A ANTONYSAMI

v.

ARULANANDAM PILLAI (D) BY LRS. AND ANR.

OCTOBER 30, 2001

B [D.P. MOHAPATRA AND K.G. BALAKRISHNAN, JJ.]

Limitation Act, 1963—Article 136—Execution of decree—Limitation period—Specified date mentioned in decree to carry out directions, whereafter execution could be applied—Compliance direction after the specified date—
C *Execution petition filed within limitation period from the date the direction carried out and not from the specified date—Held, the petition was barred by limitation—Civil Procedure Code, 1908, Order XXI.*

Limitation—Period of—Determination of—Held, is to be guided by strict grammatical meaning of the words and not on equitable consideration.
D

A suit for specific performance of contract of sale by predecessor in interest of the decree holder-appellant against the judgment debtor-respondent was decreed wherein the Court directed the judgment debtor to measure and demarcate the boundaries of the land and directed the decree
E **holder-appellant to deposit in the court the balance of the sale price for the land measured and demarcated on or before 23.9.1966 and the judgment debtor was to execute the sale deed in favour of the decree holder on such measurement and demarcation and in default the court would execute the sale deed on application of the decree-holder.**

F

The decree holder deposited the balance of the sale price by 23.9.1966 but the measurement and demarcation was done by the judgment debtor after a lapse of six years i.e. in 1973. Thereafter the decree holder-appellant filed execution petition in 1980. Judgment-debtor raised objection to the petition on the ground that it was barred by limitation because the
G **decree was enforceable on 23.9.1966. The case of the decree holder-appellant was that since the condition regarding measurement and demarcation of the land was complied with by the judgment-debtor in 1973 the period of 12 years is to be computed from the date.**

H **Executing Court held the petition to be within limitation period on**

the ground that the decree under execution was a conditional decree which became enforceable when the judgment debtor measured and demarcated the land in 1973. A

Appellate Court set aside the order of executing court and held that it was not possible to conclude that just because the judgment debtor had not measured and demarcated the property, the decree-holder had not acquired any right to execute the decree. B

High Court dismissed the revision petition holding that there was no condition in the decree and therefore the execution petition was beyond the limitation period. Hence the present appeal. C

Dismissing the appeal, the Court

HELD : 1. The Appellate Court was right in dismissing the execution petition as time barred. In the facts and circumstances of the case and on a fair reading of the decree in the context of the provisions of Article 136 of the Limitation Act, 1963 the execution petition was filed after expiry of the period of limitation prescribed under the Act. A specified date was mentioned in the decree for the judgment-debtor to carry out the direction i.e. 23.9.1966 and if he failed to carry out the direction, it was open to the decree holder to seek help of the executing court for measurement and demarcation of the land, and thereafter, to get the sale deed executed by the judgment-debtor if possible or by the Court if necessary. The decree cannot be said to be a conditional one, in the sense that the plaintiff could not enforce his rights under the decree till the defendant carried out the direction under the decree for measurement and demarcation of the land. D E F

[543-H; 544-A-B]

2. Ordinarily a decree becomes enforceable immediately after the judgment is pronounced. However, there may be situations when a decree may not be enforceable on the date it is passed. Usually this situation arises where in the decree itself, the right of the decree-holder depends on happening of certain event or on fulfilment of certain other conditions by the parties in the case or by an external agency, under any provision of law. G

[540-D-E]

W.B. Essential Commodities Supply Corpn. v. *Swedesh Agro Farming &* H

A *Storage Pvt. Ltd. and Anr.*, **[1999] 8 SCC 315, referred to.**

Abdul Rashid **v.** *Sri Sitaramaji Maharaj Brajman and Ors.*, **AIR (1974) All 275, distinguished.**

3. The fixation of periods of limitation are bound to be to some extent
B **arbitrary and may at times result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide.**

Nagendra Nath Dey and Anr. **v.** *Suresh Chandra Dey and Ors.*, **AIR**
C **(1932) PC 165, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 14559 of 1996.

From the Judgment and Order dated 21.12.93 of the Madras High Court in C.R.P. No. 1818 of 1986.

D

A.T.M. Sampath and V. Balaji for the Appellant.

M.N. Pamanabhan, Ms. S. Janani, V. Prabhakar, Rakesh Garg, Revathy Raghavan and K.K. Mani for the Respondents.

E The Judgment of the Court was delivered by

D.P. MOHAPATRA, J. Is the execution petition filed by the appellant barred by limitation is the question that arises for determination in this appeal. The High Court having answered the question in the affirmative the
F decree-holder has filed this appeal assailing the order of the High Court.

The factual backdrop of the case relevant for appreciating the points raised may be shortly stated thus :

The predecessor in interest of the decree-holder filed the suit against
G the judgment-debtor, O.S.No.35/1965, for specific performance of the contract of sale dated 7.2.1964. The suit property was described as 13 grounds and 491 sq. ft. on measurement and demarcation. The suit was decreed on 23rd July, 1966. The said decree reads as follows:

H "(1) The defendant do measure and demarcate the boundaries for 13

grounds and 491 sq. ft. in the property described hereunder on or before 23.9.1966.

(2) That the plaintiff do deposit into court on or before 23.9.1966 the balance of the sale price for 13 grounds and 491 sq. ft. on measurement and demarcation.

(3) That on such measurement and demarcation and fixation of the price and on deposit the defendant do execute the sale deed in respect of the suit house-sites in favour of the plaintiff at her costs as agreed and in default the court do execute the sale deed on application of the plaintiff and the cost of the execution of such sale deed be recovered from the defendant.

(4) That the defendant do pay to the plaintiff the sum of Rs.1,423 being costs of this suit and do bear his own costs of Rs.507.50."

The decree-holder deposited the balance of the sale price by 23.9.1966 but the measurement and demarcation was not done by the judgment-debtor on or before 23.9.1966, the time fixed for the purpose. After a lapse of more than six years the measurement and demarcation of the land was done by the judgment-debtor in the year 1973. Thereafter the decree-holder filed the execution petition on 19.4.1980 being E.P. No. 346/1981 for executing the decree for specific performance of the contract praying therein to direct the judgment-debtor to execute the sale deed as per the draft sale deed produced in the Court by the decree-holder and in default to cause the execution of the sale deed by the court.

The judgment-debtor in the objection filed against the execution petition raised the question of limitation. It was the case of the judgment-debtor that the decree became enforceable on and from 23.9.1966 by which date the decree-holder had deposited the balance consideration. If the judgment-debtor had failed to measure and demarcate the land the decree-holder should have moved the executing court for the purpose.

It was the contention of the decree-holder that since the condition regarding measurement and demarcation of the land was complied by the judgment-debtor only in 1973 the period of 12 years is to be computed from that date

A and on such computation the execution petition filed on 19.4.1980 was within time.

The Executing Court accepted the case of the decree-holder and held that the decree under execution was a conditional decree which became enforceable
B when the judgment-debtor measured and demarcated the land in 1973 and therefore the execution petition was not barred by limitation vide the order dated 16.2.1982.

On appeal by the judgment-debtor the Additional District Judge, Tiruchirapalli, by the order passed on 6.8.1985 allowed the appeal and set aside
C the order passed by the Executing Court holding, *inter alia*, that it was not possible to conclude that just because the judgment-debtor had not measured and demarcated the property the decree-holder had not acquired any right to execute the decree. The appellate court was of the view that if the contention of the decree-holder is accepted it would mean that in case the judgment-debtor
D intentionally did not fulfil the condition imposed on him in the decree he could defeat the fruits of the decree for the decree-holder and avoid the execution of the sale deed in his favour. The appellate court took the view that since the decree-holder after obtaining the decree on 23.9.1966 has not executed the decree within 12 years from that date the petition is barred by
E limitation.

Feeling aggrieved by the order of the appellate court the decree-holder filed the revision petition before the High Court at Madras assailing the said order.

F The High Court on consideration of the points raised confirmed the order passed by the appellate court. The High Court observed that there is no condition in the decree that the judgment-debtor can measure and demarcate the land as and when she pleases and the decree-holder could approach the Execution Court only after such measurement and demarcation. Therefore, the
G Execution Petition filed on 19.4.1980 was beyond the period of 12 years from 23.9.1966 and hence it was liable to be dismissed as time barred. The revision petition filed by the decree-holder was dismissed. The said order is under challenge in this appeal filed by the decree-holder.

The provision of Limitation Act, 1963 which is applicable in this case
H is Article 136 which reads as under:

Description of application	Period of Limitation	Time from which period begins to run
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	(When) the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

As per the above statutory provision the period of 12 years is to be computed from the date when the decree or order becomes enforceable. The question is when did the decree sought to be executed in the present case become enforceable? Was it from 23.9.1966 when the period of two months for measurement and demarcation of the land by the judgment-debtor fixed under the decree expired or was it from the date in 1973 when according to the decree-holder the judgment-debtor measured and demarcated the land? For consideration of this question it is necessary to have a close look at the decree. On reading the decree in its entirety it is clear to us that in paragraph 1 thereof the Court specifically issued a direction to the judgment-debtor to measure and demarcate the boundaries of 13 grounds and 491 sq. ft. of land on or before 23.9.1966. In para 2 the Court directed the plaintiff to deposit in the Court on or before 23.9.1966 the balance of the sale price for 13 grounds 491 sq. ft. of land measured and demarcated. In paragraph 3 of the decree is incorporated the direction that on such measurement and demarcation and on deposit of the amount fixed in the decree, the judgment-debtor was to execute the sale deed

A in respect of the suit sites in favour of the decree-holder at her cost as agreed and in default the Court would execute the sale deed on application of the decree-holder and the cost of the execution of such sale deed was to be recovered from the judgment-debtor. The Court took care to fix the same date i.e. 23.9.1966 for both the parties to comply with the respective directions B issued to them under the decree; the judgment-debtor to measure and demarcate the boundaries of the property and the decree-holder to deposit in Court the balance of the sale price of the property so measured and demarcated. The execution of the sale deed was to be done after the parties carried out the directions issued to them and that is what has been stated in paragraph 3 of the C decree, with the default clause that in case the defendant failed to execute the sale deed, on application of the plaintiff, the executing court was to execute the same and the cost was to be recovered from the defendant. Such a decree cannot be said to be a conditional one, in the sense that the plaintiff could not enforce his rights under the decree till defendant carried out the direction under the decree for measurement and demarcation of the land.

D

The position is well settled that ordinarily a decree becomes enforceable immediately after the judgment is pronounced. However, there may be situations when a decree may not be enforceable on the date it is passed. Usually this situation arises where in the decree itself the right of the decree-E holder depends on happening of certain event or on fulfillment of certain other conditions by the parties in the case or by an external agency, under any provision of law. This position has been clarified in the case of *W.B. Essential Commodities Supply Corpn.* v. *Swadesh Agro Farming & Storage Pvt. Ltd. and Another,* [1999] 8 SCC 315. Therein this Court repelling the impression that F a decree becomes enforceable only when it is drawn up and signed, observed:

> "From a perusal of the article extracted above, it is clear that for execution of any decree (other than a decree granting a mandatory injunction) or order of a civil court, a period of 12 years is prescribed; column 3 contains two limbs indicating the time from which the period G of limitation begins to run, that is, the starting point of limitation; they are (i) when the decree or order becomes enforceable, and (ii) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect H of which execution is sought, takes place. The proviso says that there

shall be no period of limitation for enforcement or execution of decree granting a perpetual injunction. We are concerned here with the first of the above-mentioned starting points, namely, when the decree or an order becomes enforceable. A decree or order is said to be enforceable when it is executable. For a decree to be executable, it must be in existence. A decree would be deemed to come into existence immediately on the pronouncement of the judgment. But it is a fact of which judicial notice may be taken of that drawing up and signing of the decree takes some time after the pronouncement of the judgment; the Code of Civil Procedure itself enjoins that the decree shall be drawn up expeditiously and in any case within 15 days from the date of the judgment. If the decree were to bear the date when it is actually drawn up and signed then that date will be incompatible with the date of the judgment. This incongruity is taken care of by Order 20, Rule 7 CPC which, *inter alia*, provides that the decree shall bear the date and the day on which the judgment was pronounced.

xxx xxx xxx

It follows that the decree became enforceable the moment the judgment is delivered and merely because there will be delay in drawing up of the decree, it cannot be said that the decree is not enforceable till it is prepared. This is so because an enforceable decree in one form or the other is available to a decree-holder from the date of the judgment till the expiry of the period of limitation under Article 136 of the Limitation Act.

xxx xxx xxx

Under the scheme of the Limitation Act, execution applications, like plaints have to be presented in the court within the time prescribed by the Limitation Act. A decree-holder does not have the benefit of exclusion of the time taken for obtaining the certified copy of the decree like the appellant who prefers an appeal, much less can he claim to deduct time taken by the court in drawing up and signing the decree. In this view of the matter, the High Courts of Patna and Calcutta in *Chandra Mouli Deva* v. *Kumar Binoya Nand Singh*, (AIR 1976 Pat 208) and *Sunderlal & Sons* v. *Yagendra Nath Singh*, (AIR 1976 Cal

471) have correctly laid down the law; the opinion to the contra expressed by the High Court of Calcutta in *Ram Krishna Tarafdar* v. *Nemai Krishna Tarafdar,* (AIR 1974 Cal 173) is wrong. Section 5 of the Limitation Act has no application; Section 12(2) of the Limitation Act is also inapplicable to an execution petition. If the time is reckoned not from the date of the decree but from the date when it is prepared, it would amount to doing violence to the provisions of the Limitation Act as well as of Order 20 and Order 21, Rule 11 CPC which is clearly impermissible."

Taking note of exceptions in certain cases to the general rule referred to above this Court observed:

"There may, however, be situations in which a decree may not be enforceable on the date it is passed. First, a case where a decree is not executable until the happening of a given contingency, for example, when a decree for recovery of possession of immovable property directs that it shall not be executed till the standing crop is harvested, in such a case time will not begin to run until harvesting of the crop and the decree becomes enforceable from that date and not from the date of the judgment/decree. *But where no extraneous event is to happen on the fulfilment of which alone the decree can be executed it is not a conditional decree and is capable of execution from the very date it is passed* (*Yeshwant Deorao Deshmukh* v. *Walchand Ramchand Kothari,* AIR (1951) SC 16). Secondly, when there is a legislative bar for the execution of a decree then enforceability will commence when the bar ceases. Thirdly, in a suit for partition of immovable properties after passing of preliminary decree when, in final decree proceedings, an order is passed by the court declaring the rights of the parties in the suit properties, it is not executable till final decree is engrossed on non-judicial stamp paper supplied by the parties within the time specified by the court and the same is signed by the Judge and sealed. It is in this context that the observations of this Court in *Shankar Balwant Lokhande* v. *Chandrakant Shankar Lokhande,* [1995] 3 SCC 413 have to be understood. These observations do not apply to a money decree and, therefore, the appellant can derive no benefit from them."

(Emphasis supplied)

The learned counsel for the appellant placed strong reliance on a Full Bench decision of the Allahabad High Court in the case of *Abdul Rashid* v. *Sri Sitaramaji Maharaj Brajman and Ors.*, AIR (1974) All 275. In para 8 of the judgment the High Court observed that the basic test is whether there is a right available to the decree-holder to apply for execution immediately or the fulfillment of some condition is a condition precedent and further, whether the terms of the decree cast any obligation on the decree-holder to comply with that condition within a specified period; where no such period is specified the execution of the decree must be deemed to remain in abeyance and the limitation would commence only from the date when the plaintiff chooses to comply with the condition. The High Court drew support from the language of Article 136 of the Limitation Act as giving a legislative approval to the view that the Limitation remains in abeyance so long as the contingent condition is not performed. Interpreting the decree in that case the High Court observed "In the instant case there was a clear obstacle to the immediate execution of the decree. Under the terms of the compromise decree it was obligatory for the decree-holder to serve two months' notice on the judgment-debtor calling upon him to remove the constructions and delivering possession that the decree-holder was entitled to execute the decree for possession; immediate execution of the decree was therefore negatived by the terms of the compromise decree".

This decision in our view is clearly distinguishable on facts. Even accepting the principles referred to therein it cannot be said that in the present case the decree passed was a conditional or contingent one.

The fixation of periods of limitation are bound to be to some extent arbitrary and may at times result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical, meaning of the words is the only safe guide. (See AIR 1932 PC 165). The decree was enforceable immediately after the date specified in the decree i.e. 23.9.1966 for the decree-holder to deposit the consideration money. If the direction given in the decree to the judgment-debtor to measure and demarcate the land by that date (23.9.1966) was not complied with the decree-holder was free to execute the decree. The steps to be taken by the decree-holder in this regard are provided in Order 21, Rule 34(1) CPC.

In the case in hand a specified date was mentioned in the decree for the

A judgment-debtor to carry out the aforementioned direction i.e. 23.9.1966 and if he failed to carry out the direction it was open to the decree-holder to seek help of the executing court for measurement and demarcation of the land, and thereafter, to get the sale deed executed by the judgment-debtor if possible or by the Court if necessary. The decree-holder for reasons best known to him B did not choose to execute the decree till April 1980. In the facts and circumstances of the case and on a fair reading of the decree in the context of the provisions of Article 136 of the Limitation Act the conclusion is inescapable that the execution petition was filed after expiry of the period of limitation prescribed under the Act. The Appellate Court was right in dismissing the C execution petition as time barred and the High Court committed no illegality in confirming the said order.

In the result this appeal being devoid of merit is dismissed. There will however be no order as to costs.

K.K.T. Appeal dismissed.

SANTOSH YADAV

v.

NARENDER SINGH

OCTOBER 30, 2001

[DR. A.S. ANAND, CJ., R.C. LAHOTI AND P. VENKATARAMA REDDY, JJ.]

Election :

Representation of People Act, 1951—Sections 30 and 100(1)(d)(i)—Election petition—Election of returned candidate challenged—Plea that the result of the election materially affected due to improper acceptance of nomination of one of the candidates—Absence of specific pleading setting out material facts and circumstances in support of the plea—Held, election petitioner failed to prove his case—Court cannot give findings on conjectures and surmises.

Election of returned candidate—Interference with—On account of fault of some other candidate—Held, should not be lightly interfered with unless proved that the result of the election concerning returned candidate was materially affected.

Evidence :

Burden of proof—Election matter—Held, onus is on election petitioner—Court not to determine the mode of burden of proof, but to decide whether the burden has been successfully discharged by the petitioner.

In an assembly election, appellant, a candidate, sponsored by Indian National Lok Dal (INLD) lost to the respondent (returning candidates), a candidate sponsored by Indian National Congress (INC).

Appellant filed election petition challenging the election of the respondent on the ground that election of the respondent was materially affected by improper acceptance of candidature of 'N', one of the 17 candidates in the election, who had secured votes more than 59 times the margin of votes between the votes secured by appellant and the respondent. Had the nomination of 'N' been rejected the votes polled by him would

A have otherwise been polled in favour of the appellant because 'N' had joined INLD in 1998 and having failed in getting ticket from the party he contested as independent candidate. On account of his close association with INLD, he scored high number of votes getting pro INLD and anti congress votes.

B

High Court accepting the plea of disqualification of 'N' held the election vitiated, but refused to set aside the election of the respondent since the appellant had failed in substantiating the plea raised in the election petition.

C In appeal to this Court appellant contended that since in the election there was anti-congress drive, respondent could not have secured more votes than what he had secured, and the votes secured by 'N' being pro INLD would all have been diverted to the appellant; and the votes secured by 'N' should be treated as cut into INLD votes and the same or a major D chunk of these votes would have gone to the appellants.

Dismissing the appeal, the Court

HELD : 1.1. The election petitioner-appellant has failed in discharging the heavy burden, which lay on her, of proving that the result E of election in so far as it concerns the returned candidates i.e. the respondent, has been materially affected by the improper acceptance of the nomination of 'N'. [562-H]

1.2. The burden of proof placed on the election petitioner is very strict F and so difficult to discharge as nearing almost an impossibility. There is no room for any guesswork, speculation, surmises or conjectures i.e. acting on a mere possibility. Law requires proof. How far that proof should go or what it should contain is not provided by the legislature. [558-D]

1.3. The burden of proving such material fact has to be discharged G by the election petitioner by adducing positive satisfactory and cogent evidence. If the petitioner is unable to adduce such evidence the burden is not discharged and the election must stand. This rule may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but the Court is not con- H cerned with the inconvenience resulting from the operation of the law.

Difficulty of proof cannot obviate the need of strict proof or relax the rigour of required proof. [558-B-C] A

1.4. It cannot be held that merely because the number of wasted votes bears a high degree of proportion to the margin of votes between the winning candidate and the next highest candidate, an inference must always be drawn that the result of the election was materially affected in so far as the returned candidate is concerned. There must be definite evidence available before the Court enabling an inference being drawn as to how the wasted votes would have been distributed amongst the contesting candidates. The Court cannot conjecturise or return findings on surmises. [556-F] B C

Paokai Haokip **v.** *Rishang and Ors.*, **AIR (1969) SC 663;** *Tek Chand* **v.** *Dile Ram*, **[2001] 3 SCC 290;** *Shiv Charan Singh* **v.** *Chandra Bhan Singh & Ors.*, **AIR (1988) SC 637;** *Chandrasekhara Rao* **v.** *V. Jagapathi Rao & Ors.*, **[1983] Supp. 2 SCC 229;** *Vashisht Narain Sharma* **v.** *Dev Chandra & Ors.*, **AIR (1954) SC 513 and** *Samant N. Balakrishna* **v.** *George Fernandez & Ors.*, **AIR (1969) SC 1201, referred to.** D

2. Even if burden of proof placed on election petitioner is strict, it is for the courts to apply it. It is for the Legislature to consider whether it would be altered. If there is another way of determining the burden, the law should say it and not the courts. It is only in given instances that taking the law as it is the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not. [556-H; 557-A] E F

3.1. 'N' does not have any fixed party affiliation; he has been often changing his party membership. It cannot therefore be said that the votes which he secured were necessarily a cut into INLD vote bank. [561-B]

3.2. On the pleadings and the evidence adduced, the election petitioner/appellant has utterly failed in demonstrating the pattern of voting in the Constituency in question. There were 17 contesting candidates in the field. It is difficult to make a reasonable guess, much less with any certainty that if 'N' was excluded then such number of votes would have been taken out of the votes polled by him and fallen into the box of appellant as to make her successful. [562-F-G] G H

A **4. A case of result of the election, in so far as it concerns the returned candidate, having been materially affected by the improper acceptance of any nomination, within the meaning of Section 100(1)(d)(i) of the Representation of the People Act, 1951 has to be made out by raising specific pleadings setting out all material facts and adducing cogent evidence so as**
B **to enable a clear finding being arrived at on the distribution of wasted votes, that is, the manner in which the votes would have been distributed if the candidate, whose nomination paper was improperly accepted was not in the fray. In the present case all material facts and circumstances are conspicuous by their absence. [557-F-G]**

C **5. Parliament has drawn a clear distinction between an improper rejection of any nomination and the improper acceptance of any nomination. In the former case, to avoid an election, it is not necessary to further prove that the result of the election has been materially affected. There is a presumption in the case of improper rejection of a nomination paper that**
D **it has materially affected the result of the election. The fact that one of several candidates for an election was kept out of the arena is by itself a very material consideration. The officer rejecting the nomination paper of a candidate may have kept out the most desirable candidate, the most desirable from the point of view of the other candidates, from seeking election and therefore Parliament felt that an improper rejection of any**
E **nomination paper is conclusive proof of the election being void and therefore dispensed with the need of evidence being tendered in proof of the result of the election having been materially affected. On the other hand, in the case of an improper acceptance of a nomination paper, proof is required by way of evidence demonstrating that the coming into the arena of**
F **an additional candidate has had the effect on the election in such a manner that the best choice of the electorate was excluded. [553-B-F]**

6. The success of a winning candidate at an election should not be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for non fault of his but of
G **someone else. That is why the scheme of Section 100 of the Act, especially clause (d) of sub-section (1) thereof clearly prescribes that inspite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be avoided unless and until it was proved that the result of the election, in so far as it concerns a returned**
H **candidate, was materially affected. [553-F-H]**

Vashisht Narain Sharma v. *Dev Chandra & Ors.*, **AIR (1954) SC 513;** *Samant N. Balakrishna* v. *George Fernandez & Ors.*, **AIR (1969) SC 1201;** *Shiv Charan Singh* v. *Chandra Bhan Singh & Ors.*, **AIR (1988) SC 637 and** *Tek Chand* v. *Dile Ram*, **[2001] 3 SCC 290, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1306 of 2001.

From the Judgment and Order dated 9.1.2001 of the Punjab and Haryana High Court in E.P. No. 1 of 2000.

WITH

C.A. No. 2412 of 2001.

P.S. Misra, Mahabir Singh, Bhoop Singh, Ajay Pal, S.R. Sharma and Ms. Aishwarya Bhati for the Appellant.

Rakesh Dwivedi, Rao Ranjit Singh and Ms. Niranjana Singh for the Respondent.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. Pursuant to a notification issued by the Election Commission of India under Section 30 of the Representation of the People Act, 1951 (hereinafter 'the Act', for short) in the month of January 2000 several constituencies, including 89 Ateli Assembly Constituency, in the State of Haryana, were called upon to elect members for the Haryana Legislative Assembly. Several nomination papers were filed on the dates appointed for filing nomination papers. After scrutiny held on 4th February and withdrawal of candidature by a few candidates on 7th February there were 17 candidates, including the appellant and respondent, who remained in the fray for Ateli Constituency. It may be stated that Smt. Om Kala, wife of a candidate Shri Naresh Yadav, had also filed her nomination. She is alleged to be a cover candidate for her husband. Once the nomination of Shri Naresh Yadav was found to be in order and accepted Smt. Om Kala withdrew her candidature. The constituency went to polls on 25.2.2000. On counting, the contesting candidates were found to have secured the following numbers of votes:-

Sr. No.	Name of the candidate	Party affiliation	No. of valid votes polled
1.	Rao Om Parkash, Engineer	BSP	5819
2.	Sh. Jagat Singh	JD[U]	113

3.	Sh. Narender Singh	INC	31755
4.	Sh. J.D. Yadav	HVP	500
5.	Smt. Santosh D/o Sh. Bhagwan Singh	INLD	31421
6.	Sh. Yogesh Kumar	RJD	205
7.	Sh. Laxmi Narain	SP	785
8.	Sh. Vinod Kumar	SJP[R]	212
9.	Sh. Om Parkash Yadav	IND	18
10.	Sh. Om Parkash	IND	178
11.	Sh. Naresh Yadav	IND	19855
12.	Comrade Balbir Singh	IND	476
13.	Sh. Ram Singh	IND	111
14.	Sh. Rama Nand Sharma	IND	194
15.	Smt. Santosh W/o Yudhvir	IND	40
16.	Sh. Satbir	IND	92
17.	Sh. Surender	IND	18

In the above table the party affiliation of the candidates is also given.

The respondent Shri Narender Singh who was a candidate sponsored by Indian National Congress having secured 31755 votes, the highest number of votes, was declared elected. Smt. Santosh, the appellant, who was a candidate sponsored by Indian National Lok Dal (INLD) secured 31421 votes i.e. next below the highest number of votes. Thus, there was a margin of 334 votes between the votes secured by the respondent and the appellant.

The appellant filed an election petition putting in issue the election of the respondent. One of the grounds taken in the election petition was that the nomination of Shri Naresh Yadav was improperly accepted as he had been convicted under section 304-B and Section 498-A of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years and one year respectively, besides the fine, under the judgment and order of sentence pronounced by the Court of Sessions at Gurgaon on 30-31/3/1990. Though an

appeal was filed by him before the High Court and the High Court had suspended the execution of the sentence of imprisonment, nevertheless he remained a person convicted of offences falling under clause (a) of sub-section (1) and sub-section (3) of Section 8 of the Act and hence disqualified. The plea as to disqualification of Shri Naresh Yadav has been upheld by the High Court. Neither the factum of conviction of Shri Naresh Yadav nor the disqualification flowing therefrom is in issue in this appeal. However, inspite of holding that the election held in 89-Ateli Assembly Constituency was vitiated on account of nomination of Shri Naresh Yadav having been improperly accepted, the learned designated Election Judge of the High Court of Punjab and Haryana has refused to set aside the election of the respondent as, in his opinion, the election-petitioner/appellant has failed in discharging the onus of proving that the result of the election, in so far as it concerns the respondent (the returned candidate), had been materially affected. The election petition having been dismissed, the judgment of the High Court has been put in issue by this appeal preferred under Section 116A of the Act. The question arising for decision in this appeal is: whether the High Court was right in forming the opinion that on the established facts and circumstances of the case the appellant had failed in proving that the election of the respondent was materially affected by improper acceptance of the nomination paper of Shri Naresh Yadav.

The appellant's case in this regard is that Shri Naresh Yadav was an active worker/leader of INLD and was closely associated and well acquainted with the cadre, workers, supporters and well-wishers of INLD. He was earlier a member of Bahujan Samaj Party (BSP) and had contested 1996 Assembly Elections on the BSP ticket. In August 1998, he joined INLD and actively participated in all the programmes, functions and activities of INLD carried by Shri Om Prakash Chautala, president of INLD and Shri Ajay Singh Chautala, president of the youth wing of INLD. The respondent had extensively toured the constituency accompanying Shri Om Prakash and Shri Ajay Singh. He was an aspirant of INLD ticket for contesting as an official candidate of INLD from Ateli constituency. However, the choice of INLD fell on the appellant. Shri Naresh Yadav, having failed in getting the ticket of INLD, revolted and filed his nomination as an independent candidate. On account of his close association with the INLD eadre he secured a high number of votes cutting into pro-INLD and anti-Congress votes which would have otherwise been polled in favour of the petitioner. Shri Naresh Yadav secured

A 19855 votes, which is more than 59 times the margin of votes between the votes secured by the respondent and the appellant. If only the nomination paper of Shri Naresh Yadav would have been rejected and his candidature would have been excluded the votes polled by him would have definitely been polled by the appellant. There was a pro-INLD wave in the entire State of Haryana in B the Assembly Elections of the year 2000. It was in effect an anti-Congress wave. The respondent could not have secured more votes than what he had secured and in as much as the votes secured by Shri Naresh Yadav were otherwise pro-INLD votes, they would all have been diverted to the appellant. These averments have been denied by the respondent in his written statement C as already stated. The learned designated Election Judge has formed an opinion, on appreciation of evidence, that the appellant had failed in substantiating the plea raised in the election petition. Almost similar arguments, as were advanced in the High Court, have been advanced before this Court, of course with added vigour by the learned senior counsel for the appellant. Before we deal with the merits of the submission so made and enter into D appreciation of evidence in the light of the submissions made, it will be useful to set out the relevant law.

Section 100 of the Act, in so far as relevant for the purpose of this appeal, reads as under:-

E *"100. Grounds for declaring election to be void.—*

(1) Subject to the provisions of sub-section (2) if the High Court is of opinion -

F (a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

(c) that any nomination has been improperly rejected ;

or

G

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

(i) by the improper acceptance of any nomination, or

H (ii) xxx xxx xxx xxx

(iii) xxx xxx xxx xxx

(iv) xxx xxx xxx xxx

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

The Parliament has drawn a clear distinction between an improper rejection of any nomination and the improper acceptance of any nomination. In the former case, to avoid an election, it is not necessary to further prove that the result of the election has been materially affected. The underlining reasoning for this was well set out by a Constitution Bench of this Court in *Surender Nath Khosla and Anr.* v. *S. Dalip Singh & Ors.*, AIR (1957) SC 242. There is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election. The fact that one of several candidates for an election was kept out of the arena is by itself a very material consideration. The officer rejecting the nomination paper of a candidate may have kept out the most desirable candidate, the most desirable from the point of view of electors and the most formidable candidate from the point of view of the other candidates, from seeking election and therefore the Parliament felt that an improper rejection of any nomination paper is conclusive proof of the election being void and therefore dispensed with the need of evidence being tendered in proof of the result of the election having been materially affected. On the other hand, in the case of an improper acceptance of a nomination paper, proof is required by way of evidence demonstrating that the coming into the arena of an additional candidate has had the effect on the election in such a manner that the best choice of the electorate was excluded.

It is well settled by a catena of decisions that the success of a winning candidate at an election should not be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act, especially clause (d) of sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be avoided unless and until it was proved that the result of the election, in so far as it concerns *a returned candidate, was materially affected.*

A few decisions were cited at the Bar and it will be useful to make a

A review thereof. In *Vashist Narain Sharma* v. *Dev Chandra & Ors.*, AIR (1954) SC 513, the candidate whose nomination was improperly accepted had secured 1983 votes while the margin of votes between the winning candidate and the next below candidate was 1972. This court held that having called upon to record a finding that "the result of the election has been materially affected", B the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that wasted votes would have been so distributed between the contesting candidates as would have brought about the defeat of the returned candidate. The Court emphasized the need of proof by affirmative evidence and discarded the test C of a mere possibility to say that the result could have been different in all probability. The question is one of fact and has to be proved by positive evidence. The Court observed that the improper acceptance of a nomination paper may have, in the result, operated harshly upon the petitioner on account of his failure to adduce the requisite positive evidence but the Court is not concerned with the inconvenience resulting from the operation of the law. The D Court termed it "impossible" to accept the ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. In *Samant N. Balakrishna* V. *George Fernandez & Ors.*, AIR (1969) SC 1201, this Court recognized that proof of material effect on the result of the election in so far E as a returned candidate is concerned on account of a miscarriage occasioned by improper acceptance of nomination paper at an election may be a simple impossibility. The judge has to enquire how the election would have gone if the miscarriage would not have happened and that enquiry would result virtually placing the election not in the hands of the constituency but in the hands F of the Election Judge. The Court held that neither the matter could be considered on possibility nor there was any room for a reasonable judicial guess. The law requires proof; how far that proof should go or what it should contain is not provided by the legislature; but the insistence on proof can not be dispensed with. In *Shiv Charan Singh* v. *Chandra Bhan Singh & Ors.*, AIR (1988) SC G 637, this court pointed out that proof of material effect on the result of the election in a case of improper acceptance of nomination paper involved the harsh and difficult burden of proof being discharged by the election petitioner adducing evidence to show the manner in which the wasted ballots would have been distributed amongst the remaining validly nominated candidates and in the absence of positive proof in that regard the election must be allowed to H

stand and the Court should not interfere with the election on speculation and conjectures. A

All the above said decisions were referred to, dealt with and followed in a recent decision of this Court in *Tek Chand* v. *Dile Ram*, [2001] 3 SCC 290. This court held that the mere fact that the number of votes secured by a candidate whose nomination paper was improperly accepted, was greater (more than three times in that case) than the margin of the difference between the votes secured by the returned candidate and the candidate securing the next higher number of votes, was not by itself conclusive proof of material effect on the election of the returned candidate. B C

It is common knowledge that voting and abstention from voting, as also the pattern of voting, depend upon a complex variety of factors, which may defy reasoning and logic. Depending on a particular combination of contesting candidates and the political parties fielding them, the same set of voters may cast their ballots in a particular way and may respond differently on a change in such combination. Voters have a short-lived memory and not an inflexible allegiance to political parties and candidates. Election manifestos of political parties and candidates in a given election, recent happenings, incidents and speeches delivered before the time of voting may persuade the voters to change their mind and decision to vote for a particular party or candidate giving up their previous commitment or belief. In *Paokai Haokip* v. *Rishang & Ors.*, AIR (1969) SC 663, this court has taken judicial notice of the fact that in India all the voters do not always go to the polls and that the casting of votes at an election depends upon a variety of factors and it is not possible for anyone to predicate how many or which proportion of votes will go to one or the other of the candidates. D E F

The learned senior counsel for the appellant placed heavy reliance on *Chhedi Ram* v. *Jhilmit Ram & Ors.*, AIR (1984) SC 146, and submitted that the ratio of the decision squarely applies to the present case and should govern the decision thereof. It was submitted that in *Chhedi Ram's* case the candidate whose nomination was improperly accepted had obtained 6710 votes which was almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. So also the number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of G H

A votes secured by the successful candidate - a little over 1/3rd. The learned senior counsel submitted that on availability of these twin factors it was held by this Court that 'the result of the election might safely be said to have been affected'; while the case of the present appellant stands on a much better footing in as much as the number of votes secured by Shri Naresh Yadav is
B almost 59 times of the margin between the votes secured by the appellant and the respondent.

At the first blush the submission appears to be attractive but is found to be devoid of merit on closer scrutiny. *Chhedi Ram's* case came up for the consideration of this Court at least on three occasions. In *Shiv Charan's* case
C (supra), *Tek Chand's* case (supra) and J. *Chandrasekhara Rao* v. *V. Jagapathi Rao & Ors.*, [1983] Supp. 2 SCC 229, this Court has held that *Chhedi Ram's* case rested 'on its own facts' and did not over-rule the earlier decisions of this Court namely the decisions in *Vashisht Narain Sharma's* case (supra) and *Samant N. Balakrishna's* case (supra). In *Chhedi Ram's* case not only the
D proportion of wasted votes was 20 times of the margin, there were six candidates in all in the election fray. The Court formed an opinion that a reasonable probability was raised in favour of holding that the result of the election had been materially affected. The decision in *Chhedi Ram's* case does not set out detailed facts and circumstances and the nature of the evidence adduced which
E may have persuaded the Court in arriving at a finding in favour of the election petitioner. In view of the earlier decisions of this Court existing before *Chhedi Ram's* case was decided, it cannot be held that merely because the number of wasted votes bears a high degree of proportion to the margin of votes between the winning candidate and the next highest candidate, an inference must
F always be drawn that the result of the election was materially affected in so far as the returned candidate is concerned. There must be definite evidence available before the Court enabling an inference being drawn as to how the wasted votes would have been distributed amongst the contesting candidates. The Court cannot conjecturise or return findings on surmises.

G Observations in *Shiv Charan Singh's* case (supra) are pertinent and apposite. It is no doubt true that the burden which is placed by law on the election petitioner is very strict; even if it is strict it is for the courts to apply it. It is for the Legislature to consider whether it should be altered. If there is another way of determining the burden, the law should say it and not the
H courts. It is only in given instances that, taking the law as it is the courts can

reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not. A

A word about the pleadings. Section 83 of the Act mandates an election petition to contain a concise statement of the material facts on which the petitioner relies. The rules of pleadings enable a civil dispute being adjudicated upon by a fair trial and reaching a just decision. A civil trial, more so when it relates to an election dispute, where the fate not only of the parties arrayed before the Court but also of the entire constituency is at a stake, the game has to be played with open cards and not like a game of chess or hide and seek. An election petition must set out all material facts wherefrom inferences vital to the success of the election petitioner and enabling the Court to grant the relief prayed for by the petitioner can be drawn subject to the averments being substantiated by cogent evidence. Concise and specific pleadings setting out all relevant material facts, and then cogent affirmative evidence being adduced in support of such averments, are indispensable to the success of an election petition. An election petition, if allowed, results in avoiding an election and nullifying the success of a returned candidate. It is a serious remedy. Therefore, an election petition seeking relief on a ground under section 100 (1) (d) of the Act, must precisely allege all material facts on which the petitioner relies in support of the plea that the result of the election has been materially affected. Unfortunately in the present case all such material facts and circumstances are conspicuous by their absence. B C D E

The law as regards the result of election having been materially affected in case of improper acceptance of nomination may be summed up as under :-

(1) A case of result of the election, in so far as it concerns the returned candidate, having been materially affected by the improper acceptance of any nomination, within the meaning of Section 100 (1) (d) (i) of the Representation of the People Act, 1951 has to be made out by raising specific pleadings setting out all material facts and adducing cogent evidence so as to enable a clear finding being arrived at on the distribution of wasted votes, that is, the manner in which the votes would have been distributed if the candidate, whose nomination paper was improperly accepted, was not in the fray. F G

2. Merely because the wasted votes are more than the difference of votes secured by the returned candidate and the candidate securing the next highest H

A number of votes, an inference as to the result of the election having been materially affected cannot necessarily be drawn. The issue is one of fact and the onus of proving it lies upon the petitioner.

3. The burden of proving such material effect has to be discharged by the election petitioner by adducing positive, satisfactory and cogent evidence. If B the petitioner is unable to adduce such evidence the burden is not discharged and the election must stand. This rule may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but the Court is not concerned with the inconvenience resulting from the operation of the law. Difficulty of proof cannot obviate the C need of strict proof or relax the rigour of required proof.

4. The burden of proof placed on the election petitioner is very strict and so difficult to discharge as nearing almost an impossibility. There is no room for any guesswork, speculation, surmises or conjectures i.e. acting on a mere D possibility. It will not suffice merely to say that all or majority of wasted votes *might have gone* to the next highest candidate. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature.

5. The casting of votes at an election depends upon a variety of factors and it E is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. It is not permissible to accept the 'ipse dixit' of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground.

F

Having so stated the law, we now proceed to assess and evaluate the evidence adduced by the parties.

In all there are 10 witnesses examined on behalf of the election petitioner/appellant. Balwant Singh, PW 1, the Returning Officer has deposed to G only certain undisputed facts. Sant Lal, PW 2, has produced result-sheets of Haryana State Legislative Assembly Elections held in the years 1982, 1987, 1991, 1996 and 2000. Pawan Kumar, PW 3, is a photographer and Ashok Wadhwa, PW 4, and Rohtas Yadav, PW 5, are press-reporters, who have deposed to Shri Naresh Ydadav having joined INLD publicly in early August, H 1998 in the presence of Shri Om Prakash Chautala and other leaders of INLD

which is a fact not disputed by the respondent at this stage. Ram Kumar, PW 6, District Office Secretary of INLD, has deposed to Shri Naresh Yadav and the appellant - both having been aspirants for INLD party ticket but in mid-September, 1998 the ticket having been denied to Shri Naresh Yadav and the appellant having been given the party ticket whereafter Shri Naresh Yadav made a rebellion and chose to contest as an independent candidate. Again, this is also a fact not seriously disputed at this stage. The statements of remaining four witnesses are relevant and need to be scrutinized for the purpose of deciding the main controversy in this appeal.

Bali Ram, PW 7, is a resident of village Silarpur while Sher Singh, PW 8, is a resident of village Shyampura. Both of them have deposed to there having been two main groups in their respective villages in the election. The two groups were of the Congress and the INLD. None of them speaks of having any knowledge about the entire constituency. None of the two has deposed to, he himself having been a voter and exercised his own franchise. Bali Ram, PW 7, states Shri Naresh yadav having made in -roads into the votes of the appellant. Obviously, the statement is confined to his own village. Sher Singh, PW 8, too deposed that Shri Naresh Yadav contesting as an independent candidate affected the votes of INLD and "those votes were not in favour of Congress" . What has been stated by these two witnesses does not go beyond being 'ipse dixit' of the witnesses. There is nothing on record to show how many voters were there in the two villages and which way the polling went as amongst the different candidates.

Smt. Santosh Yadav, PW 9, the appellant herself, deposed about "some party workers" having gone with Shri Naresh Yadav without disclosing the names of such party workers. She further stated that the party votes were divided because Shri Naresh Yadav asked for the votes in the name of Shri Om Prakash Chautala - a fact not alleged in the election petition. This is apart from the fact that who were such voters and at what point of time they were asked to vote for Shri Naresh Yadav is neither averred in the pleadings nor stated in her statement. According to her own admission Shri Om Prakash Chautala was touring the constituency and had come to support her in the constituency. Satbir Singh, PW 10, is General Secretary of INLD of District Mohindergarh and was In-charge of election campaigning in Ateli Constituency in February, 2000. He claims to have toured the Ateli Constituency during the elections and therefrom he deposed that on account of Shri Naresh Yadav having contested

as an independent candidate 'many of the workers and voters of INLD' supported him. The statement has remained as vague and general as is of the appellant herself. The witnesses PW 7, PW 8 and PW 10, are all party workers and would naturally have some bias in favour of their own party and would be obviously interested in the success of the appellant in the election petition. Their evidence also does not advance the case of the appellant.

The documents which have been brought on record by the election petitioner show the State level results of Haryana. But what is relevant is the trend of voting and distribution of votes amongst contesting candidates in Ateli Constituency and not necessarily the entire State. The election petitioner did not bring on record Form 20 document for the year 2000 elections or of the earlier elections so as to spell out what was the trend of voting in this particular Constituency. Form 21-E tendered in evidence establish that in the past elections, it was the Congress Party which had won election in Ateli in 1982, 1991 and 1996. In 1982 elections Congress (J) candidate was returned to Legislative Assembly having secured 27298 votes and Shri Banshi Singh, father of Shri Naresh Yadav secured 27105 votes and lost. In 1991, Shri Banshi Singh secured 19343 votes as a Congress candidate and won the election. In the year 1996 there were 47 candidates contesting from Ateli constituency. INC candidate won having secured 22114 votes. However, Om Prakash, engineer contesting on Haryana Vikas Party ticket, Ajit Singh (Samajvadi Party), Naresh Yadav (BSP), Nihalsingh (Samta Party) and Bharat Singh (Independent) secured 19270, 15686, 9846, 7534 and 3328 respectively. In the year 2000 itself one Shri Om Prakash, engineer, a BSP candidate secured 5819 votes, not a totally insignificant number and in the event of Shri Naresh Yadav being excluded he would also have shared some of the wasted votes, apart from other candidates out of 17 in all. No definite trend or mood of voters is, thus, projected from the statistics so made available. In *Paokai Haokip's* case (supra), Chief Justice M. Hidayatullah said that statistics cannot be called in aid to prove such facts, because it is notorious that statistics can prove anything and made to lie for either case. It has also come in the evidence that father of Naresh Yadav has been a Sarpanch and Smt. Om Kala, the wife of Shri Naresh Yadav is herself active in politics and contested several elections. She had contested Zila Parishad Elections within the constituency of Ateli on two occasions and on both occasions she was elected. In the year 1996, Shri Naresh Yadav had contested elections as the candidate of Bahujan Samaj Party

and had polled 9846 votes, almost half of the votes polled by him in the impugned elections. Thus, Shri Naresh Yadav and his family members are active in politics and they have their own political base. Shri Naresh Yadav does not have any fixed party affiliation; he has been often changing his party membership. It can not therefore be said that the votes which he secured were necessarily a cut into INLD vote bank. It is difficult to agree with the submission of the learned senior counsel for the appellant that while as a candidate of BSP, Shri Naresh Yadav polled 9846 votes in 1996 elections, his rise by 9885 votes in the year 2000 elections should be attributed to, and be treated as, a cut into INLD votes and these 9885 votes or a major clunk of them would have otherwise gone to the appellant. Shri Naresh Yadav having been continuously in politics, he may have gradually strengthened his political base and thereby secured a spurt in the number of his voters and supporters. It needs hardly any evidence to hold, as one can safely assume that the appellant must have openly and widely propagated herself as INLD candidate and made it known to the constituency that she was the official candidate sponsored by INLD and Shri Naresh Yadav was not an INLD sponsored candidate and was a defector. Therefore, it is difficult to subscribe to the suggested probability that any voter committed to INLD ideology would have still voted for Shri Naresh Yadav merely because he had for a period of two years before defection remained associated with INLD.

In *Vashist Narain Sharma's* case (supra) the election petitioner made an attempt at discharging the onus of proof by producing a number of electors before the Tribunal who had stated that all or some of the votes would have gone to the candidate who had polled the next highest number of votes in the absence of the improperly nominated candidate he would have polled majority of valid votes. It was held that the statement of the witnesses as to in what manner votes would have been distributed among the remaining contesting candidates could not be relied upon in determining the question of material effect on the election of the returned candidate. The Court observed that it was impossible to accept ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary grounds. *Paokai Haokip's* case (supra) witnesses were brought forward to state that a number of voters did not vote because of the change of venue and certain other incidents. This Court held that this kind of evidence was merely an assertion on the part of a witness who could not have

A spoken for 500 voters. The Court also refused to accept the statement even of village Headman that the whole village would have voted in favour of one candidate to the exclusion of the other.

The learned senior counsel for the appellant extensively read out a few passages from the decision of this Court in *Tek Chand's* case (supra). The B passages relate to marshalling of evidence. During discussions this Court has made certain observations as to the missing pieces of the facts and circumstances which by their absence had a debilitating effect on the evidence adduced. The learned senior counsel submitted that the evidence which was missing in *Tek Chand's* case has been adduced and made available in the C present case and therefore the finding on the crucial issue should lean in favour of the appellant. We are afraid such a submission can not be accepted. We see no acceptable logic behind the argument that if what was missing in *Tek Chand's* case, would have been available, the finding would necessarily have been in favour of the election petitioner.

D

We also do not see force in the submission of the learned senior counsel for the respondent that Smt. Om Kala had withdrawn her candidature because of her husband's nomination having been accepted and if the nomination of her husband Shri Naresh Yadav would have been rejected than she being a E cover candidate, would have contested the election and therefore the result of the election can not be said to have been materially affected. Suffice it to observe that we have to deal with what has happened and not with an imaginary situation which could have happened but did not happen.

In our opinion, on the pleadings and the evidence adduced, the election F petitioner/appellant has utterly failed in demonstrating the pattern of voting in Ateli Constituency. There were 17 contesting candidates in the field. It is difficult to make a reasonable guess, much less with any certainty, that if Shri Naresh Yadav was excluded then such number of votes would have been taken out of the votes polled by him and fallen into the box of appellant as to make G her successful.

In as much as we have found, agreeing with the High Court that the election petitioner/appellant has failed in discharging the heavy burden, which lay on her, of proving that the result of election, in so far as it concerns the H returned candidate i.e., the respondent, has been materially affected by the

improper acceptance of the nomination of Shri Naresh Yadav, the judgment of the High Court cannot be faulted. The respondent has preferred cross objections. Without going into the question of maintainability thereof we have found no merit therein and the learned senior counsel for the respondent, did not, in all fairness, seriously press the same. The appeal and the cross objections, are held liable to be dismissed and are dismissed accordingly, though without any order as to the costs.

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K.K.T. Appeals dismissed.