unlawful disciplinary action by the Disciplinary Authority by the provisions of Punjab National Bank Officers Employees Discipline and Appeal Regulations 1977 and if that be so, he could impugn the action of the disciplinary authority in the civil court. He submits that assuming he had the remedy of a reference to the labour court under the Industrial Disputes Act, there is nothing wrong if he sought to have this remedy through the instrumentality of the suit in the civil court. Civil court would thus have jurisdiction to try the suit.

(7) For the reasons given above, this revision is dismissed.

S.C.K.

Before S.S. Sudhalkar, J

SHANKAR LAL—*Appellant*

versus

OM PARKASH & OTHERS—*Respondents*

F.A.O. 3090 OF 1999

28th August, 2000

Punjab State Election Commission Act, 1994—Ss. 35 & 67—During counting large number of ballot papers found missing—Election Commission ordering repoll—Respondent participating in repoll without any objection—Respondent later challenging order of repoll—Respondent alleging denial of opportunity of hearing before ordering repoll—Effect of.

(Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi, AIR 1978 SC 851, followed)

Held, that the argument regarding opportunity of being heard not given before repoll was ordered tilts the scale in favour of respondent No. 1. As no opportunity of hearing was given, the counsel for the respondent has rightly made out the point that had the opportunity been given to him, he could have shown that repoll was not necessary. Even, the giving of the opportunity of hearing would have eliminated the production of 139 votes if they were not in possession of respondent No. 1.

(Paras 27)

S.C. Kapoor, Sr. Advocate with Ashish Kapoor, Advocate *for the appellant*

S.P. Jain, Sr. Advocate with Dhiraj Bali, Advocate *for the respondents.*

JUDGMENT

S.S. Sudhalkar, J

(1) Respondent No. 1 Om Parkash has filed election petition against the appellant. The same was allowed by the Election Tribunal, Fatehgarh Sahib (hereinafter referred to as the Tribunal) and the election of the appellant was declared void, and respondent No. 1 was declared elected. Being aggrieved by the said judgment, the appellant has filed this appeal.

2. The contention of respondent No. 1 in the election petition was that elections to the Municipal Council in the State of Punjab were held in the year 1998 by the Punjab State Election Commission, Chandigarh. The election of Municipal Committee, Mandi Gobindgarh took place on 12th January, 1998. There were four candidates contesting the elections in ward No. 8. Amongst the contestants were the appellant, respondent No. 1, respondent No. 5 and respondent No. 6. Respondent No. 5 Paramjit Singh submitted a notice of withdrawal of his candidature but ultimately he cancelled the said notice. Respondent No. 1 contended in the election petition that he was not satisfied with the arrangement made by the Returning Officer for conducting the elections of Ward No. 8 and brought it to the notice of the Deputy Commissioner, Fatehgarh Sahib on 8th January, 1998 that place chosen for polling of votes was inadequate as it was a *Dharamshala* having two small rooms without any exit. There were 2240 voters in Ward No. 8 and keeping in view the voting strength, the place for polling station was quite inadequate. The letter written by respondent No. 1 is at Annexure P—1 with the election petition. He has also sent a copy of the same to the State Election Commission. It was further contended by respondent No. 1 in the election petition that the President of his party also wrote a letter to the Deputy Commissioner as well as the Senior Superintendent of Police, Fatehgarh Sahib in which it was mentioned that anti social elements were trying to create disturbance with the intention to intimidate the voters and there was a chance of group clashes and that the wards were very sensitive. It was prayed to deploy necessary security forces. Again on 9th January, 1998, respondent

No. 1 also wrote a letter to the Deputy Commissioner, Fatehgarh Sahib, regarding the same. He contended that his request was not paid any heed to. The election to Ward No. 8 took place on 12th January 1998 at *Dharamshala* situated in Shanti Nagar. The polling of course was by and large peaceful.

3. The place of counting initially was to be the same. However, it was then decided that counting be done in the office of Municipal Council. Respondent No. 1 did not object to the counting being held there, it being a safe place. However, the Returning Officer insisted that the counting be held at the same place. At the time of counting, two ballot boxes of the elections were opened. The ballot papers were mixed and the counting process began. During the process of counting, the votes secured by each candidate were being separated and bundles were being made candidate-wise. At the time of counting, eight persons of election staff and Returning Officer, besides four candidates, were present there. There was non-else present in the counting room. It was further alleged by respondent No. 1 that no specific arrangement was made in regard to the counting of ballot papers.

4. As stated earlier, there were 2240 voters in Ward No. 8. The votes polled were only 1580. The counting of votes started at 4.30 p.m., and up to 5.30 p.m. it was clear that respondent No. 1 was leading with a heavy margin. It was alleged that at the instance of the appellant, respondent No. 5—Paramjit Singh suddenly stood up, took a number of ballot papers from the bundle belonging to respondent No. 1 and ran away with the ballot papers out of the room and threw them in the open, in front of the public. The public collected the ballot papers which were thrown by respondent No. 5—Paramjit Singh. They were all found to be ballot papers belonging to respondent No. 1. Some of the ballot papers which were collected by the public were handed over to respondent No. 1 which on counting were found numbering 139. Thereafter, the Presiding Officer counted the remaining votes and found that respondent No. 1 secured 512 votes. The appellant had secured 562 votes and respondent No. 5 had secured 293 votes. Respondent No. 6 had secured only two votes. There were 16 invalid votes. Hence, though the votes polled were 1580, the total votes counted were 1385. This confirmed that the ballot papers taken away by Paramjit Singh—respondent No. 5 were 195. It was the contention of respondent No. 1 that all the 139 ballot papers collected by the public and given to him were the valid ballot papers cast in his favour. The Returning Officer and the other employees did not

accept the ballot papers. It was further contended by respondent No. 1 that he secured more votes than the appellant and was liable to be declared elected. It was also contended that all the staff present, including the Returning Officer assured respondent No. 1 that he would be declared elected in case the ballot papers thrown outside the room had been polled in his favour. It was not disputed by the Returning Officer or any of his staff or the candidates that the ballot papers were not original ballot papers used in the election of Ward No. 8. However, the prayer of respondent No. 1 was not accepted and re-polling was held and after the counting of votes of re-polling, appellant was declared elected and hence election petition was filed by respondent No. 1.

5. Repondent No. 1 submitted the ballot papers to the State Election Commission, Punjab, Chandigarh. He contended that even if the rest of the missing votes are counted in favour of the appellant then also the appellant got less number of votes. It was further the contention of respondent No. 1 that he could have been declared elected as a winning candidate.

6. The election petition was contested by the appellant and some other respondents. The averments in the petition were denied. The appellant had denied the averments regarding respondent No. 5 taking away the ballot papers etc. Respondent No. 2 (respondent No. 1 in the election petition) had admitted that 139 ballot papers were received from respondent No. 1 in the Commission. It was further contended by respondent No. 2 in its reply that on the report of the Returning Officer, election of Ward No. 8 was declared void and re-poll was ordered.

7. Out of 195 ballot papers allegedly taken away, 139 ballot papers were produced by respondent No. 1 as having given to him by the public. It is not in dispute that all these 139 ballot papers are votes in favour of respondent No. 1 and they are genuine ballot papers. The case of respondent No. 1 was that even assuming the other ballot papers which were not found are considered to be appellant's votes, then also he secured more votes than the appellant and hence the appellant should have been declared elected. The plea of respondent No. 1 along with other pleas was accepted by the learned Tribunal. Counsel for the appellant has challenged the above contention. Various other contentions have also been raised by the counsel for the appellant. The first contention raised by the learned counsel for the appellant which can he disposed of first is that respondent No. 1 has taken part in

the subsequent polling after the repoll was ordered and hence he cannot now challenge the result of the re-poll. He has cited before me the case of *Gurudeo Das* v. *The Election Officer, Gram Panchayat Election, Asthama Block and others* (1). It has been held therein that where the petitioner challenged by a writ petition the election of respondent to the post of Mukhia of Gram Panchayat after having participated in the election with the full knowledge of the illegality committed in the shape of inclusion of the names of 179 persons in the voters list, the writ petition by him was not maintainable. It was also held therein that the petitioner would be deemed to have acquiesced or concurred in the election and would be estopped from challenging the election on being defeated therein.

8. Learned counsel for the appellant has also cited before me the case of *Kitabu* v. *District Magistrate/Election Officer, Muzaffarnagar* (2). It has been held by the Allahabad High Court in that case that after having taken part in the election and after having contested the election, the petitioner could not be heard to say that no election could be held for the newly created Gaon Sabha.

9. Regarding this principle, counsel for respondent No. 1 argued that question of respondent No. 1's taking part and thereby concurring to the re-polling did not arise because he had not to file a fresh nomination for the re-poll and no part, therefore, can be said to have been played by him in the re-poll and, therefore, he cannot be said to have acquiesced to the re-poll being held. The contention of learned counsel for respondent No. 1 has force. Respondent No. 1 had taken part in the election by filing a nomination form and no fresh nomination form was required to be filled up for the re-poll and, therefore, if the re-poll was imposed upon him, he cannot be said to have acquiesced to the re-poll.

10. Counsel for the appellant argued that because of the incident, the result was not ascertainable and, therefore, the re-poll was rightly ordered. He has relied on Section 67 of the Act. It reads as under :—

> "67. **Destruction, loss etc. of ballot papers at the time of counting.**—(1) If at any time before counting of votes is completed, any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out

(1) AIR 1972 Patna 283.
(2) 1991 Allahabad Law Journal 1099.

of the coustody of the Returning Officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to such an extent that the result of the poll at that polling *station or place cannot be ascertained,* the Returning Officer shall *forthwith report* the matter to the Election Commission.

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

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

(b) if satisfied that the result of the fresh poll at that polling station or place will not, in any way, effect the result of the election, issue such directions to the Returning Officer as it may deem proper for the resumption and completion of the election in relation to which the votes have been counted.

(3) The provisions of this Act and if any rules or orders made thereunder shall apply to every fresh poll ordered to be taken under clause (a) of sub-section (2) as they apply to the original poll." (emphasis supplied)

11. Counsel for the appellant also argued that section 67 of the Act deals with the position where the result of the poll in the polling station can not be ascertained and not regarding the position of the whole constituency as such. He has read Ex. PW6/6 which is a letter issued by respondent No. 1 to the Election Commissioner. It is dated 14th January, 1998. In that letter, there is no mention that 139 ballot papers, which were produced later on, were the votes of respondent No. 1. Annexure P-5 is a letter written by respondent No. 1 to the State Election Commissioner with which he had sent 139 ballot papers. This letter mentions that all the 139 ballot papers were cast in his favour. Counsel for the appellant argued that this letter has been written after respondent No. 1 lost the election. The result of the second poll was also declared on the same date, i.e. 15th January, 1998. However, it is not in dispute that 139 ballot papers produced by respondent No. 1 were votes cast in his favour. The validity of

consideration of such votes will be dealt with in the subsequent part of this judgment.

12. Counsel for the appellant has cited before me the case of *T.N. Ruqmani and another* v. *C. Achutha Menon and others* (3). It has been held therein that the High Court decided the maintainability of the petition erroneously not on the facts as they were on the date when petition was filed but on subsequent events which took place thereafter.

13. The learned Tribunal has in its impugned judgment observed that Section 35 of the Act is not followed while the re-poll was being done. The say of the respondent No. 1 is that according to Section 67(3) of the Act every fresh poll has to be carried out according to the provisions of the Act as if they apply to the original poll and, therefore, the procedure followed was not correct. Counsel for the appellant has argued that it was only a re-poll and not a re-allocation. Section 35 of the Act is the beginning section of Chapter VII of the Act regarding conduct of elections, i.e. appointment of dates for nominations, etc. So far as polling is concerned, it has to be in accordance with Chapter X of the Act, which starts from Section 67 of the Act. Therefore, when re-polling is to be made, the whole election procedure is not to be repeated.

14. The learned counsel for the appellant argued that said 139 ballot papers were produced much after the second poll was held and the result declared. The second poll was held on 15th January, 1998 and the result was declared on the same date. Learned counsel for the appellant also argued that in the election petition the result of 15th January, 1998 only is under challenge. Reading the election petition, it is clear that respondent No. 1 had sought a declaration that the notification dated 13th January, 1998 regarding re-poll be set aside and he has also prayed that he be declared elected because he had secured largest number of votes in the election dated 12th January, 1998. He has also prayed for declaring the re-poll dated 15th January, 1998 void. Therefore, setting aside the polling of 15th January, 1998 is not the only prayer. Regarding the other arguments, respondent No. 1 has given reasons for keeping the ballot papers in his custody. As per the petition filed by respondent No. 1, he has averred that the public collected 139 ballot papers but the ballot papers were not accepted by the Presiding Officer and any other employee and the public

(3) AIR 1991 SC 983

handed over the ballot papers to him. He has further contended that the Presiding Officer was shown these ballot papers in front of the public and all the staff present, including the Presiding Officer assured him that he would be declared elected in case ballot papers which were thrown outside the room were polled in his favour. He has contended that the assurance of the Presiding Officer proved to be futile when he came to know that he had to contest the same election which he had already won. He has further stated that he came to know about it on 13th January, 1998 that the re-poll had already been ordered.

15. So far as 139 ballot papers are concerned, it is not in dispute that they are in favour of respondent No. 1. Therefore, if those 139 ballot papers were counted in favour of respondent No. 1, he would have been declared elected. The question remains to be seen is that re-poll was ordered on 13th January, 1998 and was held on 15th January, 1998, while for the first time, the ballot papers produced by respondent No. 1 on 16th January, 1998. Counsel for the appellant has drawn my attention to the letter dated 16th January, 1998 written by respondent No. 1 to the State Election Commission, Ex. P-5. It is a letter with which 139 ballot papers were submitted to the Election Commission. It has been mentioned therein that the Presiding Officer did not accept the ballot papers.

16. Counsel for the appellant has also drawn my attention specifically to the date of this letter and has argued that before 16th January, 1998, the ballot papers were not produced and there was no mention of the fact that respondent No. 1 was in possession of the ballot papers. He has drawn my attention to Ex. P-7, which is a letter dated 14th January, 1998. There is no mention in the letter regarding the 139 ballot papers being in possession of respondent No. 1. Learned counsel for the appellant has further argued that all the 139 ballot papers were allegedly in favour of respondent No. 1 and not a single one against him, and hence the suspicion regarding the ballot papers can be said to have been further aggravated. However, the case is that the ballot papers of respondent No. 1 were taken out and thrown away and when this was so, the ballot papers which were bound were in favour of resondent No. 1.

17. However, one point has to be noted that though the ballot papers were the votes in favour of respondent No. 1, they were produced on 16th January, 1998 and not prior to

15th January, 1998. So, if a fresh polling has taken place during the meantime, what should be the effect ?

18. It was argued by learned counsel for the respondent that though 139 ballot papers which were recovered, were given to the authorities, they refused to accept and, therefore, the Respondent produced them on15th of course, though the Returning Officer/Presiding Officer has been examined as PW2 (Shri Amar Nath) he has not been asked any question as to the attempt of respondent No. 1 to produce the recovered ballot papers. It is argued by learned counsel for the appellant that if Respondent No. 1 had produced the ballot papers it was not accepted by the Presiding Officer then this quesition would have been put to him. Learned counsel for the appellant has relied on the letter written by Respondent No. 1. He has shown some doucuments which are on the file of the Election Tribunal. At page 66 of the file is annexure P/7. It is admitted fact that it is exhibited as PW6/6. It is a letter, dated 14th January, 1998, written by Respondent No. 1 to the Election Commisisoner. Learned counsel for the appellant argued that there is not a single word in this letter that Respondent No. 1 was in possession of 139 ballot papers. He has argued that it was only after the report that 139 ballot papers were produced.

19. Counsel for Respondent No. 1 argued that before ordering repoll, Respondent No. 1 ought to have been heard. He has relied on the case of *Mohinder Singh Gill and another* v. *The Chief Election Commissioner, New Delhi (4).* In para 72 of that judgment it has been observed by the Supreme Court as under :

> "We consider it a valid point to insist on observance of natural justice in the area of administrative decision making so as to avoid devaluation of this principle by administrators already, alarmingly insensitive to the rationale of *audi alteram partem.*"

20. In the said judgment, the Supreme Court has also referred to Lecture on 'The Mission of the law' by Professor H.W.R. Wade. It is quoted by the Supreme Court as under :

> "In his lecture on 'The Mission of the Law' Professor H.W.R. Wade takes the principle that no man should suffer without being given a hearing as a cardinal example of a principle recognised as being indispensable to justice,

(4) AIR 1978 SC 851

but which (has) not yet won complete recognition in the world of administration.....The goal of administrative sporadic and *ex port facto* judicial review. The essential mission of the law in this field is to win acceptance by administrator of the principle that to hear a man before he is penalised is an integral part of the decision-making process. A measure of the importance of resisting the incipient abnegation by the courts of the firm rule that breach of *audi alteram partem* invalidates, is that if it gains ground the mission of the law is doomed to fail to the detriment of all.

21. It has been observed by the Supreme Court after discussion on this point that fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgement of that process is permissible. The relevant paragraph can be quoted as under :

"Fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgement of the process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequatur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vested a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation."

22. Relying on these observations of the Supreme Court learned counsel for respondent No. 1 argued that before ordering the repoll, Respondent No. 1 ought to have been heard and given an opportunity as to what he has to say and if he was given an opportunity, he would certainly have produced 139 ballot papers and convinced the authorities that repolling was not necessary. He has argued that repolling was ordered behind his back. Counsel for Respondent No. 2 has read certain letters written by him

pointing out to the authorities earlier also that the place of election was not safe and inspite of that his say was ignored which resulted in191 ballot papers from his votes were taken and thrown away. He has also argued that if proper steps had been taken by the Presiding Officer, then the incident would not have taken place. His grievance is that why should Respondent No. 1 suffer for tampering with the votes when 139 ballot papers, out of the ballot papers taken away, which were votes in favour of respondent No. 1 were found.

23. Learned counsel for Respondent No. 1 has also drawn my attention to the reply by Secretary, State Election Commission (page 124 of the trial court's file). In para 12(a) thereof, it is admitted that 139 ballot papers were received from Respondent No. 1 in the Commission. In para 16 of the reply, it is admitted that the repoll was ordered by the answering respondent. It is however, stated that the date of poll involving one ward was not declared a holiday. It is also mentioned therein that there was *no need to hear any of the parties including petitioner before repoll.*

24. From this, learned counsel for Respondent No. 1 has argued that it was admitted that hearing was not given to Respondent No. 1 before ordering of the repoll.

25.Mr. Kapoor learned counsel for the appellant argued that it is stated in the petition in para 11 that the ballot papers were not accepted by the Returning Officer or other employees and the public handed over these ballot papers to the petitioner (Respondent No. 1) as all the available ballot papers had been polloed in favour of the petitioner. He has also argued that none from the public who tried to hand over the ballot papers to the authorities has been examined. Regarding hearing being not granted to Respondent No. 1 it has been argued by learned counsel for the appellant that orders were passed ; accepted by Respondent No. 1 and he never claimed for any hearing.

26.So the facts can be summed up as under :

(1) 195 ballot papers from the votes of Respondent No. 1 were thrown away.

(2) 139 of the 195 ballot papers thrown away were recovered and were valid votes in favour of Respondent No. 1.

(3) Repoll was ordered on 13th carried out on 15th and result

declared on that day when the recovered 139 ballot papers were produced before the Commission on 16th.

(4) No mention of the votes being recovered is there in the letters written by Respondent No. 1 before 16th.

(5) No opportunity of hearing was given to respondent No. 2 before ordering repoll.

27. With the abovesaid picture being clear, the argument of learned counsel for respondent No. 1 regarding opportunity of being heard not given before repoll was ordered tilts the scale in favour of Respondent No. 1. The principle laid down by the Supreme Court in the case of *Mohinder Singh Gill (supra)* is very clear and directly apply to the facts of the case. As no opportunity of hearing was given, the counsel for the respondent has rightly made out the point that had the opportunity been given to him, he could have shown that repoll was not necessary. Even, the giving of the opportunity of hearing would have eliminated the production of 139 votes if they were not in possession of Respondent No. 1.

28. In view of the above reasons, I find that this appeal deserves to be dismissed.

29. As a result, his appeal is hereby dismissed.

S.C.K.

Before Swatanter Kumar, J

DARSHAN GIR—*Petitioner*

versus

SURJIT KAUR—*Respondent*

C.R. NO. 5544 OF 1999

8th September, 2000

Code of Civil Procedure, 1908—Ss. 148& 151—Suit for specific performance decreed—Two months time granted for payment of balance sale consideration—Period expired—No payment made—Application for extension—Whether Court has jurisdiction to do so—Held, yes.

Held, that the Court has jurisdiction u/s 148 of the Code of Civil Procedure to extend the period for compliance of the terms of