Tek Chand vs Dile Ram on 24 January, 2001

Equivalent citations: AIR 2001 SUPREME COURT 905, 2001 (3) SCC 290, 2001 AIR SCW 540, 2001 (1) SCALE 471, 2001 (1) LRI 338, (2001) 2 JT 114 (SC), 2001 (3) SRJ 95, 2001 (2) JT 114, (2001) 2 ANDHLD 1, (2001) 2 TAC 173, (2002) 2 ACJ 1085, (2001) 1 ANDH LT 656, 2001 SCC (L&S) 555, (2001) 2 MAD LJ 45, (2001) 2 SCT 427, (2001) 2 SCJ 118, (2001) 1 SUPREME 444, (2001) 1 RECCIVR 727, (2001) 1 SCALE 471, (2001) 1 CURLJ(CCR) 685

Author: Shivaraj V. Patil

Bench: R.C.Lahoti, S.V.Patil

CASE NO.:
Appeal(Civil) 2730 of 2000

PETITIONER:
TEK CHAND

Vs.

RESPONDENT:
DILE RAM

DATE OF JUDGMENT: 24/01/2001

BENCH:
R.C.Lahoti, S.V.Patil

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J J U D G M E N T Shivaraj V. Patil, J.

Aggrieved by the judgment and order dated 24.03.2000 passed by the High Court of Himachal Pradesh in Election Petition No. 2/98, setting aside the election of the appellant from 61-Nachan (S.C.) Assembly Constituency and declaring it void, this appeal has been filed by the appellant under Section 116-A of the Representation of People Act, 1951 (for short `the RPA), calling in question the correctness and validity of the said judgment and order of the High Court.

The material and relevant facts, to the extent they are considered necessary for the disposal of this appeal, are set out as under.

The respondent Dile Ram filed the election petition challenging the election of the appellant from 61-Nachan (S.C.) Assembly Constituency in Himachal Pradesh, pleading that the nomination papers were filed by the appellant, the respondent and others. He was set up as a candidate by the Bhartiya Janata Party (BJP) and the appellant was a candidate sponsored by the Indian National Congress (INC). After the scrutiny and withdrawal of nomination papers, five candidates remained in the field. The polling took place on 28.02.1998. The appellant was declared elected by the Returning Officer on 02.03.1998 after the counting of votes. The votes secured by the five candidates are as given below:-

---------- Sr. Name of the candidate Party Number of No. affiliation votes polled

1. Sh. Tek Chand Indian National 14,390 Congress

2. Sh. Dile Ram Bhartiya Janata 13,631 Party

3. Sh. Sohan Lal Janata Dal 328

4. Sh. Damodar Himachal Vikas 9,182 Party

5. Sh. Nikka Ram Independent 2,287

The respondent sought for setting aside the election of the appellant on the ground that it was void as Nikka Ram, one of the contesting candidates mentioned at Sr. No. 5 above was holding office of profit under Government of Himachal Pradesh on the date of filing of his nomination paper as well as on the date of scrutiny thereof. The Returning Officer ought to have rejected his nomination paper as per Section 36(2)(a) of the RPA. According to the respondent, Nikka Ram was working as Junior Engineer in Irrigation and Public Health Department of Himachal Pradesh on the relevant dates and was holding office of profit under the State Government and as such, he was disqualified from contesting the election in view of the bar created under Article 191 (1)(a) of the Constitution of India. His nomination paper was improperly and wrongly accepted by the Returning Officer which in turn had materially affected the result of the election in so far as it concerned the returning candidate the appellant.

In support of the grounds of challenge, material averments are made in paras 4-5 of the election petition, which were denied in the written statement filed by the appellant. Since the High Court has set out the pleadings of the parties in sufficient details, we consider it unnecessary to repeat them. According to the respondent, Nikka Ram was an active worker of the Rashtriya Swayam Sevak Sangh (RSS) and was closely associated with the cadre and workers of RSS and BJP; the vote bank of the respondent as well as the said Nikka Ram by and large was common as both of them were in contact with the BJP and RSS workers, supporters and well-wishers; having failed to get BJP ticket, Nikka Ram filed his nomination paper as an independent candidate only with an object to cut into

the votes of the respondent and damage his chances of election. Hence, the result of the election so far it concerned the appellant had been materially affected.

The appellant denied that nomination paper of Nikka Ram was wrongly and improperly accepted by the Returning Officer. It was also denied that acceptance of his nomination paper had materially affected the result of election insofar as it concerned the appellant. According to him it was wrong to say that a mere margin of votes would determine or would be relevant to determine that result of election has been materially affected. He also pleaded that he was not a member or active worker of BJP or RSS and he did not campaign in the election for votes as belonging to BJP.

Certain preliminary objections were taken as to the maintainability of the election petition. By a detailed order dated 3.8.1998, the High Court held that the petition did not suffer from any fatal defect so as to entail its dismissal at the threshold. Since, thereafter main election petition itself was disposed of after a full dressed trial on merits by the impugned judgment, it is unnecessary to go into further details on this aspect.

In the light of these pleadings of the parties, the learned trial Judge framed the following issues:-

> 1. Whether the nomination paper of shri Nikka Ram was improperly and wrongfully accepted by the Returning Officer? OPP
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> 2. If Issue No. 1 is proved in favour of the petitioner, whether the result of the election has been materially affected so far as it concerns the election of the respondent? OPP
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> 3. Whether Shri Nikka Ram was holding an office of profit under Government of Himachal Pradesh and was disqualified for being chosen as member o Himachal Pradesh Legislative Assembly? OPP
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> 4. Whether Shri Nikka Ram was an active member of the Rashtriya Swayam Sewak Sangh (R.S.S.) as alleged. If so, its effect? OPP The trial court took up issue nos. 1&3 together and after discussion in the light of evidence, concluded that the nomination paper of Nikka Ram was improperly and wrongfully accepted by the Returning Officer as he was holding an office of profit under the State Government on the date of filing of his nomination paper as well as on the day of their scrutiny by the Returning Officer and was disqualified for being chosen as a Member of the Himachal Pradesh Legislative Assembly.
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> Issue nos. 2&4 were taken up together for consideration stating that they were inter-connected. The findings were recorded on these issues also in favour of the respondent holding that by the improper and wrongful acceptance of the nomination paper of Nikka Ram, the result of election has been materially affected so far as it concerned the election of the appellant. In view of these findings, the election petition was allowed, the election of the appellant was set aside declaring it as void under Section 100(1)(d)(i) of the RPA.

Shri D.D. Thakur, learned senior counsel for the appellant, urged that:

> 1. the High Court committed an error in not accepting the arguments advanced on behalf of the appellant that in view of the proviso to sub-rule (2) of Rule 48-A of the Central Civil Services (Pension) Rules, 1972 (for short the Rules), the voluntary retirement sought for by Nikka Ram became effective from the date of expiry of the period specified in the notice dated 5.12.1994; before the expiry of the said period admittedly no communication was made to said Nikka Ram either accepting or refusing voluntary retirement sought by him; the High Court wrongly brushed aside this argument stating that there was overwhelming evidence on record to show that the voluntary retirement was not accepted.
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> 2. Nikka Ram gave notice on 5.12.1994 seeking voluntary retirement under the Rules; no communication was made to him till 28.2.1998, that is, the date of election itself; no action was taken against Nikka Ram for participating in election; in response to letter dated 25.3.1998 of the respondent a reply was given on 26.3.1998 long after the result of election was declared on 3.3.1998.

In these circumstances by operation of the proviso to Rule 48-A(2) of the Rules Nikka Rams voluntary retirement became effective from the date of expiry of the period specified in the notice. As such Nikka Ram ceased to be a Government servant under the State and was not holding an office of profit. Thus he did not suffer any disqualification during the relevant period and acceptance of his nomination paper was absolutely right and justified.

3. The respondent did not specifically plead giving material particulars as to how the result of the election so far it concerned the appellant had been materially affected and he failed to establish the same by cogent and acceptable evidence; merely because the votes secured by Nikka Ram were three times more than the difference of votes secured by the appellant and the respondent, it could not be said as to how the votes secured by Nikka Ram could have been distributed in the absence of any pleading and evidence in this regard; no material was placed to show that trend or pattern of voting when in all there were five candidates in the field.

4. The approach of the High Court in appreciating the evidence placed on record was not consistent with well established principles; the High Court simply accepted the statements of the witnesses including that of the respondent made in examination-in-chief without considering their evidence brought on record in their cross-examination; the evidence of the appellant and his witnesses led in rebuttal/defence was not considered along with the evidence led on behalf of the respondent applying the same standards. In short, the analysis and appreciation of the evidence brought on record by the High Court was not objective and appropriate.

Shri P.S. Mishra, learned senior counsel for the respondent, submitted:

> 1. that the findings recorded by the High Court based on evidence are quite justified and they may not be disturbed. 2. The standard and burden of proof in the case on

> hand cannot be equated to the one which is required in an election petition filed on the ground of corrupt practices, i.e., as in a quasi criminal case; in the present case the burden of proof having regard to the ground raised in the election petition should be considered at par with a burden of proof as in any civil case. 3. Having regard to the facts and circumstances of the case, the evidence brought on record and the 2287 votes secured by Nikka Ram, which were three times more than the difference of votes secured by the appellant and the respondent, i.e., 759, the High Court was right in declaring the election of the appellant void.

Further, the court cannot expect proof in a case like this which is almost impossible so as to establish how the wasted votes would have been distributed among the contesting candidates. 4. Looking to the Fundamental Rule 56(k) and the Pension Rules the acceptance of voluntary retirement of Nikka Ram by competent authority was mandatory; in the absence of such acceptance he should be treated to have continued in Government service; acceptance of voluntary retirement after the expiry of the period specified in the notice was not automatic; acceptance of voluntary retirement may be from a date later than the date specified in the notice of voluntary retirement and the voluntary retirement could become effective from the date of expiry of the period mentioned in the notice having regard to Rule 48-A read as a whole along with Fundamental Rules touching the question of voluntary retirement. We have carefully considered the submissions made by the learned counsel for the parties in the light of the pleadings and evidence brought on record. The following two points arise for our consideration and decision in this appeal: - 1. Whether at the relevant time Nikka Ram was holding an office of profit being in the service of the State of Himachal Pradesh and as such his nomination paper was improperly accepted, and, if so 2. whether the result of the election, insofar as it concerned the appellant, had been materially affected to declare it void. Section 100, to the extent relevant for the purpose of this case, reads: - 100. Grounds for declaring election to be void. (1) Subject to the provisions of sub- section (2) if the High Court is of opinion

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

(i) by the improper acceptance of any nomination.

In an election petition where an election of a returned candidate is impeached under section 100(1)(d)(i) of the RPA, it is not enough only to establish that a nomination of a candidate was improperly accepted. In addition, it has to be further established that such wrong acceptance of nomination paper has materially affected the result of the election in so far it concerned the returned candidate. In this view, in this case, having regard to facts and contentions, we think it is appropriate to take up the second point set forth above for consideration first.

In support of his case, the respondent (the election petitioner) examined PWs 1-10 including himself. The appellant (the respondent in the election petition) examined RWs 1-13 including himself in rebuttal. The High Court having rightly stated in para 73 of the judgment that the onus was very heavy on the respondent on issue no. 2 and that burden had to be discharged by him not only through specific and proper pleadings but also through cogent evidence but went wrong in its

approach while discussing the evidence and recording finding on issue no. 2. As is evident from the discussion made by the High Court in paras 80-104 on the evidence led by the parties, the approach was almost one-sided. In accepting the case of the respondent and his witnesses, as spoken to in examination-in-chief without focusing the attention on what was brought about in the cross-examination of these witnesses to test their truthfulness, correctness, probability or veracity, the learned trial judge failed to objectively analyse and evaluate the evidence. Further the evidence led by appellant was also not kept in view while appreciating the evidence of the respondent and his witnesses.

As is evident from the election petition, the respondent did not specifically plead that Nikka Ram was a member of RSS and / or BJP except stating that he was an activist or actively associated with them; no documents were produced to establish that he was a member of RSS and / or BJP; similarly nothing was placed on record to show that he applied for and failed to get ticket from BJP to contest the election as a BJP candidate; however it is stated that the vote bank was common for both, the respondent and Nikka Ram. It is further stated that Nikka Ram secured 2287 votes whereas the margin of difference between the votes secured by the appellant and the respondent was only 759. As such the votes secured by Nikka Ram were disproportionately large, being three times more than the margin of difference between the votes secured by the appellant and the respondent; had the nomination paper of Nikka Ram been rejected, the votes polled in his favour would have definitely been polled in favour of the respondent as those were pro-BJP and anti-establishment. The main plank of the campaign of Nikka Ram was asking for votes in the name of Shri Atal Bihari Vajpayee; he being an RSS activist would stand by the side of Shri Atal Bihari Vajpayee if elected as MLA. Hence improper acceptance of nomination paper of Nikka Ram had materially affected election of the appellant so far he was concerned. It is not pleaded as to the pattern or trend of voting so as to show how the wasted votes secured by Nikka Ram could have been distributed. In his deposition the respondent (PW1) has not spoken to as to the trend of voting or possible distribution of votes between the contesting candidates but for Nikka Ram being in the field. He referred to greeting cards said to have been sent to several persons and he received one Exbt. PW1/1 which was marked subject to objection but ultimately that was not admitted in evidence. In examination-in-chief, he also stated that Nikka Ram had connection with RSS and was also associated with BJP. He did not assert or say that Nikka Ram was member of RSS and / or BJP. He admitted in cross-examination that in 1993 also, the appellant contested and won the election as an independent candidate. The respondent lost the election by a margin of 7300 votes. Congress candidate in that election got only 3000 votes. In 1989 election to Lok Sabha, Mr. Maheshwar Singh was the BJP candidate. He secured 5500 votes in this constituency, more than the Congress candidate and the respondent who contested the Assembly election in the year 1990 as a BJP candidate got less votes than the BJP Parliamentary candidate. He has admitted that witnesses cited by him were the BJP activists; they were office bearers of the party prior to 1991. He has further stated that one Ganga Singh, a former M.P. is a resident of his constituency and his Panchayat. He was not aware whether the said Ganga Singh supported him or opposed him. He was President of the BJP earlier. He has further admitted that it is correct that Nikka Ram never made any request for being made a member of the BJP in Nachan constituency. I have no proof to the effect that the request was made by Nikka Ram for obtaining the BJP ticket for Nachan constituency. I do not have the record indicating that Nikka Ram was the active member of the BJP. The request for being made

a member is to be formally accepted by an authority. I am not aware whether the request made by Nikka Ram was accepted. In his evidence, he stated that he never found Nikka Ram canvassing in his presence. He only heard some people telling that he was trying to tell that after winning the election, he would formally join BJP. He was unable to give names or particulars of those some persons who were telling so. Although he made a statement that some members of the BJP joined Nikka Ram, he could not give their names, parentage, village, place, time and their whereabouts. As to Exbt. PW1/1, he admitted that it was not written in his presence; it was not signed by Nikka Ram in his presence and that his name, date and other particulars were also not written in his presence. He stated that this card was received by him through post. However, he did not have the possession of the envelope with him. In the cross-examination, he further admitted that wife of Nikka Ram had defeated the candidate of BJP in Zila Parishad elections and that she secured 3700 votes. The BJP candidate secured 1200 votes only. It is also admitted that wife of Nikka Ram was the President of Chatar Panchayat to which Tek Chand, the appellant, belonged. She defeated both the Congress and BJP candidates for the presidentship of the Panchayat. Nothing was brought on record to show that the relationship between Nikka Ram and his wife were strained or they belonged to different political parties or ideologies. From this evidence of the PW1, it is not at all possible to hold that Nikka Ram was either a member of RSS or BJP or was actively associated with them. One of the cardinal principles of evidence is that the best possible evidence should be placed before the court for establishing a particular fact or a relevant fact. Either to the membership or association of Nikka Ram with RSS or BJP, no documentary evidence was placed on record such as membership register, application form, correspondence or his participation in any of the programmes or activities of RSS or BJP. So much so, no documentary evidence was placed on record to show the trend of voting or distribution of votes between the contesting candidates belonging to different political parties or independent candidates during previous elections of either assembly, parliament or panchayat elections. No other witness for the respondent spoke about the possible distribution of so called wasted votes. Having regard to the evidence and in the absence of positive and cogent evidence lead on behalf of the respondent it is not possible to hold that how many out of the votes secured by Nikka Ram could have gone to the respondent so as to say that the result of the election was materially affected so far as it concerned the returned candidate. Looking to the above evidence it cannot be said that in this constituency all along BJP was leading and that the contest was only between two parties or that it was a strong hold of BJP. There were in all five candidates in the field. Damodar, candidate sponsored by Himachal Vikas Congress secured 9182 votes and Sohan Lal, Janata Dal 328 votes. It is also not possible to say with reasonable certainty or guess that all the votes secured by Nikka Ram or more than 759 votes could have gone in favour of the respondent if Nikka Ram was not in the field that too in the absence of any material to show the trend or probable distribution of wasted votes. Further, there were two other candidates also in the field. In this situation, how these 2287 votes of Nikka Ram could have been distributed among the remaining four candidates cannot be judicially guessed.

The statement of PW1 that all witnesses cited by him were active workers of BJP is to be kept in mind while appreciating their evidence. PW4 is one Ranvir. He stated that he was the President of the BJP of Mandi Sadar and he filled up membership form of Nikka Ram for BJP. In the cross-examination, he has admitted that Nikka Ram never applied for being enrolled as a member from Nachan Mandal; he applied for the membership from the Mandi constituency; membership

was never given to him from Nachan constituency. He admitted that PW5, Ram Swarup, was the General Secretary of BJP of Mandi district; PW6, Joginder Singh, was the active member of BJP from Nachan constituency. He also stated that membership register of Nachan would be with its President but the said register was not produced. The evidence of this witness did not help the respondent to establish that Nikka Ram was member of BJP or he was associated with RSS or he was active worker of RSS or BJP. PW5 stated that Nikka Ram was one of the activists of the BJP. He was aspiring for BJP ticket from Nachan constituency. In his cross-examination, he stated that they had the list of the members of the BJP and that the name of Nikka Ram appeared therein but he could not produce that record. He further stated that names of members were received from Mandals and then the list was prepared; the name of Nikka Ram was received from Mandi Mandal. Those records were not produced. He, however, further stated that the membership of the BJP had not been conferred upon Nikka Ram. PW6, is Joginder Singh, proposer of the respondent in the election. He filed objection to the nomination paper of Nikka Ram. In his evidence he stated that he was an active participant in the RSS and Nikka Ram was associated with the activities of the RSS and BJP. The Returning Officer directed him to produce evidence that Nikka Ram was in the active service. He could not produce evidence as the time given was too short. In the cross-examination, he has stated that resignation was given by Nikka Ram in the year 1995. He had no personal knowledge as to whether the resignation was accepted or not. He did not make any written request to the Returning Officer to grant more time to place the record. PW7, Nand Lal, was the President of the Gram Panchayat Bara, from 1990 to 1995. He stated that he was associated with the BJP; Nikka Ram used to come and meet with a request to vote for BJP; when he was unable to get the BJP ticket, he told he was the worker of BJP, therefore, the votes should be given to him; Nikka Ram claimed himself as the man of Shri Atal Bihari Vajpayee on the ground that he belonged to that party. In the cross-examination, he admitted that he had no proof of the fact that Nikka Ram was an active member of the BJP. PW8, Uma Dutt, stated that he became a member of the BJP after his retirement. Nikka Ram was Junior Engineer in his Circle. He had known and seen Nikka Ram as an active member of the BJP. In his cross-examination he said that he helped the respondent in the election. He was not aware as to which Pradhan of Gram Panchayats belonged to which party and for which party they worked. He was also not aware who worked for the BJP or for the Congress or for the independent candidate. His evidence is of no help to the respondent. PW9, Prem Chaudhary, stated that he knew the appellant and Nikka Ram; Nikka Ram belonged to RSS; he received a greeting card; he also belonged to RSS; during election, Nikka Ram was soliciting votes as being member of BJP. In the cross-examination, he stated that he received the card in March 1997. He had not seen any record of membership of Nikka Ram. He stated that Nikka Ram attended training camp of the RSS with him but did not remember the date nor the month nor the year. He further stated that he helped Nikka Ram during the election, as he was one among them. The last witness PW10 examined in support of the election petition was Dhameswar Dutt, Pradhan of Gram Panchayat, Jhungi since 1993. He stated that a meeting was held in the Panchayat. In that meeting, Nikka Ram said that he belonged to BJP and was follower of Shri Atal Bihari Vajpayee. He further stated that the speech made by Nikka Ram did not have any impact on the members of the Panchayat. He denied that he was the active member of the BJP, although PW1 himself had stated that all his witnesses belonged to BJP. From this evidence, it cannot be said that the burden of proof placed on the respondent (election petitioner) was discharged. By this evidence, it was not established that Nikka Ram was either a member or activist of RSS and / or BJP. There was also no

evidence to establish that he applied for BJP ticket and the same was denied to him. Similarly, there was no evidence to establish that he campaigned in the election that he belonged to BJP; he would join BJP in case he was elected and that he was supporter of Shri Atal Bihari Vajpayee. Further there was nothing to establish that voters of BJP and Nikka Ram were common. On the other hand wife of Nikka Ram contested an election as an independent candidate and defeated both BJP and Congress candidates. Having regard to the trend of voting in the previous elections, as brought out in the cross-examination of PW1 and in the absence of any evidence as to the distribution of wasted votes, it cannot be said that votes polled in favour of Nikka Ram would have gone in favour of the respondent if his nomination paper had not been accepted. This being the position, it is not possible to hold that the result of the election in so far it concerned the returned candidate was materially affected. Unfortunately, the High Court has recorded a finding otherwise. The High Court has found fault with the appellant saying that there was no rebuttal evidence as against the so called positive and cogent evidence led on behalf of the respondent (election petitioner), even when the respondent failed to establish his case by discharging burden of proof placed on him. Even otherwise the rebuttal evidence is very much there as contained in evidence of RWs 1-13.

RW1, K.D. Lakhanpal, the Returning Officer, in his evidence has stated that Nikka Ram was an independent candidate. One Joginder Singh (PW6) raised objection to the nomination paper of Nikka Ram. At 12.15 PM on 5.2.1998, time was given to Joginder Singh to prove his objection upto 3.00 PM that Nikka Ram was in Government service. He failed to prove his objection by 3.00 PM. The Returning Officer waited for him upto 6.25 PM; even then he did not produce any proof and no extension of time was sought for on behalf of the objector beyond 6.25 PM. On the basis of the record available, he accepted the nomination paper of Nikka Ram by rejecting the objection of Joginder Singh on the ground of lack of proof. In the cross-examination, he denied the suggestion that time sought for to furnish proof by Joginder Singh was denied. The appellant was examined as RW-2. In his evidence, while rebutting the case of the respondent and supporting his defence, he has clearly denied the suggestions in the cross-examination to the contrary. RW2 in his evidence has further stated that Nikka Ram contested the election as an independent candidate. He and Nikka Ram belong to same Panchayat. Nikka Rams wife Raj Kumari was the Pradhan of said Gram Panchayat. She defeated both BJP and Congress candidates in the election of Pradhan of Gram Panchayat. The BJP candidate had polled 250 votes whereas she had polled 750 votes. In the Zila Parishad election, she had polled approximately 3,700 votes while the BJP candidate had polled 1200 votes. Out of 40 Gram Panchayats, 30-32 have Congress elected Pradhans. During election, Nikka Ram had been canvassing for vote as an independent candidate and did not appeal in the name of any political party. It was denied that Nikka Ram was active worker of RSS. It was also denied that because of the propaganda of Nikka Ram, the votes of BJP supporters which would have been in the normal course polled in favour of the respondent instead went in favour of Nikka Ram. He also denied the suggestion that in case nomination paper of Nikka Ram had not been accepted, the respondent would have been successful in the election. The appellant also denied that he had put up Nikka Ram as a candidate for the said election by financing him so as to cut into the votes of Dile Ram (the respondent). The High Court did not accept his evidence on the ground that in cross-examination, certain suggestions were made although they were denied and that RW-2 did not raise any objection to the nomination paper of Nikka Ram. RW-3, Raju, in his evidence has stated that Nikka Ram had appointed him as polling agent at Chachyot polling station and he had

accompanied Nikka Ram for canvassing votes in his favour and he heard Nikka Ram saying to the voters that they all had seen what Dile Ram had done and also what Tek Chand had done and they should vote him as he is an educated person. He further stated that he had not canvassed for votes on the ground of being an active member of any political party nor he had asked for votes in the name of any political party. His evidence was sought to be discredited on the ground that he reached Shimla in jeep belonging to the appellant in order to give evidence in court and he had stayed previous night with the appellant in MLA hostel. Assuming, the witness was interested but did not support the case of the election petitioner in any way on whom the burden of proof was heavy to establish his case. RW4, Hemraj, stated that he was a worker of Nikka Ram as well as his polling agent at Khanet-II polling station. According to him, Nikka Ram asked for votes holding out a promise that he would get minor work done such as repair of roads etc. He did not say that he would join any political party in case he was elected and that he did not canvass for or seek votes in the name of any political party. Nothing was said as to why his evidence was discarded. The evidence of RW5, Kamla Devi, is also to the same effect and she stated that during election campaign in her presence Nikka Ram had not announced himself to be a worker of BJP nor did he say that his leader was Shri Atal Bihari Vajpayee. RW6, Charandas has deposed that Nikka Ram had asked for their votes by saying that he was a person from the same constituency and that he would give better account if elected and that he had not canvassed for votes in the name of BJP nor he had stated that in case of being elected, he would join that party. RW7, Dhanram Das and RW8, Dayal Singh, have also stated that Nikka Ram did not ask for votes in the name of BJP and he had also not canvassed saying that he would join BJP in case he is elected. The High Court has commented on the evidence of RW8 saying that he had not been able to tell the date of Nikka Rams visit to his village nor the names of the persons who accompanied him on that occasion. Nothing more is said as to why the evidence of these witnesses should not be accepted. The evidence of RWs 9-13 are also more or less to the same effect. No good reasons are given by the High Court for not accepting their evidence. The learned trial Judge in the judgment has stated that the respondent pleaded his case in the election petition in a positive and forthright manner and also has led positive and reliable evidence. Placing strong reliance on Chhedi Ram vs. Jhilmit Ram and Others [(1984) 2 SCC 281], concluded that by improper acceptance of the nomination paper of Nikka Ram who was disqualified from contesting the election on the relevant date and the number of votes polled by him, namely 2287 which would be in the nature of wasted votes, the substantial majority of the said wasted votes would have been polled by the respondent, had Nikka Ram not been in the electoral fray. In view of this conclusion, the learned trial Judge held that the result of the election insofar it concerned the appellant has been materially affected to the detriment of the respondent who would have been otherwise the successful candidate. The argument advanced on behalf of the appellant that in case nomination paper of Nikka Ram had been rejected, it was not necessary that all votes polled by him would have gone only to the respondent and not to the other candidates when there were two other candidates in the field and one of them namely Damodar of Himachal Vikas Congress had polled 9182 votes, was lightly brushed aside saying that there was no merit in that argument inasmuch as the respondent had led positive and cogent evidence to show that Nikka Ram cut deeply into the votes of the respondent by contesting election as a parallel BJP candidate. We are unable to agree with the statement of the High Court that the respondent led positive and cogent evidence to show that Nikka Ram cut deeply into the votes of the respondent by contesting the election as a parallel BJP candidate as it is not supported by cogent and acceptable evidence. On behalf of the appellant,

it was also urged before the High Court that in order to succeed on the ground that the result of the election had been materially affected in so far as it concerned the returned candidate by the improper acceptance of the nomination paper of Nikka Ram, the respondent had to establish by positive evidence that the wasted votes polled, would have been otherwise polled in favour of the respondent. In support of this contention, the case of Vashit Narain Sharma vs. Dev Chandra and others [(1995) 1 SCR 509] of this Court was cited. This contention was rejected saying that in the present case the petitioner has adduced satisfactory and positive evidence to show that the wasted votes polled by Nikka Ram would in substantial majority have been polled otherwise by the petitioner. So the question of finding being speculative or conjectural does not arise on the facts of this case. Here again, the High Court was not correct in the light of the evidence brought on record.

In Vashit Narain Sharma vs. Dev Chandra and others [1955 (1) SCR 509], a three Judge Bench of this Court has expressed the view that whether the result of the election has been materially affected 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 the wasted votes would have been distributed in such a manner between the contesting candidates, which would have brought about the defeat of the returned candidate and burden of proof in this regard lies upon the petitioner, who questions the validity of the election and that the election of a returned candidate cannot be set aside on mere possibility or conjecture as to the distribution of wasted votes.

This Court in Samant N. Balakrishna etc. vs. George Fernandez and others etc. [1969 (3) SCR 603] has referred to and followed Vashit Narain case (supra). In para 2 at page 644 of that judgment it is stated, thus: - In our opinion the matter cannot be considered on possibility. Vashist Narains case insists on proof. If the margin of votes were small something might be made of the points mentioned by Mr. Jethmalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently huge. There is no room, therefore, 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. In Vashists case and in Inayatullah v. Diwanchand Mahajan (15 ELR 210) the provision was held to prescribe an impossible burden. The law has however remained as before. We are bound by the rulings of this Court and must say that the burden has not been successfully discharged. We cannot overlook the rulings of this Court and follow the English ruling cited to us.

[emphasis supplied] This Court in Shiv Charan Singh vs. Chandra Bhan Singh [(1988) 2 SCC 12], after referring to Vashit Narain case (supra) and Chhedi Ram vs. Jhilmit Ram [(1984) 2 SCC 281], dealing with an election petition filed on the ground under Section 100(1)(d)(i) itself, has clearly stated that the burden of strict proof is on election petitioner; it is not permissible to act on conjectures and surmises; mere fact that number of votes polled by a candidate, whose nomination was improperly accepted, was greater than the margin of votes polled by the returned candidate and the candidate securing the next highest number of votes not by itself was conclusive proof of the material effect on the election of the returned candidate. Paras 10 and 11 of the judgment read thus: -

10. In the instant case Shiv Charan Singh the appellant had polled 21,443 votes and Roshan Lal had polled 16,946 the next highest number of votes. There was thus a difference of 4497 votes between

the votes polled by the appellant and Roshan Lal. Kanyaiya Lal whose nomination paper had improperly been accepted, had secured 17,841 votes which were wasted. The election petitioners did not produce any evidence to discharge the burden that improper acceptance of the nomination paper of Kanhaiya Lal materially affected the result of the election of the returned candidate. On the other hand the appellant who was the returned candidate produced 21 candidates representing cross-section of the voters of the constituency. All these witnesses had stated before the High court that in the absence of Kanhaiya Lal in the election contest, the majority of the voters who had voted for Kanhaiya Lal would have voted for Shiv Charan Singh the appellant. The High Court in our opinion rightly rejected the oral testimony of the witnesses in view of this courts decision in Vashist Narain Sharma case. The High Court however having regard to the votes polled by the appellant Roshan Lal and Kanhaiya Lal held that the result of the election was materially affected. The High Court held that in view of the fact that difference between Shiv Charan Singh the appellant and Roshan Lal was only 4497 and Kanhaiya Lal, whose nomination was improperly accepted had secured 17,841 votes therefore it could reasonably be concluded that the election was materially affected. In our opinion the High Court committed error declaring the appellants election void on speculations and conjectures.

11. Indisputably, the election petitioners had failed to discharge the burden of proving the fact that the result of election of the appellant had been materially affected by reason of improper acceptance of the nomination paper of Kanhaiya Lal. In the absence of any positive evidence produced by the election petitioners, it was not open to the High Court to record findings that the result of the election was materially affected. The High Courts findings relating to the material affect on the result of the election are based on conjectures and surmises and not on any evidence. The legislature has, as noted earlier, placed a difficult burden on the election petitioner to prove that the result of the election was materially affected by reason of improper acceptance of nomination paper of a candidate (other than the returned candidate) and if such burden is not discharged the election of the returned candidate must be allowed to stand as held by this court in Vashist Narain Sharma and in Paokai Haokip [(1969) 1 SCR 637] case. It is true that the burden placed on the election petitioner in such circumstances is almost impossible to discharge. But in spite of the fact that this Court had highlighted this question on more than one occasion, Parliament has not amended the relevant provisions although the Act has been subjected to several amendments. It is manifest that law laid down by this Court in Vashist Narain Sharma case and Paokai Haokip case holds the field and it is not permissible to set aside the election of a returned candidate under Section 100(1)(d) on mere surmises and conjectures. If the improperly nominated candidate had not been in the election contest, it is difficult to comprehend or predicate with any amount of reasonable certainty the manner and the proportion in which the voters who exercised their choice in favour of the improperly nominated candidate would have exercised their votes. The courts are ill-equipped to speculate as to how the voters could have exercised their right of vote in the absence of improperly nominated candidate. Any speculation made by the court in this respect would be arbitrary and contrary to the democratic principles. It is a matter of common knowledge that electors exercise their right of vote on various unpredictable considerations. Many times electors cast their vote on consideration of friendship, party affiliation, local affiliation, caste, religion, personal relationship and many other imponderable considerations. Casting of votes by electors depends upon several factors and it is not possible to forecast or guess as to how and in what manner the voters would

have exercised their choice in the absence of the improperly nominated candidate. No inference on the basis of circumstances can successfully be drawn. While in a suit or proceedings it may be possible for the court to draw inferences or proceed on probabilities with regard to the conduct of parties to the suit or proceedings, it is not possible to proceed on probabilities or draw inferences regarding the conduct of thousands of voters, who may have voted for the improperly nominated candidate. In the instant case there were 11 contesting candidates. If Kanhaiya Lal whose nomination paper had been improperly accepted was not in the election contest, it is difficult to say in what proportion the voters who had voted for him would have voted for the remaining candidates. There is possibility that many voters who had gone to the polling station to cast their votes in favour of Kanhaiya Lal may not have gone to exercise their vote in favour of the remaining candidates. It is probable that in the absence of Kanhaiya Lal in the election contest, many voters would have voted for the returned candidate as he appeared to be the most popular candidate. It is difficult to comprehend that the majority of the voters who exercised their choice in favour of Kanhaiya Lal would have voted for the next candidate Roshan Lal. It is not possible to forecast how many and in what proportion the votes would have gone to one of the other remaining candidates and in what manner the wasted votes would have been distributed among the remaining contesting candidates. In this view, the result of the returned candidate could not be declared void on the basis of surmises and conjectures.

[Emphasis supplied] Further in our country as the things stand, all voters do not belong to or are affiliated to one or the other political party. Large majority of them may be neutral or independent or not committed. In this case, Nikka Ram contested the election as an independent candidate, obviously, on a symbol other than those allotted to recognized political parties. Hence it cannot be said that all 2287 votes secured by Nikka Ram were from common vote bank of BJP. May be, many out of those voters did not belong to any political party.

In para 12 of the same judgment it is clearly stated that decision of this court in Chhedi Rams case did not overrule earlier decisions in Vashit Narain Sharma and Paokai Haokip cases and added that Chhedi Rams case did not lay down any different law and that decision turned upon its own facts. In Chhedi Rams case the difference between successful candidate and the candidate who had secured the next highest number of votes was 373 only. While the candidate whose nomination paper found to have been improperly accepted had polled 6710 votes, i.e., almost 20 times of the difference of number of votes secured by the successful candidate and the candidate securing the next highest number of votes. In that situation result of the election was held to have been materially affected.

In Chhedi Ram vs. Jhilmit Ram and others [(1984) 2 SCC 281], it is held that the burden of establishing that the result of election has been materially affected due to the improper acceptance of nomination is on the person impeaching the election. If, having regard to the facts and circumstances of a case the reasonable probability is all one way, the burden may be said to have been discharged and a court must not lay down an impossible standard of proof and hold a fact as not proved. It is added that question must depend on the facts, circumstances and reasonable probabilities of the case, particularly, when votes secured by a candidate, whose nomination was improperly accepted, was disproportionately large as compared with the difference between the votes secured by the returned candidate and the candidate securing the next highest number of

votes. In the case we are dealing with the facts and circumstances are entirely different. The reasonable probability is not all one way in favour of respondent. On the other hand there is no cogent and reliable evidence to probablise the case of the respondent.

A three Judges Bench of this Court in J.

Chandrasekhara Rao vs. V. Jagapathi Rao and others [(1993) Supp. 2 SCC 229], after referring to other decisions of this Court including Chhedi Rams case (supra) has held that Chhedi Rams case did not overrule the earlier decisions and that Chhedi Rams case rested on its own facts. It is further expressed that a decision in the election petition can be given only on the positive and affirmative evidence and not merely on speculation and suspicion, however, strong they may be. Para 18 of the said judgment reads: -

18. Thus it can be seen from all the aforesaid decisions of this Court that it is for the election petitioner to prove by positive and reliable evidence that either improper acceptance of the nomination of the candidate or on account of the non-compliance with the provisions of the Constitution or the Act, Rules or orders etc. that the wasted votes would have been distributed in such a manner among the remaining candidates that any candidate other than the returned candidate would have polled the highest number of valuable votes. Such a burden of proof maybe difficult, say impossible, but the courts cannot set aside the election of the returned candidate on surmises and conjectures unless established by positive evidence that the election of the returned candidate has been materially affected.

[emphasis supplied] In spite of this Court explaining the position clearly, as above, in relation to Chhedi Rams case in two subsequent decisions of three Judges Bench in Shiv Charan Singh and Chandrasekhara Rao cases (supra), strangely the High Court misread Chhedi Rams case and preferred to support its view from that case as against aforementioned decisions and other decisions of this Court. We may repeat that in the aforementioned decisions it is clearly stated that the Chhedi Rams case was decided on its own facts.

In Uma Bhallav Rath (Smt.) vs. Maheshwar Mohanty (Smt.) and others [(1999) 3 SCC 357], this Court has taken a view that election of a returned candidate cannot be set aside on presumptions, surmises or conjectures. There must be clear and cogent proof in support of the allegations. Applying the principles stated and law laid down by this Court in the aforementioned decisions and in the facts and circumstances of the case having regard to the evidence placed on record we have no hesitation in reaching the conclusion that the High Court committed a manifest error in concluding that the result of the election of the appellant had been materially affected on account of improper acceptance of the nomination paper of Nikka Ram. No doubt, in appeal court will be slow in disturbing a finding of fact recorded by the trial court based on proper appreciation of evidence but it is also the duty of the appellate court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of law laid down by this Court. More so when there is non consideration of material evidence and appreciation of evidence is not objective and one sided.

In a democratic set up, an election of a returned candidate should not be easily vulnerable to vague allegations or to averments made in an election petition not substantiated or supported by positive, cogent and reliable evidence. The verdict given by the majority of voters in a constituency in favour of an elected candidate to represent a constituency in a State Legislative Assembly or Parliament cannot be lightly annulled or negatived in the absence of specific, acceptable and convincing evidence in support of the grounds raised in an election petition. Being the Court of first appeal when the finding recorded by the High Court in this case is not based on proper appreciation and objective assessment of evidence brought on record, as discussed above, we have no impediment in reversing the finding recorded by the High Court.

Thus viewed from any angle and even assuming that nomination paper of Nikka Ram was improperly accepted we hold that the election of the appellant-the returned candidate in so far it concerned him had not been materially affected. The point No. 2 is answered accordingly.

In view of our finding recorded on point no. 2, we could have disposed of this appeal without any further discussion on point No. 1. Since the learned counsel on both sides took pains in elaborately arguing on this point as well, we will examine and consider the same for completion.

Answer to this question depends on whether Nikka Ram was in Government service on the date of filing and scrutiny of his nomination paper. Nikka Ram gave an application for voluntary retirement on 5.12.1994 to the Superintending Engineer, Irrigation and Public Health, Circle Rampur, District Shimla, Himachal Pradesh. In that application he has stated that he had completed 20 years of service and sought voluntary retirement with all benefits of service. The said application mentioned also of three months notice with a request that he may be retired with effect from 28.2.1995. According to the respondent, as pleaded in para 4 of the election petition, the said application made for voluntary retirement had not so far been accepted by the Government and Nikka Ram still continued in Government service. Copy of the letter dated 26.3.1998 issued by the Superintending Engineer certifying that voluntary retirement application of Nikka Ram had not been accepted, was filed alongwith the election petition. Exbt. PW3/1 is said to be the Office Order of the IPH Deptt. dated 18.12.1996; it says that an inquiry under Rule 14 of the Central Civil Service (Classification, Control and Appeal) Rules, 1965 is being held against Nikka Ram and the Inquiry Authority to inquire into the charges framed was appointed. Of course, the nature and contents of the charges were not indicated. Exbt. PW3/2 is a letter dated 29.12.1994 from the Superintending Engineer, IPH, Circle Rampur, addressed to the Executive Engineer. In the letter it is stated that Nikka Ram had sought voluntary retirement from Government service with effect from 28.2.1995 by giving three months notice. Further the Executive Engineer was requested to examine the case properly as required under the Rule and send No Demand Certificate as well as Vigilance Clearance Certificate alongwith specific comments to take further action. It is further indicated that if not the detailed position be intimated to this office immediately, the VVC may be obtained personally from the E-In-C, IPH Department, Shimla, as well as from the C.N. Dharmshala immediately. Copies were sent to other authorities to take immediate action. Exbt. PW3/1 is another letter dated 2.4.1998 from the Superintending Engineer addressed to Nikka Ram at his home address stating that his voluntary retirement as sought could not be accepted for the reason that total length of his service was 19 years 10 months and 6 days which was less than 20 years. One more letter Exbt. PW3/2

dated 26.3.1998 from the Superintending Engineer was addressed to the respondent in reply to his letter dated 25.3.1998 informing that issue of voluntary retirement of Nikka Ram had not been finalized due to some departmental formalities and his request for voluntary retirement had not been accepted till date. In response to the application dated 6.8.1998 of the respondent, Exbt. PW3/3 dated 7.8.1998 was issued giving various details of the departmental formalities and hurdles indicating that his voluntary retirement could not be accepted.

It is not disputed that the appointing authority did not refuse to grant the permission for retirement before expiry of the period specified in the said application dated 5.12.1994 given by Nikka Ram. Further, no communication whatsoever was made to him within the said period. During the course of the argument before the High Court, the learned counsel for the parties referred to Rule 48-A of the Rules, of course, placing their own interpretation. Since the said Rule is material and has bearing on the question to be determined, it is extracted below:-

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      48-A.    Retirement  on  completion   of   20   years
qualifying service.
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(1) At any time after a Government servant has completed twenty years qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.

Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is

(i) on assignments under the Indian Technical and Economic Co- operation (ITEC) Programme of the Ministry of External Affairs and other aid programmes.

(ii) Posted abroad in foreign based offices of the Ministries / Departments.

(iii) On a specific contract assignment to a foreign Government, unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority;

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

.....

Under sub-rule (1) of the said Rule, at any time after completion of 20 years qualifying service, a Government servant could give notice of not less than three months in writing to the appointing

authority for retirement from service. Under sub-rule (2), voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority. In the proviso to sub-rule (2) of Rule 48-A, it is clearly stated that in case the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

It is clear from sub-rule (2) of the Rule that the appointing authority is required to accept the notice of voluntary retirement given under sub-rule (1). It is open to the appointing authority to refuse also on whatever grounds available to it but such refusal has to be before the expiry of the period specified in the notice. The proviso to sub-rule (2) is clear and certain in its terms. If the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement sought for becomes effective from the date of expiry of the said period. In this case, admittedly, the appointing authority did not refuse to grant the permission for retirement to Nikka Ram before the expiry of the period specified in the notice dated 5.12.1994. The learned senior counsel for the respondent argued that the acceptance of voluntary retirement by appointing authority in all cases is mandatory. In the absence of such express acceptance the Government servant continues to be in service. In support of this submission, he drew our attention to Rule 56(k) of Fundamental Rules. He also submitted that acceptance may be on a later date, that is, even after the expiry of the period specified in the notice and the retirement could be effective from the date specified in the notice. Since the proviso to sub- rule (2) of Rule 48-A is clear in itself and the said Rule 48-A is self-contained, in our opinion, it is unnecessary to look to other provisions, more so in the light of law laid down by this Court. An argument that acceptance can be even long after the date of the expiry of the period specified in the notice and that the voluntary retirement may become effective from the date specified in the notice, will lead to anomalous situation. Take a case, if an application for voluntary retirement is accepted few years later from the date specified in the notice and voluntary retirement becomes operative from the date of expiry of the notice period itself, what would be the position or status of such a Government Servant during the period from the date of expiry of the notice period upto the date of acceptance of the voluntary retirement by the appointing authority? One either continues in service or does not continue in service. It cannot be both that the voluntary retirement could be effective from the date of expiry of the period mentioned in the notice and still a Government servant could continue in service till the voluntary retirement is accepted. The proviso to sub-rule (2) of Rule 48-A of the Rules does not admit such situation.

This Court in a recent judgment in the case of State of Haryana and others vs. S.K.Singhal [(1999) 4 SCC 293], after referring to few earlier decisions of this Court touching the very point in controversy in para 13 of the judgment has held thus :-

> 13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in Dinesh Chandra Sangma case by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice. If, however, as in B.J. Shelat case and as in Sayed Muzaffar Mir case the authority concerned is empowered to withhold permission to

> retire if certain conditions exist, viz, in case the employee is under suspension or in case a departmental enquiry is pending or is contemplated, the mere pendency of the suspension or departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the authority concerned must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in B.J. Shelat case and in Sayed Muzaffar Mir case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

In our view, this judgment fully supports the contention urged on behalf of the appellant in this regard. In this judgment, it is observed that there are three categories of rules relating to seeking of voluntary retirement after notice. In first category, voluntary retirement automatically comes into force on expiry of notice period. In second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in third category voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules. In the case decided, the relevant rule required acceptance of notice by appointing authority and the proviso to the Rule further laid down that retirement shall come into force automatically if appointing authority did not refuse permission during the notice period. Refusal was not communicated to the respondent during the notice period and the court held that voluntary retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntary retired had no effect. The present case is almost identical to the one decided by this Court in the aforesaid decision.

This Court in B.J. Shelat vs. State of Gujarat & Ors. [(1978) 2 SCC 201] while dealing with a case of voluntary retirement, referring to Bombay Civil Service Rules, Rule 161(2)(ii) proviso and Rule 56(k) of the Fundamental Rules, in similar situation, held that a positive action by the appointing authority was required and it was open to the appointing authority to withhold permission indicating the same and communicating its intention to the Government Servant withholding permission for voluntary retirement and that no action can be taken once the Government servant has effectively retired. Paras 9 and 10 of the said judgment read thus :

> 9. Mr. Patel next referred us to the meaning of the word withhold in Websters Third New International Dictionary which is given as hold back and submitted that the permission should be deemed to have been withheld if it is not communicated. We are not able to read the meaning of the word withhold as indicating that in the absence of a communication it must be understood as the permission having been withheld.

10. It will be useful to refer to the analogous provision in the Fundamental Rules issued by the Government of India applicable to the Central Government servants.

Fundamental Rule 56(a) provides that except as otherwise provided in this Rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. Fundamental Rule 56(j) is similar to Rule 161(aa)(1) of the Bombay Civil Services Rules conferring an absolute right on the appropriate authority to retire a Government servant by giving not less than three months notice. Under Fundamental Rule 56(k) the Government servant is entitled to retire from service after he has attained the age of fifty-five years by giving notice of not less than three months in writing to the appropriate authority on attaining the age specified. But proviso (b) to sub-rule 56(k) states that it is open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause. Thus under the Fundamental Rules issued by the Government of India also the right of the Government servant to retire is not an absolute right but is subject to the proviso where under the appropriate authority may withhold permission to a Government servant under suspension. On a consideration of Rule 161(2)(ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government Servant its decision to withhold permission to retire on one of the grounds specified in the proviso.

In this decision effect of Rule 56(k) of Fundamental Rules is also considered which answers the argument of the learned counsel for the respondent on this aspect. It may also be noticed that under Rule 48-A in Government of Indias decision giving instructions to regulate voluntary retirement it is stated, Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice unless the competent authority issues an order to the contrary before the expiry of the period of notice.

If we accept the argument of the learned senior counsel for the respondent, even if the refusal of voluntary retirement is not communicated within the period specified in notice, the voluntary retirement cannot be effective unless it is accepted by the appointing authority, no meaning and effect can be given to the proviso to sub-rule (2) to Rule 48-A. It is cardinal rule of construction that no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute or a rule.

The High Court looking to the letters dated 29.12.1994, 18.12.1996, 2.4.1998, 26.3.1998 and 7.8.1998 came to the conclusion that Nikka Ram was in Government service on the date of filing nomination paper. The High Court also observed that there was glaring omission on the part of the appellant in not controverting the pleadings and evidence of the respondent with regard to Nikka Ram being in Government service at the relevant time and also relied on the oral evidence in this regard to say that Nikka Ram was holding office of profit by being in Government service on the date of filing nomination paper and as such his nomination paper was wrongly accepted. It is not disputed, as already stated above, that no communication was given to Nikka Ram before the expiry of the period specified in the notice of voluntary retirement. Nikka Ram was not examined. Exbt. PW3/2, letter dated 26.3.1998, Exbt. PW3/3, letter dated 2.4.1998 and Exbt. PW3/3 letter dated

7.8.1998 were of dates subsequent to the date of filing of nomination paper and even declaration of the result of the election on 2.3.1998. On the basis of the material available on record on the date of scrutiny of nomination paper, there was nothing to show that Nikka Ram continued in Government service in view of the admitted position that he had submitted application for voluntary retirement by giving notice on 5.12.1994 and no refusal was communicated to him, refusing acceptance of voluntary retirement before 28.2.1995. By virtue of Rule 48-A, as discussed above, the voluntary retirement of Nikka Ram came into force and became effective from 28.2.1995. Neither Nikka Ram nor Government of Himachal Pradesh are parties to this appeal before us. In this appeal we do not wish to deal with the status of Nikka Ram in relation to Government service or the respective rights and contentions, if any, of Nikka Ram and State Government in regard to his service and the consequences that may follow. For the purpose of this appeal it is enough to say that on the date of filing and scrutiny of nomination paper of Nikka Ram, he should be deemed to have been voluntarily retired by operation of proviso to sub-rule (2) of Rule 48-A. I.As. 2/2000 and 3/2000 are filed for impleadment of Nikka Ram and State of Himachal Pradesh and for modification of the order dated 24.7.2000 respectively. Application for impleadment was made on the ground that Nikka Ram and State of Himachal Pradesh were not made parties to the election petition. The decision, one way or the other, on the point whether the said Nikka Ram ceased to be a Government servant or continued to be in Government service may result in serious consequences affecting the rights of Nikka Ram or the State Government as the case may be. Since neither Nikka Ram nor the State of Himachal Pradesh were necessary or proper parties to be impleaded in the election petition, we do not think it appropriate to allow I.A. No. 2/2000. Hence it is rejected. We, however, wish to add that the order passed or observations made in this appeal on the point of acceptance of the nomination paper of Nikka Ram on the ground that he had ceased to be in Government service having regard to the proviso to sub-rule (2) of Rule 48-A on the available material on the date of his nomination and scrutiny, will be without prejudice to the rights and contentions either of Nikka Ram or the State Government in relation to service of Nikka Ram. No order is necessary in I.A. 3/2000.

In the result, for the reasons stated above, this appeal merits acceptance. Hence, it is allowed. The judgment and order of the High Court impugned in this appeal are set aside and the election petition stands dismissed. Parties to bear their own costs.