

Ramesh Rout vs Rabindra Nath Rout on 9 December, 2011

Equivalent citations: AIR 2012 SUPREME COURT 329, 2012 (1) SCC 762, 2012 AIR SCW 297, 2011 (13) SCALE 423, (2012) 1 CLR 90 (SC), (2012) 3 KCCR 148, (2012) 112 ALLINDCAS 251 (SC), (2012) 117 ALLINDCAS 7 (SC), 2012 (1) CLR 90, AIR 2012 SC (CIVIL) 441, (2012) 1 ORISSA LR 130, (2012) 1 RECCIVR 551, (2011) 13 SCALE 423, (2012) 93 ALL LR 2

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Bench: Jagdish Singh Khehar, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4956 OF 2010

Ramesh Rout

.... Appellant

Versus

Rabindra Nath Rout

....Respondent

WITH

CIVIL APPEAL NO. 4962 OF 2010

JUDGMENT

R.M. Lodha, J.

The returned candidate -- Ramesh Rout - whose election to the 14th Orissa Legislative Assembly from 89-Athagarh Assembly Constituency has been set aside by the High Court of Orissa has preferred these two appeals under Section 116A read with Section 116C of the Representation of the People Act, 1951 (for short, 'the 1951 Act').

2. The Election Commission of India (for short, 'Commission') in order to constitute 14th Legislative Assembly announced general elections in the State of Orissa to be held in two phases on April 16, 2009 and April 23, 2009. Following this, the Governor of the State of Orissa in exercise of powers conferred under Section 5(2) of the 1951 Act issued a notification which was published in the official gazette on March 28, 2009. The 89 - Athagarh Assembly constituency is one of the 147 Assembly constituencies in the State of Orissa and is 'General' constituency. The Commission appointed the following schedule of election :

"28.3.2009 To 04.04.2009 = Period prescribed for filing of "NOMINATIONS"

06.04.2009 = date fixed for SCRUTINY OF NOMINATIONS.

08.04.2009 = last date for WITHDRAWAL OF NOMINATIONS 23.04.2009 = date of POLLING.

16.05.2009 = date of COUNTING OF VOTES.

28.05.2009 = date before which the Election shall be completed."

3. On April 4, 2009, at 11.25 A.M., the respondent in Civil Appeal No. 4962 of 2010 - Ranendra Pratap Swain (hereinafter referred to as 'proposed candidate') filed four sets of nomination papers for 89-Athagarh Assembly constituency as a candidate of Biju Janata Dal ('BJD') - a registered and recognized political party in the State of Orissa before the Returning Officer. Seven other candidates including the present appellant also filed their nomination papers at the said election. The check list (ticked original) was issued by the Returning Officer with his signature to the proposed candidate at 11.45 a.m. A copy of the check list (ticked duplicate) was retained by the Returning Officer.

4. On the appointed date (i.e. April 6, 2009) and time for scrutiny of nominations, the Returning Officer rejected the nomination papers of the proposed candidate on the ground that the Form A and Form B filed by the proposed candidate along with his first set of nomination paper were not duly signed in ink by the authorized officer of the political party (BJD).

5. Upset with the order of Returning Officer dated April 6, 2009, rejecting his nomination, the proposed candidate filed a writ petition before the Orissa High Court. However, the High Court did not entertain the writ petition and directed him to pursue his grievance before the Commission or seek appropriate relief after election process was over. The proposed candidate raised his grievance

before the Commission but without any success.

6. The election to the 89-Athagarh Assembly constituency was held as per election schedule and the appellant who contested the election as an independent candidate was declared elected.

7. Two election petitions came to be filed before the Orissa High Court challenging the election of the appellant to 89-Athagarh Assembly Constituency. One by the proposed candidate being Election Petition no. 4 of 2009 and the other by the proposer - respondent in Civil Appeal No. 4956 of 2010 being Election Petition no. 6 of 2009. In both election petitions, the election of the appellant was challenged on the ground of improper rejection of nomination papers of the proposed candidate. It was averred therein that the proposed candidate had filed Form A and Form B signed in ink by the authorized person along with first set of nomination paper showing that he had been duly sponsored by the BJD to contest as a party nominee from 89-Athagarh Assembly constituency and with other three sets of nomination, he had filed xerox copies of original Forms A and B duly authenticated by a Notary Public. The election petitioners raised diverse grounds in challenging the order of the Returning Officer dated April 6, 2009 whereby the nomination papers of the proposed candidate were rejected.

8. The appellant -- (respondent therein) - contested the election petitions by filing separate written statement. He raised objections about the maintainability of election petitions on facts and in law. Inter alia, it was denied that the proposed candidate filed original Form-A and Form-B signed in ink by the authorized person of BJD as at the time of scrutiny original Form A and Form B were not available and the Form A and Form B on record did not contain ink signature.

9. On the respective pleadings of the parties, the High Court initially framed four issues but later on framed additional issue no. 5. The relevant two issues, namely, issue no. 3 and issue no. 5 read as follows :

"3. Whether the Returning Officer improperly rejected the nomination of the Election Petitioner in violation of the statutory provisions and rules?

5. Whether the Returning Officer improperly rejected the nomination of Sri Ranendra Pratap Swain, the official candidate of Biju Janata Dal in violation of the instructions issued by the Election Commission of India in exercise of its constitutional powers and the principles of natural justice or not?"

10. The election petitioners as well as the returned candidate tendered oral and documentary evidence. On behalf of the election petitioners, three witnesses, namely, proposer - Rabindra Nath Rout (PW-1); proposed candidate - Ranendra Pratap Swain (PW-2) and authorised agent - Tarani Kanta Biswal (PW-3) were examined. On the other hand, the returned candidate examined himself as RW-1 and one Magnicharan Rout as (RW-2). The Returning Officer was examined by the Court as its witness (CW-1). The documents tendered in evidence were marked separate exhibits.

11. The High Court also called for all the original documents pertaining to the scrutiny of nomination papers for 89-Athagarh Constituency and 87-Badamba Constituency. We shall refer to relevant documentary evidence appropriately wherever necessary.

12. The High Court on hearing the parties, at the time of decision in the election petitions, framed an additional issue no. 6 namely, whether the election petitioner (proposed candidate) filed the original Form A and Form B duly signed in ink by the authorized person with the first set of his nomination paper. The High Court answered issue nos. 3, 5 and 6 in the affirmative and allowed both election petitions on June 23, 2010 and declared the election of the appellant null and void. The High Court declared that a casual vacancy is created relating to 89-Athagarh Assembly Constituency and the Commission was directed to conduct fresh election in respect of the said constituency in accordance with law.

13. It is from this judgment that these two appeals have arisen.

14. We have heard Mr. Gopal Subramanian, learned senior counsel for the appellant and Mr. K.K. Venugopal, learned senior counsel for the proposed candidate.

15. The Returning Officer plays an important role in the election management and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers (for short, 'the handbook') The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions; to acquaint them with up-to-date rules and procedures prescribed for the conduct of elections and to ensure that there is no scope for complaint of partiality on the part of any official involved in the election management. We shall refer to the relevant provisions of the handbook a little later. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers.

16. By virtue of a notification dated February 10, 2009 (Exhibit 10) issued by the Commission, for the first time, the issuance of check list to a candidate filing nomination paper has been introduced. Prior thereto, there was no such provision. It is provided that in respect of each candidate, the Returning Officer should maintain, in duplicate, the check list of the documents/requirements filed by the candidates. When a candidate files nomination paper, the Returning Officer shall indicate in the second column of the check list whether the concerned documents have been filed or other requirements fulfilled. If any of the documents has not been filed, it requires the Returning Officer to clearly state in the bottom of the check list, indicating the time limit by which such document/s can be submitted. The check list in two sets with all requirements indicated is needed to be signed by the Returning Officer as well as the candidate. The check list (marked original) is handed over to the candidate/proposer who files nomination paper, while check list (marked copy) is retained by the Returning Officer. The notification states that the copy of the check list will serve the dual purpose of acknowledging the receipt of the documents submitted as well as of notices as directed in the handbook. It is further provided that no separate notice is required to be given to the candidate in respect of the items mentioned in the check list. If and when a document is filed subsequent to filing of nomination, an acknowledgment to that effect is issued to the candidates, namely,

mentioning the date and time at which it is filed and this is also indicated in the appropriate place in the check list retained by the Returning Officer. The proforma of the check list has also been notified with the notification dated February 10, 2009.

17. Section 33 of the 1951 Act makes provision for presentation of nomination paper and requirements for a valid nomination. To the extent it is relevant for the purposes of the present case, it is reproduced as follows :

"S. 33. Presentation of nomination paper and requirements for a valid nomination.--(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o' clock in the forenoon and three o' clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

xxx

xxx

xxx

(4) On the presentation of a nomination paper, the

returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

xxx xxx xxx"

18. Section 35 provides for notice of nominations and the time and place for their scrutiny.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

xxx xxx xxx"

20. The Conduct of Elections Rules, 1961 (for short, '1961 Rules') have been framed under the 1951 Act. Rule 4 provides that every nomination paper presented under sub-section (1) of Section 33 shall be completed in such one of the Forms 2A to 2E as may be appropriate. Proviso that follows Rule 4 makes a provision that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B shall not be deemed to be a defect of substantial character within the meaning of sub-section (4) of Section 36.

21. Form 2B under Rule 4 is in three parts. Part-I is to be used by a candidate set up by a recognised political party. Part-II is required to be filled by a candidate for election to the legislative assembly not set up by a recognised political party and it provides that there should be ten electors of the constituency as proposers.

Part-III of Form 2B is a declaration to be made by the candidate giving assent to his nomination. Clause (b)(i) is applicable to a candidate who has been set up by a recognised political party with a request that symbol reserved for such party be allotted to him. Clause

(b)(ii), on the other hand is applicable to a candidate not set up by any registered recognised political party or a candidate who is contesting the election as an independent candidate. A recognised political party means a political party recognised by the Commission under the 1968 Order.

22. Rule 5 of the 1961 Rules makes a provision for symbols for elections in parliamentary and assembly constituencies. Rule 10 of 1961 Rules provides for preparation of list of contesting candidates.

23. In exercise of the powers conferred by Article 324 of the Constitution of India read with Section 29A of the 1951 Act and Rules 5 and 10 of the 1961 Rules, the Commission made Election Symbols (Reservation and Allotment) Order, 1968 (for short '1968 Order'). Unregistered political parties are out of its purview. The registered recognized and unrecognized political parties and independent candidates are dealt with by the 1968 Order. 1968 Order came to be amended by notification no. 56/2000/Judl. III dated 1st December, 2000. Para 13 of the 1968 Order is relevant for consideration of the present matter. It reads as follows :

"13. When a candidate shall be deemed to be set up by a political party.--For the purposes of an election form any Parliamentary or Assembly Constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any

such Parliamentary or Assembly Constituency, if, and only if--

(a) the candidate has made the prescribed declaration to this effect in his nomination paper, (aa) the candidate is a member of that political party and his name is borne on the rolls of members of the party;

(b) a notice by the political party in writing in Form B, to that effect has, not later than 3.p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency;

(c) the said notice in Form B is signed by the President, the Secretary or any other office-bearer of the party, and the President, Secretary or such other office bearer sending the notice has been authorised by the party to send such notice;

(d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the constituency and to the Chief Election Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and

(e) Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party:

Provided that no facsimile signature or signature by means of rubber stamp, etc. of any such office bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted."

24. Chapter VI of the handbook deals with the scrutiny of nominations by the Returning Officer. Para 2 emphasises that scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards. Para 6 provides that even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, the Returning Officer has to hold a summary inquiry to decide the same and treat the nomination paper to be either valid or invalid. It states that brief reasons in support of the decision must be set out, particularly, where an objection has been raised or the nomination paper has been rejected. Para 7 provides for presumption of validity of every nomination paper unless the contrary is prima facie obvious or has been made out. In case of a reasonable doubt, as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Para 7 seeks to remind the Returning Officer that whenever a candidate's nomination paper is improperly rejected and he is prevented from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper rejection and the election is liable to be set

aside. Para 9.6 sets out some of the defects which may be treated by the Returning Officer as defects of substantial nature. It, inter alia, provides that failure to submit written authorisation form from the political party, within prescribed time and in prescribed form, where a candidate claims to have been set up by a national or state party, is a defect of substantial nature. Para 10.3 says that the nomination paper filed by a candidate claiming to have been set up by a recognised national/state party subscribed by only an elector as proposer is liable to be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the Constituency by an authorised office-bearer of that political party by 3 p.m. on the last date for making nominations in Forms A and B devised by the Commission for the purpose under para 13 of the 1968 Order.

25. In light of the above provisions, particularly Sections 33(1) and 36(1) of the 1951 Act, Rule 4 of the 1961 Rules, Part-III of Form 2B, para 13(e) of the 1968 Order and Forms A and B appended to 1968 Order and the guidelines issued to the Returning Officers in the handbook, Mr. Gopal Subramanian, learned senior counsel for the appellant submitted that where a candidate for the election to Assembly has been set up by a recognised political party, the filing of original Forms A and B duly signed in ink by an authorised person of such political party is non-negotiable and non-filing of original Forms A and B signed in ink constitutes a defect of substantial nature.

Learned senior counsel argued that proviso to Rule 4 carves out an exception in respect of declaration in relation to symbol by candidates of unrecognised political party and independent candidates as per clause (b)(ii) of Part-III of Form 2-B and has no application to the case of a candidate belonging to a recognised political party who has to make a declaration as required by clause(b)(i) thereof. According to Mr. Gopal Subramanian, the proviso appended to Rule 4 and para 13 of the 1968 Order operate in completely different fields without any overlap or conflict. He vehemently contended that the present case squarely falls under Section 36(2)(b) of the 1951 Act for failure to comply with the requirement of nomination paper completed in prescribed form. He would argue that the nomination having been subscribed by one proposer, basing on the declaration given by the election petitioner, it is intrinsic mandatory requirement of the 1968 Order that ink signed Forms A and B were filed prior to 3 P.M. on the last date of making nomination so as to sustain the declaration of the candidate having been set up by a recognised political party.

26. On the other hand, Mr. K.K. Venugopal, learned senior counsel for the proposed candidate contended that Section 36(4) of the 1951 Act read with proviso to Rule 4 of the 1961 Rules and Form 2 B (Part III) would make the filing of xerox copy of Form A and Form B permissible (assuming that xerox copy of Form A and Form B were filed only) and cannot form the basis of the rejection of the nomination paper. He submitted that failure to file original Form A and Form B signed in ink was not defect of a substantial character within the meaning of Section 36(4) of the 1951 Act. According to him, para 13(e) of the 1968 Order that states "Forms A and B are signed, in ink only, by the said office bearer or person authorised by the party" is only an expression of hope and is not mandatory as it does not use the expression 'shall be signed'. He referred to a decision of this Court in the case of Jagan Nath v. Jaswant Singh & Ors.¹ in support of his submission that the election law is

technical and unless 1954 SCR 892 express provision is found, one cannot read the word "are" as "shall". With reference to Section 33(1) of the 1951 Act, Mr. Venugopal would submit that the expression "a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer" did not require the nomination paper to be accompanied by specified documents. Rule 4 of the 1961 Rules deals with the nomination paper while para 13 of the 1968 Order deals with the political party's authorisation. The two are separate and distinct and para 13 of 1968 Order cannot be read into Rule 4 of the 1961 Rules.

27. Mr. K.K. Venugopal, learned senior counsel submitted that neither Section 33 nor Section 34 of the 1951 Act required that the nomination should be accompanied by the sponsorship or authorisation of a political party. Section 36(2) of the 1951 Act sets out the grounds on which nomination paper can be rejected. Neither clause (a) which deals with qualifications and disqualifications nor clause (b) that deals with failure to comply with Section 33 nor Section 34 or clause (c) which deals with signature of the candidate or his proposer is relevant to the present controversy.

28. On the above contentions, the question presented for our consideration is, whether it is mandatory for a candidate set up by a recognised political party to file original ink signed Forms A and B appended to para 13 of the 1968 Order.

29. Before we consider the above question, it is important to recapitulate the general rule relating to election law stated by the Constitution Bench of this Court in the case of Jagan Nath¹. This Court (at page 895) stated :

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions, however, have any application if the special law itself confers authority on a tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected."

30. Section 33 of the 1951 Act enacts that a candidate shall file nomination paper on or before the appointed date in the prescribed form. The form in which nomination paper shall be presented and

completed is provided in Rule 4 of the 1961 Rules. According to Rule 4, every nomination paper presented under sub- section (1) of Section 33 shall be completed in such one of the forms 2-A to 2-E, as may be appropriate. Proviso that follows Rule 4 provides that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of substantial character within the meaning of Section 36(4) of 1951 Act. The controversy in the present case relates to a candidate set up by a recognised political party of the State and, therefore, the relevant form in this regard is Form 2-B. Form 2-B is in three parts. Part-II is not relevant and, therefore, it is not necessary to refer to that. Part-I and Part-III of Form 2-B are relevant. Part-I of Form 2-B is required to be completed by a candidate set up by a recognised political party. Part-III of Form 2-B is a declaration to be made by the candidate giving assent to his nomination. The candidate is required to declare, in case of a candidate set up by a recognised State party in terms of para b(i), "that I am set up at this election by theparty, which is recognised national party/state party in this State and that the symbol reserved for the above party be allotted to me". Para b (ii) of Part-III is applicable to a candidate set up by any registered unrecognised political party or a candidate who is contesting the election as an independent candidate. A plain reading of proviso that follows Rule 4 leaves no manner of doubt that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B by a candidate set up by a recognised political party or a candidate set up by registered unrecognised political party or a candidate who seeks to contest the election as an independent candidate is not a defect of substantial nature. It is not possible to catalogue defects contemplated by the proviso. However, to illustrate the few; wrong description of symbol, omission to fill blank space given in proforma in respect of choice of symbols, selecting a symbol which is reserved, etc., fall in the category of defects not of a substantial character. We are fortified in our view by a decision of this Court in Krishna Mohini (Ms) v. Mohinder Nath Sofat² wherein this Court said in para 32 (Pg. 159) :

"32. Though Rule 4 of the Conduct of Elections Rules requires every nomination paper presented under sub- section (1) of Section 33 to be complete in such one of the Forms 2-A to 2-E as may be appropriate and, therefore, the blank space meant for showing three symbols in order of preference as symbols of the candidate's choice, has to be filled in; however, non-filling of the space as to choice of symbol is not a defect of a substantial character. Such deficiency in the nomination paper is saved by the proviso to Rule 4 of the Conduct of Elections Rules, 1961 which 2 (2000) 1 SCC 145 provides that failure to complete or defect in completing the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of Section 36. Choosing a wrong symbol, leaving blank the space meant for filling the choice of symbols and an error in describing the symbol -- are all defects not of a substantial character. An independent candidate may mention as his preference the symbol reserved for a recognised political party, but that again will not be a defect of a substantial character. Dealing with such cases, this Court has held in K.S. Abdul Azeez v. Ramanathan Chettiar (AIR 1967 SC 85) that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled, on this ground, during

the interval."

31. The applicability of proviso that follows Rule 4, however, is limited to defect in the declaration as to symbol made by a candidate in Form 2-A or 2-B appended to 1961 Rules. Its operation does not extend to the defects in forms required to be filled or completed by a candidate set up by a recognised political party under 1968 Order or non-fulfilment of requirements set out in clauses

(a) to (e) of para 13 of the 1968 Order.

32. 1968 Order has been made by the Commission to provide for specification, reservation, choice and allotment of symbols of elections in Parliamentary and Assembly Constituencies for the registered political parties (recognised or unrecognised) and the independent candidates. Para 13 provides in unmistakable terms that for a candidate to be considered to have been set up by a political party in a parliamentary or assembly constituency, he has to comply with the conditions set out in clauses (a) to (e) thereof. In *Krishna Mohini (Ms)*², this Court held that in order to be a candidate set up by a registered and recognised political party so as to take advantage of being proposed by a single elector, all the four requirements set out in clauses (a), (b), (c) and (d) of para 13 of 1968 Order must be satisfied. The Court went on to say that if any one or more of the requirements are not satisfied, the benefit of nomination being proposed by a single elector is not available to him. Clause (e) of para 13 of the 1968 Order is equally important. It reads, "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party". Proviso appended to para 13 makes a provision that no facsimile signature or signature by means of rubber stamp, etc. of any such office-bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted. In other words, for a candidate, proposed by a single elector alone, to be treated as a candidate set up by a recognised political party, the filing of notice and communication in Forms A and B referable to clauses

(b), (c) and (d) and in accord with clause (e) of para 13 of the 1968 Order is essential and on its non-compliance, the nomination of such candidate is liable to be rejected.

33. That clause (e) of para 13, 1968 Order does not use the expression "shall be signed" is obvious from the bare reading of the provision but the significance of the word "only" therein cannot be ignored.

34. In Concise Oxford English Dictionary (Tenth Edition, Revised), the word 'only' is explained :

Only adv. 1 and no one or nothing more besides. adj. alone of its or their kind; single or solitary.

35. In Webster Comprehensive Dictionary, International Edition (Volume Two), the word 'only' is defined thus :

Only (n'l) adv. 2 In one manner or for one purpose alone. 4 Solely; merely; exclusively: limiting a statement to a single defined person, thing, or number.

- adj. 1 Alone in its class; having no fellow or mate; sole; single; solitary:

36. The word 'only' is ordinarily used as an exclusionary term. In the American case of *Henry R. Towne v. Mark Eisner* (245 US 418 at 425), the court said, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". In ascertaining the meaning of the word 'only', its placement is material and so also the context in which the word has been used. The use of the word 'only' in clause (e), para 13, 1968 Order emphasises that Forms A and B are to be signed in ink by the office bearer or person authorised by the recognised party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognised political party. In our view, therefore, the word 'only' used in clause (e) of para 13 is indicative of the mandatory character of that provision.

37. Where a candidate is set up by a recognised political party, clause (b)(i), Part-III of Form 2-B becomes relevant as by making declaration therein the candidate makes a request that symbol reserved for such party be allotted to him. It is for this reason that the requirements of para 13 of the 1968 Order become integral part of Form 2-B, Part-III under Rule 4 of the 1961 Rules where a candidate is set up by a recognised political party. We are unable to accept the submission of Mr. K.K. Venugopal that para 13 of the 1968 Order cannot be read into Rule 4. Non-compliance of requirements of para 13 of the 1968 Order, in our view, is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected under Section 36(2)(b) as it tantamounts to non-compliance of the provisions of Section 33, namely, the nomination paper having not been completed in the prescribed form.

38. The proposed candidate admittedly filed his nomination paper proposed by a single elector having been set up by BJD, a recognised political party in the State of Orissa, and, therefore, it was incumbent upon him that the requirements of para 13 of the 1968 Order were fully complied with. In other words, it was necessary for the proposed candidate that Forms A and B referable to clauses (b),

(c) and (d) of para 13, 1968 Order were submitted to the Returning Officer duly signed in ink by the authorised person of BJD not later than 3.00 p.m. on April 4, 2009.

39. Having held so, the other questions that need to be considered by us in these appeals are, whether the High Court erred in framing issue no. 6 at the time of decision in the election petitions, i.e., whether the election petitioner Ranendra Pratap Swain filed the original Form-A and Form-B being duly signed in ink by the authorised person with the first set of his nomination and whether the finding recorded by the High Court on that issue suffers from any illegality.

40. The pleadings of the parties as well as the evidence let in by them clearly show that the parties were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of BJD were filed by the proposed candidate with the first set of his nomination paper. The election petitioners (in both election petitions) asserted that the proposed candidate had

filed original Forms A and B duly signed in ink by Shri Navin Patnaik (authorised person of BJD) before the Returning Officer on April 4, 2009 at the time of presentation of nomination paper and check list was issued acknowledging receipt of these forms. The returned candidate disputed the said assertion made in the election petitions. The evidence of the Returning Officer, who was examined as court witness no. 1, and his cross-examination on behalf of the proposed candidate as well as the returned candidate also indicate that the factual controversy in the election petitions centered around on the filing of the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination. It follows that by framing issue no. 6 at the time of final decision of the election petitions, no prejudice has been caused to the returned candidate. As a matter of fact, no ground of prejudice has been raised in the appeals nor such argument was advanced before us by the learned senior counsel for the returned candidate. We, accordingly, hold that the High Court did not commit any error in framing issue no. 6 which was quite vital and material for decision in the election petitions. We further hold that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions.

41. The proposed candidate PW-2 deposed that he had contested Orissa Assembly Elections held in 1990, 1995, 2000 and 2004 from 89-Athagarh Constituency and had won all these four elections. While giving the details of nomination papers and the documents presented personally by him on April 4, 2009 at 11.25 a.m., he stated that in the first set of nomination, Rabindra Nath Rout (PW-1) was the proposer and along with the first set of nomination paper, original Form-A and Form-B signed in ink by Shri Naveen Patanaik, President and the authorised signatory of BJD were filed. He deposed that he had presented four sets of nominations as the nominee of BJD for 89-Athagarh Assembly Constituency and all his four sets of nominations were complete in all respect. He also deposed that immediately after he presented four sets of nominations, as a nominee of BJD, the Returning Officer asked him to take oath before him and he, accordingly, took oath before the Returning Officer. From 11.25 a.m. to 11.45 a.m., the Returning Officer examined the four sets of nominations presented by him and thereafter the Returning Officer personally prepared the check list of documents; put his signature on that and asked him (proposed candidate) to sign on the said documents. The Returning Officer retained with him one of such check list ticked duplicate (Ex. 22) and handed over another to him (proposed candidate) ticked original (Ex. 11).

42. The deposition of the proposer--Rabindra Nath Rout (PW-1) is not of much help as he has stated that he was not present in the office room of the Returning Officer when the proposed candidate filed his nomination.

43. Significantly, the Returning Officer (CW-1) in his deposition has not specifically denied that Form-A and Form-B in original duly signed in ink by the authorised officer of BJD were not filed by the proposed candidate. Rather he stated that had it come to his notice that Form-A and Form-B duly signed in ink by the authorised signatory were not filed by the proposed candidate, he would have made an endorsement on the bottom of the check list to that effect and asked the proposed candidate to file the original ink signed forms within time. He admitted that no such endorsement was made in the check list. The Returning Officer also stated in his deposition that the nomination papers filed by the proposed candidate were examined by him only from technical stand point and it

was not his duty to examine the correctness or validity of the documents at the time of filing of the same.

44. Although there is voluminous documentary evidence, in our view, the three documents viz; the check list (Ex. 11), Form 3-A (Ex. 42/F) and the consolidated list of nominated candidates (Ex. 44) are important. The check list marked 'original' (Ex. 11) given to the proposed candidate is as follows :

Sl. No.	Documents	Whether filed (write yes/no)
1.	Affidavit in Form-26	yes

2. Affidavit as per the Commission's order yes dated 27.03.03

3. Certified extract of electoral roll (when Not candidate is an elector of a different needed constituency)

4. Forms A and B (applicable in the case yes of candidates set up by political parties)

5. Copy of caste certificate (if the Not needed candidate claims to belong to SC/ST)

6. Security deposit (whether made) yes

7. Oath/affirmation (whether taken) yes The following documents which have not been filed should be filed as indicated below :

(a) _____ should be filed latest by _____.

(b) _____ should be filed latest by _____.

Received.

.....

(Signature of candidate)

Date & time : 04.04.2009 -- 11.45 a.m.

Place : ATHAGARH"

45. List of nominated candidates--Checks If (Ex.44) to the extent it is relevant is as follows :

Name of Parliamentary/Assembly Constituency -89 Athagarh No Name of the Address of Symbols Name of political Whether Forms Whether . candidate candidate chosen in Party `A' and `B' have main Order of (National/State or been received candidate or preference registered) by by 3.00 p.m. on substitute by the which the the last date for candidate of candidate. candidate claims making the party (as to have been set nominations in per Party's up/independent respect of the intimation candidate candidate in Form B) 1 Ranendra At- Cunch Biju Janata Yes Main Pratap Radhago Dal Candidate Swain vindapur P.O.-

Dhaipur, P.S. Athagarh Dist.-

Cuttack

46. On April 4, 2009, the Returning Officer published a notice in Form 3A on the notice board of his office in respect of the nomination papers presented before him on that day. In that notice - Form 3A (Ex. 42/F), it was mentioned in column no. 6 that proposed candidate was nominee of BJD. Pertinently, April 4, 2009 was the last day of nominations. Form 3A was displayed on the notice board after 3 p.m. Had the proposed candidate not filed Forms A and B as required, i.e., duly signed in ink by an authorised person of BJD, he would not have been shown as a nominee of that party in Form 3A.

47. On behalf of the returned candidate it was contended before the High Court and reiterated before us that none of these documents indicate that Forms A and B were filed in original. It was submitted that these documents only indicate that Forms A and B were filed as endorsed in the check list and were received before 3.00 p.m. on the last date of making nominations but these documents do not prove that original Forms A and B signed in ink by the authorised signatory of the party were filed.

48. It is true that neither in the check list nor in the list of nominated candidates, the word `original' before Forms A and B is mentioned but it was not required to be mentioned as in the case of candidates set up by political parties; the requirement is that such candidates file Form A and Form B duly signed in ink by the authorised officer of the concerned political party. In the event of filing of Form A and Form B otherwise, an endorsement would obviously be made against that column in the check list and time would be given to make up the deficiency by 3.00 p.m. on the last day of nomination. In the circumstances, having regard to the significance of the check list, if Forms A and B were not filed in original by the proposed candidate, an endorsement would have been made by the Returning Officer that only xerox copies of Forms A and B were filed. No doubt under Section 33(4) of the 1951 Act, the Returning Officer is not expected to make a detailed scrutiny of the nomination paper presented before him but in the case of a candidate who has filed his nomination paper as a candidate set up by a recognised political party and in view of para 13 of the 1968 Order, the Returning Officer would surely check whether Form A and Form B suffer from any defect.

49. As a matter of fact, to obviate unnecessary dispute about presentation of nomination paper by a candidate, the Commission in the handbook has provided for guidelines pertaining to check list. Accordingly, a check list is required to be prepared duly certified by the Returning Officer that all documents have been received. Such check list is signed by the Returning Officer as well as by the candidate. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption. In the present case, the check list (Ex.11), Form 3A (Ex. 42/F) and the list of the nominated candidates

--checks IF (Ex. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination paper. The question is whether this presumption has been rebutted by the returned candidate? We do not think so. The oral evidence of the returned candidate (RW-1) and his witness (RW-

2) is not of much help insofar as this aspect is concerned. The Returning Officer has not stated firmly and with certainty in his evidence that the proposed candidate had not filed Form-A and Form-B signed in ink by the authorised person of the BJD. Rather he stated that had it come to his notice that the original Form-A and Form-B duly signed in ink were not filed along with the nomination paper by the proposed candidate, he would have made an endorsement to that effect in the check list. Moreover, between 11.46 a.m. when the check list was prepared by the Returning Officer and given to the candidate and 3.00 p.m. on April 4, 2009 (last date of nominations) no intimation was issued by the Returning Officer or received by the candidate with regard to non-filing of original Forms A and B. No doubt, the burden is on the candidate set up by a recognised political party to prove that he had filed Forms A and B duly signed in ink by the authorised person of that party but that burden gets discharged on production of evidence that raises presumption in his favour. In the present case the proposed candidate has been successful in discharging the burden placed upon him.

50. The evidence of the Returning Officer is the important part of the case. He admitted in his evidence that the xerox copies of the nomination papers and documents were got prepared through his officials for the purpose of displaying on the notice board. He also admitted that since proposed candidate had filed all documents required in the nomination form, no further endorsement was made in the check list that he (proposed candidate) was required to file any documents. Moreover, with regard to another candidate, Janaki Rout in respect of 89-Athagarh Assembly Constituency, the Returning Officer stated that he asked him to file the document which he had not filed along with the nomination paper by 3.00 p.m. at the latest. In respect of yet another candidate Bijaya Kumar Biswal, in the check list, he had endorsed therein that the certified extract of the electoral roll was not filed and asked him to file the same at 11.00 a.m. on April 6, 2009 at the latest. It is, thus, seen that the Returning Officer was conscious of his duties as per the statutory provisions and the guidelines issued by the Commission by way of handbook. On presentation of nomination papers by respective candidates wherever deficiencies were found, he made endorsement in the check list and

gave them time to make up the deficiency as per law. A careful consideration of the evidence of Returning Officer leaves no manner of doubt that he has not distorted the facts nor withheld anything from the court with regard to presentation of nomination papers by the candidates including the proposed candidate. The evidence on record, i.e, the evidence of the Returning Officer, the documentary evidence, namely, the check list, Form 3A displayed on the notice board, the consolidated list of nominated candidates and the evidence of PW-2 clearly establish that original Form-A and Form-B signed in ink by authorised officer of the party (BJD) were presented by the proposed candidate along with 1st set of nomination paper on April 4, 2009. The finding returned by the High Court in this regard cannot be said to be wrong or unjustified.

51. It is a fact that the original Forms A and B were not available on record before the Returning Officer on April 6, 2009 at the time of scrutiny. However, we are not persuaded by the submission made on behalf of the returned candidate that in the absence of original Forms A and B on record, the Returning Officer had to proceed on the basis of records available before him on that day and he had no option but to reject the nomination. The least expected of the Returning Officer, when he found that original forms A and B were not available on record, was to make brief enquiry about non-availability of the forms A and B. It was all the more necessary as the nomination papers along with accompanying documents were sent for xeroxing.

52. Section 83 of the 1951 Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. It has been repeatedly held by this Court that Section 83 is peremptory. In *Samant N. Balakrishna, etc. v. George Fernandez and others etc.* 3, this Court observed in para 29 (Pg. 1212) of the Report thus:

3 AIR 1969 SC 1201 ".....The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct....."

53. In *Azhar Hussain v. Rajiv Gandhi*⁴, this Court held that an election petition must be dismissed if the mandatory requirements enjoined by Section 83 to incorporate the material facts and particulars relating to alleged corrupt practice in the election petition are not complied with.

54. In *Hari Shanker Jain v. Sonia Gandhi*⁵, this Court reiterated the mandatory provision contained in Section 83(1)(a) of the 1951 Act and observed therein that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, this Court said that they must be such facts as would afford the basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. 4 AIR 1986 SC 1253 5 (2001) 8 SCC 233

55. A 3-Judge Bench of this Court in Pothula Rama Rao v. Pendyala Venakata Krishna Rao and Others⁶, stated in paragraph 8 (at Pg. 6) of the Report as follows :

"If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to Sub- section (1) of Section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination was subscribed by ten proposers who were electors of the Constituency and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognized political party by issue of a valid 'B' Form and that his nomination was signed by an elector of the Constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action."

56. In a recent decision in Nandiesha Reddy v. Kavitha Mahesh⁷, this Court observed that where election petitioner alleges improper rejection of his/her nomination paper by the Returning Officer, he/she must set out in election petition reasons given by the Returning Officer for refusal to accept nomination paper and facts necessary to show that refusal was improper. In paragraphs 36 and 37 of the Report (at Pg. 734), this Court held as under :

6 (2007) 11 SCC 1 7 (2011) 7 SCC 721 "36. Section 83 (1)(a) inter alia provides that an election petition shall contain a concise statement of the material facts. Further, Section 87 of the Act provides that subject to the provisions of the Act and the Rules framed thereunder every election petition shall be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Order VI of the Code of Civil Procedure is devoted to the pleadings generally and Rule 2(i) thereof, inter alia, provides that every pleading shall contain a statement in a concise form of all the material facts on which the party pleading relies for claim. In an election petition, which does not contain material facts, no relief can be granted.

37. The phrase "material fact" as used in Section 83 (1)

(a) of the Act or Order 6 Rule 2 of the Code of Civil Procedure has not been defined in the Act or the Code of Civil Procedure. In our opinion all specific and primary facts which are required to be proved by a party for the relief claimed are material facts. It is settled legal position that all material facts must be pleaded by the party on which the relief is founded. Its object and purpose is to enable the contesting party to know the case which it has to meet. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action.

However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard."

57. In view of the above legal position, there is no doubt that in a case under Section 100(1)(c) of the 1951 Act, the only issue before the Court is improper rejection of nomination paper and the court is required to examine the correctness and propriety of the order by which the nomination paper of a candidate is rejected. The grounds set out in the election petition challenging the order of rejection of nomination paper, thus, form the basis of adjudication in the election petition.

58. The learned senior counsel for the appellant submitted that the material facts relating to the ground on which election of the returned candidate has been set aside have neither been pleaded in the election petition nor have been proved by leading cogent evidence. We do not find any merit in this contention.

59. In the Election Petition No. 4 of 2009 filed by the proposed candidate, the order of rejection of nomination has been assailed, inter alia, on the following grounds:

"5(C) That the reasonings given in the decision of the Returning Officer, in his order of rejection dtd. 06.04.2009 is also not legally sustainable for the following reasons :-

(a) The Nominee of B.J.D. Nominee for 87-BARAMBA Assembly Constituency was submitted on 03.04.2009. The Returning Officer had the occasion to examine the same and grant the Check List on 03.04.2009 i.e. one day before the submission of the Nomination of the Election Petitioner, whereas the Election Petitioner submitted his Nomination on 04.04.2009. If according to the Returning Officer, "from comparison of two sets of Form A & B submitted in 87- BARAMBA, he came to conclusion that the set of Form A & B, submitted by the Election Petitioner along with his first set of Nomination was not original and not signed in ink but a xerox copy, then in ordinary course of human conduct and in view of instruction of the Election Commission", he would have recorded an endorsement to that effect in the CHECK LIST which he himself gave at 11.45 AM on 04.04.2009, and would have further called upon the Election Petitioner to produce the same by 3 PM on the same day.

(b) The Returning Officer instead of making a comparison with the Form A & B submitted along with the Nominations of 87- BARAMBA, should have referred to the Form A & B, which was communicated both to him & to the CEO under the provisions of Election Symbol (Reservation & Allotment) Order - 1968.

5(D) That a plain reading of four Orders of rejection recorded by the Returning Officer on four sets of Nominations submitted by the Election Petitioner spells out so much so discrepancy that the same itself is sufficient to conclude that the order suffers from inconsistency and is an outcome of non application of mind.

5(E) That on the date of scrutiny no objection was raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny to the effect that the Form A & B, filed by the Election Petitioner with his first set of "NOMINATION" were not original not it contains the signature of the authorised person IN INK were Xerox copies.

The complaint was raised by the Returning Officer himself who had received all the four sets of Nominations, along with other affidavits, documents original money receipt and original Form A & B, duly signed in ink, by the authorised person, and had signed the CHECK LIST which is a document required to be signed & delivered to the candidate in exercise of his statutory powers on 04.04.2009. The partisan attitude and hostility of the Returning Officer towards the Election Petitioner emanates from his own conduct, when he refused minimum opportunity to the Election Petitioner to REBUT the so called allegations regarding non-submission of original Form

- A & B containing signature of authorised person in ink, which a candidate is entitled to as of right under the Rules of Election Law."

60. The High Court, inter alia, considered the evidence of PW-2 and also the evidence of the Returning Officer, the documentary evidence, namely, the check list (original-exhibit 11), Form 3-A (exhibit 42/F) and consolidated list of nominated candidates

--checks IF (exhibit-44) and the contentions of the returned candidate and held as under :

"13. As found from the evidence of P.Ws 1 and 2, the latter filed four sets of Nomination along with other accompanying documents. In the 1st set of Nomination Papers, he filed original ink signed Form A and Form B. Accordingly, the Returning Officer issued the Check List to Sri Ranendra Pratap Swain. They further deposed that while handing over the Check List, the Returning Officer stated that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List. You preserve the Check List with you. If in fact the Returning Officer had stated so, it being a material fact, the same should have been averred in the election petition. In absence of pleading this part of evidence of P.Ws 1 and 2 cannot be relied upon. According to the evidence of Returning Officer, on examining the documents on technical stand point, he found the election Petitioner, Sri Ranendra Pratap Swain to have filed all required documents and accordingly he issued the Check List marked Ext. 22 to him. He fairly admitted in his evidence that he can distinguish a xerox copy from its original. He further deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the xerox copies of the original ink signed Form A and Form B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. Again on 04.04.2009 after the time fixed for filing the Nomination Papers was over, he prepared copy of those documents in Form 3A to publish in the notice board. At that time also he could not detect the filing of Xerox Copies of the original ink signed Form A and Form B. Furthermore, when he prepared the consolidated "List of Nominated Candidates-Checks if". He could not detect the so called defect. He

mentioned the symbol "Conch" in the appropriate column of the said form so also the name of political party, which set up the candidate, Sri Ranendra Pratap Swain. Since the signature of P.W. 1 the proposer of Ranendra Pratap Swain, partially got effaced, the Returning Officer asked him to put another signature and accordingly he did it. When the Returning Officer was alive to find out an effaced signature in the Nomination, it appears some what fishy how he failed to detect the Xerox copies of the original ink signed Form A and Form B, if filed. The original ink signed Form A and Form B, if filed. The contention of learned counsel for the respondent that there was no pleading with regard to Form 3A and consolidated "List of Nominated Candidates-Checks If" in either of the election petitions and as such the same cannot be relied upon cannot be accepted. It is the fundamental rule of pleadings that pleading must contain a statement of the material facts, but not the evidence by which they are to be proved. In the present case, it has been averred in the election petitions that Shri Ranendra Pratap Swain filed the Nomination along with required documents including original Form A and Form B ink signed, before the Returning Officer. Moreover, Form 3A and consolidated "List of Nominated Candidates-Checks if"

have been admitted as Exts. 42/f and 44 respectively without objection. So their validity cannot be questioned. As per the decision State of Orissa and others (supra) their probative value is also very high. Even if those documents were not referred to in the election petitions, the evidence led in that respect can be accepted."

61. The High Court finally concluded that the proposed candidate had filed the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination and, accordingly, decided Issue No. 6 in favour of election petitioners. The consideration of the matter by the High Court in para 14 of the judgment may be reproduced as it is.

"14. No doubt at the time of filing of Nomination, the Returning Officer is not required to scrutinize the Nomination and the accompanying documents in minor details, but he is duty bound to examine the same on technical stand point. Now the pertinent question is whether he was expected to examine whether the original ink signed Form A and Form B were filed, while examining the Nomination Paper along with the accompanying documents, on technical stand point. In my considered opinion, he had to do so, particularly when he deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form-A and Form-B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. At this stage Mr. Palit, learned counsel for the respondent submitted that unless, an election petitioner fully established his case, it would not be proper to set aside the election. In support of his submission, he relied on the decision in the case of Ram Phal Kundu Vs. Kamal Sharma, AIR 2004 Supreme Court 1657, where the apex Court held as follows.

"Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant."

As found from the evidence of P.Ws. 1 and 2 the latter filed the original ink signed Form A and Form B in his 1st set of Nomination. This part of their evidence could not be shaken. Even no suggestion was given to P.W. 1 that P.W. 2 did not file original ink signed Form A and Form B in his 1st set of Nomination. So, the above decision is not applicable to the present case.

The Returning Officer has admitted in his evidence that the Nominations along with all the accompanying documents of all the eight candidates were Xeroxed outside in Anand Xerox of Athagarh. He has also admitted that on 04.04.2009 all the four sets of Nomination papers of Sri Ranendra Pratap Swain were Xeroxed to display the same in his Notice Board. The possibility that, in the process the original ink signed Form A and Form B were inadvertently exchanged for the Xerox copies thereof, cannot be ruled out. Under such premises, in my considered opinion, Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorised person with the 1st set of his Nomination. Accordingly, issue no. 6 is answered in affirmative.

62. In what we have already discussed above, we do not find any error in the consideration of the matter by the High Court.

63. The election petitioner, as noticed above, in ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. In our view, the Returning Officer ought to have acted in terms of proviso to Section 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to rebut the objection and show to the Returning Officer that the proposed candidate had filed Forms A and B duly signed in ink by the authorised person of BJD. PW-3, the authorised representative of the election petitioner did state in his evidence that he requested to the Returning Officer, when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of PW-3 in support of ground 5(E).

64. The proviso that follows sub-section (5) of Section 36 of the 1951 Act provides that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

65. In *Rakesh Kumar v. Sunil Kumar*⁸, this Court held in para 21 (Pg. 500) as under:

"21.The use of the expression "not later than the next day but one following the date fixed for scrutiny"

under the proviso to Sub-section (5) of Section 36 of the Act un-mistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the respondent and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer. The Returning Officer has also not given any cogent reasons for his refusal to grant an opportunity as prayed for by the respondent. The Returning Officer appears to have been labouring under some misconception when he recorded that the political party "cannot be given further time to change such authorisation after scrutiny". Under the proviso to Section 36(5) of the Act, the scrutiny itself would have been postponed to the adjourned time and, therefore, it was not a case of meeting the objection after scrutiny of the nomination papers. The failure to exercise his jurisdiction to postpone the decision as to the validity of the nomination paper of the respondent, even after the respondent had sought time to meet the objection, indeed rendered the rejection of the nomination paper of the respondent as both improper and illegal. The Returning Officer is not expected to reject a nomination paper, without giving an opportunity to the candidate or his representative present at the time of scrutiny to meet an objection, capable of being met, particularly where such an opportunity is sought for by the candidate or his 8 (1999) 2 SCC 489 representative and no one present on behalf of the other candidates had opposed the claim made by the respondent. Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction under Section 36(5) of the Act properly and thereby fell in a grave error in rejecting the nomination paper of the respondent....."

66. In the facts and circumstances of the present case, which have already been noticed above, the Returning Officer erred in acting in hot haste in rejecting the nomination paper of the proposed candidate and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate. The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination paper. In other words, they have been able to prove the ground for setting aside appellant's election to 89-Athagarh Assembly Constituency under Section 100(1)(c) of the 1951 Act.

67. The consideration of the matter by the High Court does not suffer from any factual or illegal infirmity. In this view of the matter - and the factual and legal position discussed above - we see no ground to interfere with the impugned judgment.

68. The appeals, accordingly, fail and are dismissed with no order as to costs.

.....J (R.M. LODHA)J. (JAGDISH SINGH KHEHAR) NEW
DELHI DECEMBER 9, 2011.