an interpretation in the statute. It is reasonable in the circumstances to take into account the meaning of the word as is understood in the

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English language. According to the Shorter Oxford Dictionary (Third edition) the word 'void' in the context would mean "devoid of, free from, or not tainted with some bad quality, fault or defect; not affected or impaired by something unpleasant or hurtful; destitute of some virtue or good quality; lacking or wanting." It is plain that the impugned order in so far as it transgressed the statutory bounds of time becomes tainted with an irremediable defect and in that sense void. I feel no difficulty at all in holding, therefore, that the High Court, in the exercise of its undoubted power under section 100 of 1951—Act can declare the election void as I consider that the vote cast by Hari Singh was not only void but materially affected the result of the election so far as the returned candidate was concerned. It is, of course, disputed on which side Hari Singh cast his vote, but that is a matter which is not for our consideration.

(48) Some argument also centred on the point that section 30 of the Act which provides a bar to the jurisdiction of Civil Courts includes, as stated in clause (a) "whether any person is or is not entitled to be registered in an electoral roll for a constituency". Plainly, this section is not applicable to the High Court which is alone competent to entertain election petitions. As observed by Capoor, J., in the Full Bench decision of *Roop Lal Mehta*:—

" It seems that when by the Representation of the People (Amendment) Act, 1966, High Court was given the jurisdiction under section 100, the consequential amendment was by inadvertence not made in section 30 so as to exclude the High Court hearing election petition from the bar to the jurisdiction of civil courts to the extent that the High Court had jurisdiction under sections 100 and 101 of the 1951 Act, and it must be held that there has been implied modification of section 30 of the 1950-Act."

(49) Plain language of command has been employed in subsection (3) of section 23 of the Act. The direction for inclusion has to be made up to the date of nominations and not subsequently. Mr. Sarhadi has strongly urged before us that the language is directory un-accompanied as it is by any penal provision. Reliance is placed by Mr. Sarhadi on the authority of the Supreme Court in

Jagan Nath v. Jaswant Singh and others (6) where Chief Justice Mahajan, speaking for the Court, said at page 214:—

“There is no valid reason for treating the word ‘shall’ in section 82 in a manner different from the same word used in order 34, rule 1, Civil Procedure Code. It is one of the rules of construction that a provision like this is not mandatory unless non-compliance with it is made penal.”

(50) The penal provision for infringement of the condition laid down in sub-section (3) of section 23 of the Act may not be there in the section itself, but no doubt can be entertained that sub-clause (iii) of clause (d) of section 100 makes it incumbent on the High Court to declare an election void if the vote had been improperly received. In the words of Mr. Justice Vivian Bose in *Pratap Singh v. Shri Krishna Gupta and others* (7), “some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues”. Hari Singh, or indeed any other person interested to have his name included in the electoral roll, should have known that the final direction to this effect could have been given not later than 12th March, 1968. The application by Hari Singh was made on 8th March, 1968, but as the provisions of law, to which I have adverted, clearly show that the inclusion of names involved time and compliance of rules, it was his duty to ensure that the order for inclusion of his name was made before the last date for nominations. Whether the application made by Hari Singh on 8th March, 1968, was within time or not is wholly irrelevant. What he should have been aware of is that the inclusion had to be done after compliance of statutory provisions before the 12th March, 1968, and if proceedings had to be taken with expedition and despatch, the matter at least should have been brought to the pointed attention of the dealing authority. If Hari Singh chose to make his application firstly to a wrong person at the nick of time, he cannot be heard to say that he has been harmed or prejudiced by the act of an authority whose bounden duty was to give a decision by 12th of March, 1968. The copy of the notification which might conceivably have expedited the process was not attached to the application, and the information had

(6) A.I.R. 1954 S.C. 210.

(7) A.I.R. 1956 S.C. 140.

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to be obtained from other sources. In retrospect, it may appear to be a mechanical decision which was embodied in the direction of 5th of April, 1968, but there can be no doubt that the authority concerned was not guilty of any misconduct or negligence in the exercise of his power. I also think that the rule embodied in sub-section (3) of section 23 of the Act went to the root of the matter and it could not be broken. The breach of the mandatory requirement which the Parliament had deliberately adopted to replace the undefined time-limited, could not be said to be a mere breach of a directory rule whose non-compliance could be overlooked. Indeed, the acceptance of the position that the corrections in the electoral roll could be made right uptill the time of election would re-introduce a confusion which the Parliament in its wisdom thought it fit to eliminate by repealing section 23 and making a provision in sub-section (3) of section 23 placing a time limit on the order which may have been passed by the electoral registration officer. Not only is this conclusion supported by the clear and unambiguous language of sub-section (3) of section 23 of the Act, but the intention is made manifest by the Report on the Third General Elections in India 1962 submitted by the Election Commission India, on the basis of which amendments in the Act were made. The question in point is discussed as follows:—

“Section 23 of the Representation of the People Act, 1950, permits applications for inclusion of names in the electoral rolls being made at any time From the point of view of the returning officer who has to make various arrangements for the poll, and also from the point of view of the contesting candidates, it is not desirable that new names should be included in the electoral rolls until practically the last minute. Finality should be given to the electoral roll at some stage. The Commission considers that the suitable date line for this purpose would be the last date for making nominations, and in that case the application could as well be made to the registration officer instead of to the chief electoral officer. . . .”

In the summary of recommendations of the Commission re-produced from page 121 onward of the Report, sub-clause (iv) of clause (b) is as follows:—

“At election time, applications for inclusion of names in the electoral roll of a constituency should not be permitted after the last date for making nominations.”

(51) These extracts make it clear what the *raison d'etre* of the amendment was.

(52) Another authority cited by Mr. Sarhadi of *Harcharan Singh, v. Mohinder Singh* (8), contains the following passage to which our attention has been particularly directed:—

“The primary purpose of the diverse provisions of the election law which may appear to the technical is to safeguard the purity of the election process, and the Courts will not ordinarily minimise their operation.”

(53) It is suggested by Mr. Sarhadi that the rule of procedure whose breach has been complained of, does not involve any purity in the election process and can, therefore, be overlooked. The passage, read as a whole, does not appear to convey this impression. It is definitely and separately stated by Mr. Justice Shah, speaking for the Court, that the Courts will not ordinarily minimise the operation of rules, and it cannot be contended that this rule of prudence is to be attached only to provisions which safeguard the purity of the election process. Indeed, the rules when framed by competent authority are to be given their full effect and the Courts, in the words of Mr. Justice Shah, “will not ordinarily minimise their operation.”

(54) It needs to be noted that Mr. Sarhadi in support of the result contended for by him placed reliance on a Full Bench decision of the Allahabad High Court in *Ghulam Mohiuddin v. Election Tribunal* (4). There are some passages in this judgment which no doubt tend to reinforce the submission of the respondents' counsel, especially in the observation of Raghubar Dayal, J., that:—

“The vote of a person having a right to vote is therefore a lawful vote, and it is, therefore, not open to the Election Tribunal to go behind the electoral roll to determine whether the entry of the person's name in the electoral roll was rightly made or not.”

(55) The judgment was also approved by the Full Bench of this Court in *Roop Lal Mehta's case*. It is not possible, however, in the context of the amendment introduction in Act No. 47 of 1968 to

attach only a minor and secondary role to the order for inclusion passed in the teeth of the mandatory requirement that the order should be made before the date of nominations. Likewise, in a Division Bench of the Patna High Court (Sahai and Untwalia, JJ.) in *Ramswaroop Prasad Yadav v. Jagat Kishore Prasad Narain Singh* (3), the matter dealt with there was under the unamended provision of section 23 of the Act. The name of a person had been included in the electoral roll by the electoral registration officer and it was held that the power having been exercised under sub-section (3) of section 23 of the Act directing a person's name to be included in the roll, "he becomes immediately entitled to exercise the right of franchise, and he is not deprived of such a right merely because the office staff of the Electoral Registration Officer did not paste or stitch the *sudhi patra* to the electoral roll as finally published". The distinguishing feature of that case is manifest and the ruling based on the unamended section cannot be pressed into service to support the proposition that an order passed after the date of nominations by an electoral registration officer for the inclusion of a name must remain unchallenged and unchallengeable.

(56) I would, therefore, answer the question formulated at the outset in the negative and would hold that this Court can go into this question, the matter being essentially one of the jurisdictions of the authority whose order is impugned. In the result, the case would be sent back to the learned Judge for disposal of the re-criminatory petition.

HARBANS SINGH, J.—(68) I have had the advantage of going through the order proposed by my learned brother Shamsheer Bahadur, J., and agree with answer returned and the reasons given.

(57) I find no difficulty in coming to the conclusion that the Electoral Registration Officer in issuing a direction, for inclusion of the name of Hari Singh, after the last date of nomination, acted against the express prohibition contained in sub-section (3) of section 23 of the Act of 1950 and as such his act was beyond the jurisdiction vested in him, under section 22 and 23 to amend, alter, remove or add to the Electoral list.

(58) Under the unamended sub-section (2) of section 23, there were two different officers, viz., Electoral Registration Officer and the Chief Election Officer who were invested with the jurisdiction

to issue a direction for the inclusion of a name, not already included in the electoral roll of a constituency. Their respective jurisdiction was circumscribed by the point of time when an application for the inclusion was made. If it was made prior to the date of the notification calling upon the constituency to elect a member, it was the Electoral Registration Officer who had the jurisdiction to issue the requisite direction; and if it was made after that date, it was the Chief Election Officer who could do it. If after the date of the notification an application is entertained and a direction issued by the Electoral Registration Officer, such an act would not only be merely illegal, but would be altogether without jurisdiction for the simple reason that after the date in point, it is only the Chief Election Officer who could do so.

(59) Under the amended sub-section (2) of section 23, there is only one officer—Electoral Registration Officer—who is invested with the jurisdiction of including a name and there is no limitation of time up to which he can receive and entertain an application. However, under sub-section (3), Electoral Registration Officer is specifically debarred from issuing any direction either in respect of inclusion under sub-section (2) of section 23 or of otherwise ordering amendment, transposition or deletion, as envisaged by section 22, after the last date of nomination and before the completion of the election in that constituency.

(60) Thus the Electoral Registration Officer is invested with jurisdiction to do the various acts enumerated in sections 22 and 23 up to the last date of nomination and then after the completion of election. Neither he nor any other higher officer is invested with power to do any of such acts during the period intervening between the last date of nomination and the date of completion of the election. In fact there is a pre-emptory prohibition against making any type of alteration in electoral roll during this crucial period, when the Returning Officer as well as the candidate or candidates should be sure of the finality of the list as it exists on the last date of nomination. If the Electoral Registration Officer, does issue a direction during this period, during which he is not authorised to do so, his act will clearly be without jurisdiction and any addition or alteration so ordered by him will be treated as non-existent.

MAHAJAN, J.—(61) With utmost respect to my learned brothers, I venture to disagree with their conclusion that the registration of

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Hari Singh's name in the electoral roll by the Electoral Registration Officer against the provisions of the Representation of the People Act, 1950 (hereinafter referred to as the '1950 Act') is wholly without jurisdiction and, therefore, *non-est*. I do not agree that Hari Singh could not cast his vote and that the vote, he cast, is void.

(62) I indicated tentatively my view in my referring order, which may be read as part of this order. In addition to the reasons stated therein, I now state a few more and better reasons for holding that the inclusion of the name in the electoral roll against the provisions of section 23(3) of the 1950 Act cannot be held to be without jurisdiction. It is undisputable that the inclusion of his name in electoral roll is illegal. But every illegal order is not an order without jurisdiction. When the Electoral Registration Officer was moved, that is on the 8th of March, 1968, for the inclusion of the name of Hari Singh, admittedly, the Electoral Registration Officer had the jurisdiction to allow the application because the application was made before the date of nomination, namely, the 12th of March, 1968. The Constituency was called to elect its representative on the 5th of March, 1968. The order undoubtedly was passed after the 12th of March, 1968; and on this basis, it is urged that the order is wholly without jurisdiction. I do not see how the passing of the order would affect jurisdiction, when the application, on the basis of which the order had to be passed, was made when the Electoral Registration Officer had the jurisdiction to entertain it. If he had passed the order on or before the 12th of March, 1968, it is not disputed, it would be within his jurisdiction. But if he passes the order on an application, he was competent to deal with, after the 12th of March, 1968, the order would become without jurisdiction. I do agree with my learned brothers that after the 12th of March, 1968, the Electoral Registration Officer could not pass the order. If he did so, it will be illegal being contrary to the statute. But if he does disobey the mandate of the statute, can it be said that his order is without jurisdiction. In my opinion, this result cannot follow. The position might have been different if the application under section 23 had been made after the 12th of March, 1968, for the inclusion of the name in the electoral roll, on the basis of which the poll had to take place in pursuance of the notification of the 5th of March, 1968. But that is not the case here. The application was made before the relevant date, that is the 12th of March, 1968. The Registration Electoral Officer thus had the jurisdiction to entertain it and decide it; and

the mere fact, that he defers his decision, will not oust his jurisdiction. Supposing, he had passed the order after the 12th of March, 1968, that the application had become infructuous, could it be said that such an order is without jurisdiction? The answer will be—'No'. His order will be perfectly legal. But if he allows the application after the relevant date, the order will certainly be illegal; but not without jurisdiction.

(63) The second reason, which prevail with me, for holding that the vote of Hari Singh is not void, is that only those votes are void which fall within the ambit of section 62 of the Representation of the People Act, 1951 (hereinafter referred to as the '1951 Act'). The question, whether Hari Singh's vote is void or not, has arisen in an election petition filed under the 1951 Act. The grounds for declaring the election void are stated in section 100; and according to the learned counsel for the petitioner, Hari Singh's vote is void under section 100(1) (d) (iii) for the reason already stated. The argument is that his vote was void and has been improperly received. The reason, why the vote is stated to be void, is that his name has been brought upon the electoral roll in direct violation of section 23(3) of the 1950 Act; and, therefore, it should be assumed that the name of Hari Singh did not exist on the electoral roll. This argument loses sight of the fact that the name of Hari Singh was not on the electoral roll, as furnished to the Presiding Officer. It cannot be disputed that that name had been brought upon the electoral roll illegally. But once the name of a person has been brought on the electoral roll, he is entitled to vote in view of the provisions of section 62(1) of the 1951 Act. Sub-sections (2), (3), (4) and (5) of section 62 of the 1951 Act are an exception to sub-section (1). Even if the name of a person is entered in the electoral roll, he cannot vote, if the provisions of sub-sections (2), (3), (4) and (5) apply to him. It is of considerable significance that sub-section (2) refers to section 16 of the 1950 Act, but not to section 23. If the intention of the Legislature was that a person, whose name is entered in the electoral roll in opposition to section 23 of the 1950 Act was not entitled to vote, this would have been so mentioned in section 62 of the 1951 Act. There is no definition of 'elector' in the 1950 Act. But 'elector' has been defined in section 2(e) of the 1951 Act, which reads thus:—

“elector”, in relation to a constituency means a person whose name is entered in the electoral roll of that constituency

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for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950)."

(64) Section 16 of the 1950 Act provides that the following person shall be disqualified for registration:—

A person who is:—

(a) not a citizen of India; or

(b) of unsound mind;

(c) for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections."

(65) Section 17 of the 1960 Act provides that no person shall be registered in more than one Constituency. Section 18 of the 1950 Act provides that no person shall be registered more than once in any Constituency. Section 19 of the 1950 Act provides that no person would be entitled to be registered, if he is less than twenty-one years of age and is ordinarily resident in a Constituency. The provisions of sections 16, 17, 18 and 19 of the 1950 Act are mandatory because the word 'shall' is used. But the Legislature in the 1951 Act, while enacting section 62, only thought fit to take away the right to vote of a person entered in the electoral roll, who could not be so entered in violation of the provisions of sections 16, 17 and 18 of the 1950 Act, but not those who had been entered against the provisions of sections 19 and 23 of the 1950 Act. I see no difference on principle between the prohibition in sections 19 and 23 of the 1950 Act. But if somehow or the other, the name of a person does appear on the electoral roll, as prepared under the 1950 Act by a mistake on the part of the person authorized with its preparation, the only method to correct it is as provided in the 1950 Act. If those mistakes persist, the person so entered in the electoral rolls as an elector has the right to vote, unless section 62 stands in his way. The observations of the learned Judges in the Allahabad Full Bench in *Ghulam Mohiuddin v. Election Tribunal for Town Areas Sakit and another* (4) which were followed by a Full Bench of this Court in *Roop Lal Mehra v. Dhan Singh and others* (2) fully support my conclusion. The observations of Raghubar Dayal J. (as he then was), who

presided over the Full Bench, are quoted below for facility of reference:—

“.....The age and residence therefore were considered as conditions for registration. A person got the right to be enrolled or was qualified to be enrolled in an electoral roll if he was not less than 21 years of age and if he had resided for the prescribed period in a particular constituency.

A person's non-residence for the prescribed period or not attaining the age of 21 years is not his disqualification for registration but amounts to his being not qualified to be registered. So long as one is not qualified no question of disqualification arises. According to Murray's New English Dictionary, 'disqualification' means 'the action of depriving of requisite qualifications' and 'to disqualify' means 'to deprive of the qualifications required for some purpose'. A disqualification is therefore not identical with the absence of qualification.

It is further to be noticed that sub-section (2) of section 16 of the Representation of the People Act provides for the striking off the name from the electoral roll of a person who becomes disqualified after registration and does not provide for the striking off the name of a person who was disqualified but whose disqualification could not be discovered at the time of entering his name in the electoral roll. His disqualification could be considered by the Election Tribunal if he had exercised his right to vote on the basis of the entry of his name in the electoral roll of a particular constituency.

The Election Tribunal held that the reverse of the qualifications mentioned in sections 17, 18 and 19 of the Representation of the People Act would amount to a disqualification. This view finds support from the case of *Prabhakar Yajnik v. District Magistrate, Bulandshahr* (9) where in Mootham J. (as he then was) had to consider the scope of the expression 'disqualification' in section 12-D of the Municipalities Act and said at page 669 (of All. LJ): (at p. 417 of AIR):

“The conclusion which I have reached, although not without some hesitation, is that in section 12-D of the Municipalities Act, the word 'disqualified' is used as meaning the opposite to 'qualified', that is as meaning 'not qualified' ”.

(66) With respect, I do not agree with this interpretation for the reasons mentioned above. It is true that the name of a person •

who suffers from any of the disqualifications mentioned in section 16 will not be entered in the electoral roll though he satisfies the conditions of registration and therefore the result would be the same as would be if the person did not satisfy the conditions of registration mentioned in section 19. But the rationale of the non-entry is different in the two cases.

(67) In the former case a person satisfies the conditions and therefore has the right to have his name entered in the electoral roll and it is due to the disqualification that his name is not entered. Notionally it can be said that on the basis of his right his name had been entered but had been removed on account of the disqualification, though this will not be exactly correct as sub-section (2) of section 16 does not provide for the removal of the name of a person who had the disqualification prior to the registration of his name in the electoral roll.

(68) It will be clear from sub-section (1) of section 62, that the right to vote is conferred only on those persons who are entered in the electoral roll. In other words, the right to vote has been conferred simply by virtue of the fact that their names are entered in the electoral roll. Therefore, it would not be possible to go behind the roll either for proving that a person's name should have been entered but has been wrongly omitted or for showing that a person's name should not have been entered and has been wrongly entered. But, as observed by Chaturvedi J., the Legislature did not stop at sub-section (1) and, following the English practice, enacted sub-section (2), that:—

“No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the 1950 Act.”

(69) Not only that, the Legislature went further and brought in the prohibition of sections 17 and 18 of the 1950 Act and made those provisions at par with section 16 of the 1950 Act. It is significant that the error in the initial inclusion of the name against the provisions of sections 16, 17, 18 and 19 of the 1950 Act could be made irrespective of the provisions of section 23 of the 1950 Act. Section 23 of the 1950 Act is merely enacted to set right the defects in the electoral roll or to provide the omissions in the same. But it does not stand on a higher footing than section 19 of the 1950 Act. All that can be said is that where the provisions of section 23 or section 19 of the 1950 Act have not been followed, there has been an illegality in the preparation of the electoral roll.

But it is not every illegality which is fatal. And similarly, every illegality cannot lead to the conclusion that what has been done has been done without jurisdiction. In either event, the electoral roll has been prepared by the competent authority, but against the statutory provisions of law. But only those illegalities can be taken notice of which are covered by section 62 of the 1951 Act not otherwise. It appears to me that this result is inevitable if the preambles of both the Acts are kept in view. The 1950 Act concerns itself with the preparation of the electoral roll etc; whereas the 1951 Act primarily concerns itself with the conduct of elections. While judging the validity of a vote, we are mainly concerned with the conduct of elections and not with the preparation of the electoral roll. It is for this reason that I see no difference in this case and the case of *Roop Lal Mehta*. On principle, *Roop Lal Mehta's case* must govern the present case.

(70) The third reason, which has prevailed with me, relates to the interpretation of section 23. In my opinion, the provisions of this section are directory and not mandatory. If the provisions had been mandatory, section 23 would have found mention in section 62 of the 1951 Act. Courts must assume that the authorities prohibited to do a thing will not do it. But if they do it, the violation of prohibition may be such that it does not, in any manner, either confer a right or take away a right of a person who did not possess it or possessed it. It is common ground that Hari Singh was qualified to be an elector. And if his name has been brought on the electoral roll and he has voted, he has not exercised a right which did not vest in him. In my opinion, the principle laid down in the decisions in *J. K. Gas Plant Manufacturing Co. Ltd. and others v. Emperor* (10), *Jagan Nath v. Jaswant Singh and others* (6) and *Pratap Singh v. Shri Krishan Gupta and others* (7) would apply. In all these cases, the language of the statute was mandatory and yet keeping in view the purpose of the Act and the object to be achieved, their Lordships held that the word 'shall' can be read as 'may'. In other words, the statute was held to be directory and not mandatory.

(71) After giving the matter my careful consideration, I am of the view that it cannot be said that Hari Singh was not entitled to vote and the vote cast by him is void. The view, I have taken of the matter, finds full support from the decision of the Supreme Court in *B. M. Ramaswamy v. B. M. Krishnamurthy and others* (1) and of this Court in *Roop Lal Mehta's case*.

K. S. K.

(10) A.I.R. 1947 F.C. 38.