



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

EMP No.2 of 2024 in
Election Petition No.1 of 2024

Reserved on: 27th August, 2024

Decided on: 16th September, 2024

Dr. Abhishek Manu Singhvi ...Non-applicant/Petitioner

Versus

Harsh Mahajan ...Applicant/Respondent

Coram

Ms. Justice Jyotsna Rewal Dua

Whether approved for reporting? Yes.

For the Non-applicant/ : Mr. P. Chidambaram & Mr. Prashanto
Petitioner Sen, Senior Advocates (through video
conference), Mr. Neeraj Gupta, Senior
Advocate with Mr. Ajeet Pal Singh
Jaswal, Mr. Vedhant Ranta, Mr. Aman
Panwar, Mr. Muddit Gupta and
Mr. Yash Johivi, Advocates.

For the Applicant/ : Mr. Maninder Singh, Senior Advocate
Respondent (through video conference) with
Mr. Prabhas Bajaj, Mr. Ramgasaran
Mohan, Mr. Virbahadur Verma
(through video conference), Mr. Vikrant
Thakur, Mr. Shriyek Sharda,
Mr. Shubham Guleria and Mr. Ankit
Dhiman, Advocates.

Whether reporters of print and electronic media may be allowed to see the order? Yes

Jyotsna Rewal Dua, Judge

INDEX

Sr. No.	Particulars	Pages
1.	Overview	2-3
2.	Grounds for rejection of Election Petition.	4
3.	Disclosure of material facts	4-21
4.	Cause of action	21-43
5.	Consent/Waiver	43-46
6.	Material effect on election result	46-49
7.	Conclusion	49-51

EMP No.2 of 2024

Respondent has moved this application under Order 7 Rule 11 R/W Section 151 of the Civil Procedure Code (CPC) read with Sections 81, 83, 86 and 87 of the Representation of the People Act, 1951 (in short ‘the R.P. Act 1951’), seeking rejection of Election Petition No.1 of 2024.

2. Overview of Election Petition No.1 of 2024
filed by the non-applicant/election petitioner:-

Petitioner/non-applicant and respondent/
applicant contested biennial elections to Council of States
on 15.02.2024 from the single seat in the State of Himachal

Pradesh. They were the only candidates for the said seat. On counting, petitioner and respondent secured 34 votes each. The Returning Officer (RO) proceeded to determine the result by draw of lots. He applied Rules 75(4) and 81(3) of the Conduct of Election Rules, 1961 (in short 'Rules'). The lot fell on petitioner's name, however, instead of adding one vote to petitioner's tally of votes in terms of Section 65 of the R.P. Act 1951, the RO erroneously applied Rule 75(4) and added one vote to the kitty of the respondent, who was consequently declared as the 'returned candidate'. Petitioner's case is that he had been wrongly excluded and the respondent was wrongly declared as the returned candidate on account of non-compliance to the statutory provisions by the RO. Petitioner seeks to declare the election result announced on 27.02.2024, declaring the respondent as the returned candidate to Council of States from Himachal Pradesh, as void under Section 100(1)(d)(iv) of the R.P. Act 1951. Petitioner seeks further relief of his being declared as elected to Council of States from Himachal Pradesh in accordance with Section 84 read with Section 101(a) of the R.P. Act, 1951.

3. Learned Senior Counsel for the respondent/ applicant has **focused on following pleaded grounds** for rejection of Election Petition No.1 of 2024:-

- A.** Material facts have not been stated in the petition.
- B.** Petition does not disclose any cause of action against the respondent.
- C.** Petition is also barred by principles of estoppel and waiver.
- D.** Infraction of statutory provisions/rules/regulations etc. as alleged in the election petition will have no material effect upon the result of the election.

4. For convenience and to avoid repetition, submissions of learned Senior Counsel for the parties and observations thereupon are being discussed hereinafter head-wise.

4A. Material facts:-

4(i). Learned Senior Counsel for the respondent/ applicant submitted that:-

4(i)(a). Section 83 of the R.P. Act 1951 mandates that an election petition must contain all material facts of the case. In absence of same, the petition is liable to be rejected.

4(i)(b). Instant election petition lacks material facts as also the particulars. Petitioner has made only vague and

misconceived allegations regarding non-compliance of the provisions of the R.P. Act 1951 against the RO. No allegation has been made against the returned candidate.

4(i)(c). Material facts required to be disclosed in the election petition would include not only the positive facts, but also the negative facts involved. Petitioner has not disclosed all material facts in the petition, rather, concealed material facts, viz. at the time of conduct of the elections, the RO had clearly explained the procedure to both the candidates that draw of lot shall be conducted in accordance with Rules 75(4) & 81(3) of the Rules, whereby the person whose name shall appear on the lot drawn, would stand excluded from the election and the other candidate shall be declared successful. Both the candidates had consented to drawing the lot in such manner. Draw of lots was conducted by the RO after both candidates consented to such procedure and appended their signatures in acceptance of this procedure, on the proceedings drawn for the purpose.

4(i)(d). Petitioner had consented to the above procedure as explained and intended to be applied by the RO not only before the draw of lots, but also consented to the declaration of respondent as the returned candidate after

the draw of lots, consequent upon his own exclusion. Petitioner's signatures on the proceedings drawn at two stages of the election, i.e. pre and post draw of lots, evidences this fact. These material facts have not been disclosed in the petition. Petitioner has not approached the Court with clean hands.

4(i)(e). Procedure adopted by the RO was in conformity with law. It was duly explained to the contesting candidates at every stage of the election and was given effect to with their consent. Petitioner had accepted the applicability of the procedure and also his resultant exclusion. But these facets have not been pleaded in the petition. The petition is silent on these material facts.

4(i)(f). Learned Senior Counsel for the respondent has further endeavored to elaborate that though the Proceedings of Counting of Votes dated 27.02.2024 have been enclosed with the election petition, however, the requisite pleadings thereto are lacking in the election petition. The election petition, therefore, suffers from defect of non-disclosure of material facts or concealment thereof.

Petitioner has not disclosed material facts, which are evident from Proceedings of Counting of Votes appended at Annexure P-5 with the election petition.

4(i)(g). The petitioner has not disclosed in the election petition that the RO had specifically explained the procedure for draw of lots and declaration of result for breaking the tie to the candidates and their agents in the counting hall. Both the contesting candidates were clearly informed that by excluding the name that would appear on the chit during draw of lots, the other candidate will be declared elected. Petitioner had accepted and consented to this procedure applied by the RO as per Rules 75(4) and 81(3) of the Rules, but did not disclose his such acceptance/consent to the procedure adopted by the RO, in the petition. By merely appending the Proceedings of Counting of Votes dated 27.02.2024, the petitioner is not absolved from his duty cast in law to make full disclosure of all material facts in the petition, which he failed to do. The events and facts, which are recorded in the Proceedings of Counting of Votes dated 27.02.2024, were required to be incorporated & pleaded in the petition. The documents appended with the petition and Proceedings of Counting of Votes dated 27.02.2024 (Annexure P-5) cannot be read into the petition. There had to be specific pleadings in that regard inclusive of all the positive and negative facts. It is only in reply to the present application under Order 7 Rule

11 CPC that the petitioner has attempted to plead some of the material facts. Mere appending the proceeding sheet and omitting to plead material facts in the election petition makes it evident that despite being aware of the facts, the same had not been pleaded. There had been deliberate concealment of facts. The petition as instituted was in violation of the provisions contained in Section 83(1)(a) of the R.P. Act 1951.

4(i)(h). In support of the above submissions, reliance was placed upon several judicial pronouncements including ***Kanimozhi Karunanidhi Versus A. Santhana Kumar and others*¹; *Ajay Maken Versus Adesh Kumar Gupta and another*²; *Hari Shankar Jain Versus Sonia Gandhi*³; and *Mahadeo Rao Sukaji Shivankar Versus Rama Ratan Bapu*⁴.**

In view of the above submissions (encapsulated), prayer has been made for the respondent/applicant to reject the election petition.

4(ii). **Learned Senior Counsel for the petitioner/non-applicant** opposed the above plea. The stand taken is that:-

¹ 2023 SCC OnLine SC 573

² (2013) 3 SCC 489

³ (2001) 8 SCC 233

⁴ (2004) 7 SCC 181

4(ii)(a). All material facts have been comprehensively pleaded in the petition.

4(ii)(b). It has been pleaded that there was a tie. The RO sought to determine the result by applying a certain procedure, viz. by draw of lots as per Rules 75(4) and 81(3) of the Rules.

4(ii)(c). Exercise of draw of lots carried out on 27.02.2024 as per Annexure P-5 has been mentioned in the petition. Annexure P-5 was filed by the petitioner. It clearly reflects that the petitioner and respondent were made aware of the procedure applied by the RO. There are specific pleadings that the contesting parties and their agents had signed on the procedure/proceedings that were conducted by the RO.

4(ii)(d). Petitioner has pleaded that the RO had picked up one of the two chits during draw of lots. The chit picked up carried name of the petitioner. By applying Rule 75(4) of the Rules, the respondent was declared the returned candidate.

4(ii)(e). All material facts have been disclosed in the petition. Petition contains a concise statement of material facts as required under Section 83(1)(a) of the Act. Petitioner has also disclosed that all the Proceedings of

Counting of Votes that took place were in presence of the contesting candidates and duly signed by all present.

4(ii)(f). Petitioner has nowhere pleaded that the RO had carried the proceedings at the back of the petitioner or the petitioner was not made aware of the procedure being applied by RO.

4(ii)(g). Proceedings of Counting of Votes dated 27.02.2024 have been annexed at Annexure P-5 by the petitioner himself alongwith election petition. There is no concealment of facts much less of material facts. The said annexure has been duly signed and verified by the petitioner as per provisions of the Act. It gives complete detail of the proceedings carried out at the time of counting of votes. The document forms part of the petition.

4(ii)(h). In support of above submissions (encapsulated), reliance was placed upon several judicial pronouncements, i.e. ***Kanimozhi Karunanidhi Versus A. Santhana Kumar and others*¹**, ***Mohan Versus Bhairon Singh Shekhawat*⁵** and ***Ashraf Kokkur Versus K.V. Abdul Khader and others*⁶**.

⁵ (1996) 7 SCC 679

⁶ (2015) 1 SCC 129

4(iii). Consideration (material facts):-

4(iii)(a). Section 83 of the R.P. Act 1951 mandates disclosure of all material facts on which the petitioner relies and reads as under:-

- “83. Contents of petition.- (1) An election petition-*
- (a) shall contain a concise statement of the material facts on which the petitioner relies;*
 - (b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and*
 - (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:*
- Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.*
- (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.”*

Section 83 of the R.P. Act 1951 is concerning contents of the election petition. Section 83(1)(b) pertains to a case where the election petition is on the grounds of corrupt practice. Section 83(1)(a) requires the election petition to contain concise statement of the material facts on which the petitioner relies. This would encompass all other grounds including the case of non-compliance with statutory provisions.

In the instant case, the petitioner has challenged the election not on grounds of corrupt practice, but on account of alleged non-compliance of statutory provisions by the RO.

4(iii)(b). There can be no dispute about the settled legal position as highlighted by learned Senior Counsel for the respondent/applicant that the petitioner is required to plead and disclose all material facts, not only the positive ones, but also the negative facts involved. Non-disclosure of even a single material fact would entail rejection of the election petition at the threshold. It is rather a duty cast upon the Court to dismiss an election petition where material facts are not disclosed.

4(iii)(c). It would be appropriate at this juncture to refer to relevant pleadings made in para 5 of the election petition that describe the factual position:-

i). Paragraphs 5(a) to 5(e) of the petition describe the events, such as notification of elections, fixation of election schedule, appointment of the RO, Assistant RO, submission of nomination by the petitioner etc.

ii). Paragraph 5(f) pleads about total number of votes cast. Paragraph 5(g) mentions that both the petitioner

and respondent had secured 34 votes each and reads as under:-

“5(g). That upon counting of the votes cast, the Petitioner as well as the Respondent received equal number of votes i.e. 34 votes each. Both candidates only received first preference votes (34 votes each) and there were no second preference votes in favour of either of the candidate.

True copy of result of counting dated 27.02.2024 for the Biennial Election to the Council of States (Rajya Sabha) from Himachal Pradesh, 2024 is attached hereto and marked as ANNEXURE P-4.”

iii). Paragraphs 5(h) and 5(i) contain the averments that since there was a tie in the number of votes secured by the candidates, the RO proceeded to resolve the tie by referring to the Rules. That the person whose name is drawn on the lot would be excluded. Paragraphs, as extracted from the Proceedings of Counting of Votes dated 27.02.2024, have also been highlighted in para 5(i) to emphasize that the RO had explained that the procedure as per Rules 75(4) and 81(3) of the Rules would be applied and the candidate whose name appeared on the chit in draw of lots will be excluded. These paras inclusive of the paragraphs extracted from the Proceedings of Counting of Votes drawn on 27.02.2024, read as under:-

“5(h). That since there was a tie, inasmuch as, both the contesting candidates had received equal number of votes for the single notified vacancy for the subject election, the RO proceeded to resolve the tie by making reference to the Conduct of Election Rules, 1961

(hereinafter also referred to as “the Rules” or “the Election Rules”). It was observed by the R.O. as recorded in the ‘Proceedings of Counting of Votes’ dated 27.02.2024, that “since there is only one vacancy to be filled in this election for Council of States from Himachal Pradesh, provisions of Rule 75 & Rule 81(3) of the Conduct of Election Rule 1961 will be applicable ...”.

True and typed copy of the Certified ‘Proceedings of Counting of Votes’ for Election to the Council of States (Rajya Sabha) from Himachal Pradesh dated 27.02.2024 is attached hereto and marked as ANNEXURE P-5.

5(i). That further, as recorded in the ‘Proceedings of Counting of Votes’ dated 27.02.2024, the returning officer observed the following:

“... As per the provisions to Rule 75(4) if, when a candidate has to be excluded under clause (a) of sub rule (3), 2 or more candidates have been credited with the same value and stands lowest on the poll, and the candidates for whom the lowest number of original votes are recorded shall be excluded, and if their number also is the same in the case of two or more, the RO shall declare by lot, which of them shall be excluded.

Similarly Rule 81(3) of the Conduct of Election Rule 1961 says “when at the end of any count only one vacancy remains unfilled and there are only two continuing candidates and each of them has the same value of votes and no surplus remains capable of transfer, the returning officer shall decide by lot which of them shall be excluded; and after excluding him on the manner aforesaid, declare the other candidate to be elected.

(emphasis supplied)”

iv). Paragraph 5(j) details the exercise of draw of lots conducted by the RO as under:-

“5(j). Accordingly, as recorded by the Returning Officer in the ‘Proceedings of Counting of Votes’ dated 27.02.2024, considering that both candidates had obtained equal number of votes, the result was sought to be determined by draw of lots in accordance with Rule 75(3), Rule 75(4) and Rule 81(3) of the Rules. For the purpose of

draw of lots, the Returning Officer undertook the following procedure:

- i. Two equal slips were made of two A4 size paper taken from a new ream opened in front of the candidates/election agents.
- ii. The name of each candidate printed on an A4 size paper was shown to the candidates and all present in the counting hall.
- iii. Then the slips were folded multiple times and put in a specially designed and prepared cardboard box for draw of lots.
- iv. The box was shown as empty to the candidates/agents before putting these slips in the cardboard box."

v). Paragraph 5(k) states that the RO shuffled the two slips and picked one, which had the name of the petitioner. The para reads as under:-

"5(k). Thereafter, the RO shuffled the two slips by and inside the cardboard box and thereafter picked one of the slip for the draw of lots and showed the same to all present in the counting hall. Admittedly, the name on the picked-up slip was "Dr. Abhishek Manu Singhvi" i.e. the Petitioner herein and the same was shown to all present."

vi). Paragraph 5(l) speaks as under about RO's applying Rule 75(4) of the Rules and declaring the respondent as the returned candidate on 27.02.2024:-

"5(l). That thereafter, the R.O. by applying Rule 75(4) of the Rules excluded the name of the Petitioner, and announced, as well as, declared the Respondent as the elected candidate. Subsequently, the R.O. informed the candidates that he would now submit a report regarding the same to the Election Commission of India and thereafter handover the Election Certificate to the Respondent."

vii). Paragraph 5(m) states that entire proceedings (conduct of election) narrated in previous paras were duly recorded in writing. The proceedings were signed by all those, who were present.

From holistic reading of paragraph 5 of the election petition that describes the events, it cannot be said that material facts have not been disclosed or that there is any concealment of material facts in the election petition. An aspect much pressed upon by learned Senior Counsel for the respondent/applicant is that facts apparent from perusal of Annexure P-5 have not been pleaded in the petition; It has not been pleaded that the petitioner had given his consent to the procedure intended to be applied by the RO, i.e. recourse to Rules 75(4) and 81(3), for drawing of lots and exclusion of the name that would appear on the chit; It has not been disclosed that the petitioner had consented to this procedure and had put his signatures in acceptance thereof; It has not been disclosed that after the exclusion of the name of the petitioner consequent to draw of lots, he had also accepted the result so declared and had accordingly appended his signatures on the Proceedings for Counting of Votes. The point being made out by the respondent is that the petitioner had not

disclosed material facts that he had consented to the procedure adopted by the RO for determining the result of election and also the fact that he had consented to the consequent declaration of the result in that manner, therefore, the petition is liable to be rejected.

4(iii)(d). Import of Section 83(1)(a) of the R.P. Act 1951 is for disclosure of such material facts upon which the petitioner relies, of course that would include positive and negative both sides of those facts. The case of the petitioner as projected does not revolve around his agreeing/ consenting to the procedure applied by the RO for draw of lots and consequent exclusion of his name that appeared on the chit so drawn. Signatures of the petitioner at two places on the Proceedings for Counting of Votes is a fact evident from Annexure P-5. The petitioner does not dispute his signatures on Annexure P-5. The petitioner in his petition has acknowledged this procedure as adopted and followed by the RO during counting of votes, i.e. application of Rules 75(4) and 81(3) of the Rules. It is also not the case of the petitioner that he objected to the application of this procedure during counting of votes or at the relevant time. Rather, the petitioner has himself appended Annexure P-5, i.e. the Proceedings for Counting of Votes. The annexure

has been signed and verified by the petitioner as per provisions of the R.P. Act 1951. The annexure makes it evident, as has been pleaded in the election petition also, that to break the tie during counting of votes, Rules 75(4) and 81(3) of the Rules were applied. It is not the case of the petitioner that RO had carried out the proceedings behind the back of the petitioner or the petitioner was not made aware of the procedure being applied by the RO. The case set up by the petitioner in the election petition is entirely different. Petitioner's case is that some other provisions of the R.P. Act 1951 were required to be applied and not the Rules, which were actually applied. According to the petitioner, the RO ought to have determined the result as per provisions of Section 65 of the R.P. Act 1951 and ought to have declared the petitioner as the successful candidate. According to the petitioner, the election result is materially affected by non-compliance with Section 65 of the R.P. Act 1951 and the flawed invocation of Rule 75(4) of the Rules by the RO. In view of the case set up by the petitioner, it cannot be said that there is suppression or intent to suppress the material facts in the petition upon which the petitioner relies. Noticeably, even the respondent has comprehended the election petition in that manner, which

is evident from respondent's following pleadings in para 27 of this application:-

"27. At this stage it is extremely significant to submit that the factum of Petitioner's consent to the aforementioned manner/procedure of counting of votes- is admitted and thus, undisputed even in the Petition. This admission by the Petitioner reinforces the legality and propriety of the Returning Officer's actions, confirming that they were executed in strict adherence to the statutory requirements and cannot be contended to be improper or illegal."

(emphasis supplied)

The above being respondent's own understanding of the election petition, defies logic as to how the respondent is seeking to reject the election petition on the projected ground that the petitioner has not disclosed in the petition of his having consented to the procedure applied by the RO.

4(iii)(e). In **Kanimozhi Karunanidhi's¹** case, the petitioner's allegations were that Kanimozhi had omitted to disclose the Income Tax Return (ITR) and Permanent Account Number (PAN) of her husband, who was a foreign citizen. Despite relying upon these facts, the particulars of ITR and PAN number of Kanimozhi's husband and how the other details furnished by her were insufficient, were not disclosed by the petitioner in the petition. It was in the given facts that the Hon'ble Apex Court held that absence of

such disclosure was concealment of material facts and that the petition did not disclose complete cause of action.

In the instant case, whether the signatures of petitioner on Proceedings for Counting of Votes would amount to his consent or not, acceptance or otherwise of the procedure adopted by the RO during counting of votes, the interpretation of the Proceedings of Counting of Votes inclusive of the consequence of petitioner having signed the Proceedings before applying the procedure under Rules 75(4) and 81(3) of the Rules and also thereafter to the declaration of the respondent as successful candidate-to the exclusion of the petitioner, are the aspects to be considered, deliberated upon & interpreted at an appropriate stage of the petition. In my considered view, the petitioner has disclosed entire proceedings that were carried out during the election process and the fact that he was present & had signed the proceedings. The consequence of his signatures on the Proceedings drawn for Counting of Votes, whether it amounts to his consent or acceptance, or acquiescence or waiver, and if so, the effect thereof upon the relief prayed for, whether petitioner's so called consent would estop him from filing the election petition, are entirely different issues. The petition discloses

all material facts, upon which the petitioner relies, both positive and negative. The 'consent' on part of the petitioner is not a fact on which the petitioner relies, but is a fact projected by the respondent. It cannot be said that the petition is liable to be rejected on the ground of non-disclosure of material facts.

Point is answered accordingly.

4B. Cause of action:-

4(iv). Next contention raised for the respondent/applicant is that the election petition is liable to be rejected in terms of Order 7 Rule 11(a) CPC as it does not disclose cause of action. Learned Senior Counsel for the respondent/applicant has submitted that:-

4(iv)(a). Not only the material facts are required to be pleaded in the election petition, but such material facts should also clothe the petition with cause of action.

4(iv)(b). In the instant case, even assuming for arguments that the petition divulges complete facts, then also they do not disclose any cause of action in favour of the petitioner or against the respondent. Hence, the petition is liable to be rejected at the threshold under Order 7 Rule 11(a) CPC.

4(iv)(c). Reliance placed by the petitioner upon Section 65 of the R.P. Act 1951 to question the procedure followed for counting of votes is misconceived. Section 65 of the R.P. Act 1951 has no applicability to the facts of the instant case:-

i). Under the scheme of Constitution read with provisions of the Act and the Rules made thereunder, following two categories of elections have been clearly demarcated:-

- (a).** Elections through single ballot without transferability of vote; and
- (b).** Elections through system of proportional representation by means of single transferable vote.

Section 65 of the R.P. Act 1951 does not deal with latter category. It only deals with the elections, where there is a single ballot without transferability of the vote.

Wherever there is a single ballot with transferability of vote such as elections to seats in the Council of States, the procedure for conduct of such an election would be covered by Section 169(2)(f) of the R.P. Act 1951 read with the Rules.

ii). Elections to Lok Sabha and Assembly Constituencies, not based upon system of proportional

representation by means of the single transferable vote are covered by Rules in Part IV and Part V of the Rules.

iii). Rule 64 of Part V of the Rules makes reference to Section 65 of the R.P. Act 1951. Part V of the Rules pertains to counting of votes in Parliamentary and Assembly constituencies. It stipulates declaration of election results subject to Section 65 of the Act wherever applicable. This governs elections characterized by direct voting by electorate. However, Rule 64 and Section 65 have no applicability to the conduct of elections to seats in Council of States.

iv). Rules under Part VI and Part VII of the Rules would apply for conduct of elections to seats in Council of States. Rule 75 falls under Part VII of the Rules and is, therefore, applicable for election to seats in the Council of States. It is Part VII of the Rules, which addresses the elections conducted through proportional representation by means of single transferable vote. Rule 75 falls under this part and governs the election. The RO had correctly proceeded as under in accordance with Rule 75:-

- After counting all valid ballots, both candidates were found to have received 34 votes each.

- Under Rule 75(1), every valid ballot paper has value of 1. Quota required to secure the election is determined by adding values credited to all candidates under Rule 74(c), dividing the total by 2 and adding 1 to the quotient. In the instant case, there were two candidates and one seat, therefore, quota calculation would be $(34+34)/2+1=35$.
- Neither the petitioner nor the respondent had reached the quota of 35 votes required for election under Rule 75(2), therefore, the RO proceeded to the next step as per Rule 75(3).
- Under Rule 75(3)(a), the RO would exclude from the poll the candidate, who upto that stage is credited with the lowest value. In the instant case, since both the candidates had same number of votes (34), the RO decided to proceed to the next step.
- Rule 75(3)(b) could not be resorted to as no second preferences had been indicated.
- Rule 75(4) stipulates that if after exclusion, both candidates still have an equal number of votes, the candidate with lowest number of original

votes recorded would be excluded. In the given facts of the case, there were only two candidates and both had received same number of original votes, therefore, even this step envisaged in first part of Rule 75(4) was not applicable.

In the event of both candidates having identical votes even after considering original votes, as was the situation in the instant case, Rule 75(4) allowed the RO to decide by lot which candidate should be excluded. This step ensured a fair resolution of the tie situation for determining the final outcome of the election. The RO's decision to resolve the tie by draw of lot as prescribed in Rule 75(4) was lawful and in compliance to the procedure. The RO had correctly applied the second part of Rule 75(4).

4(iv)(d). The petition harps on Section 65 of the R.P. Act 1951, which has no applicability to the facts of the case. The petition does not plead any legal and valid cause of action, therefore, it is liable to be rejected under Order 7 Rule 11(a) CPC.

4(iv)(e). Learned Senior Counsel for the respondent/applicant also reiterated the following submissions for rejection of petition under Order 7 Rule 11(a) CPC, which

had also been pressed for rejection of the petition on the ground of non-disclosure of material facts:-

- Upon both candidates getting equal number of votes, the RO had explained the procedure he intended to apply, i.e. by draw of lots as per Rule 75(4) of the Rules; That the person in whose name lot is drawn, shall be excluded and the other candidate shall be declared as elected; That Proceedings of Counting of Votes bear signatures of the petitioner. The petitioner had accepted and consented to this procedure as explained by the RO before actually giving effect to it.

- Name of the petitioner emerged on the chit in the draw of lots. In terms of the procedure/method agreed upon with the consent of the candidates, name of the petitioner was excluded and the respondent was declared as elected. The petitioner accepted the result without any demur or protest and appended his signatures to such declaration of result.

- Having given his consent, having agreed to the procedure at both stages of the election, the petitioner now cannot claim to be aggrieved by such decision, hence, there is no cause of action in his favour.

Learned Senior Counsel for the respondent/ applicant submitted that it is settled principle of law that a party, who specifically consents/accepts/agrees to a particular action/decision, has no cause of action to challenge the said action/decision before the Court.

4(iv)(f). Reliance in support of the above submissions was placed upon ***Janak Singh versus Ram Das Rai and others***⁷; ***K. Kamaraja Nadar Versus Kunju Thevar and others***⁸; ***T. Arivandandam Versus T.V. Satyapal and another***⁹; ***Azhar Hussain Versus Rajiv Gandhi***¹⁰; ***Liverpool & London S.P. & I Association Ltd. Versus M.V. Sea Success I and another***¹¹; ***Dahiben Versus Arvinbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives and others***¹²; ***R.K. Roja Versus U.S. Rayudu and another***¹³; ***Smt. Hema Purohit v. Sri Trivendra Singh Rawat and others***¹⁴; ***Ranveer Singh Versus State of Uttar Pradesh Through Secretary and others***¹⁵; ***P. Chidambaram Vs. The Returning Officer***

⁷ (2005) 2 SCC 1

⁸ AIR 1958 SC 687

⁹ (1977) 4 SCC 467

¹⁰ 1986 (Supp) SCC 315

¹¹ (2004) 9 SCC 512

¹² (2020) 7 SCC 366

¹³ (2016) 14 SCC 275

¹⁴ 2018 SCC OnLine Utt 649

¹⁵ (2016) 14 SCC 191

*and others*¹⁶; and *Dr. Rameshkumar Bapuraoji Gajbe vs. Election Commission of India, New Delhi and others*¹⁷.

4(v). **Learned Senior Counsel for the petitioner/non-applicant** refuted the contentions of the respondent/applicant and submitted that:-

4(v)(a). All material facts have been stated in the petition. They are sufficient to constitute cause of action for filing election petition on ground of non-compliance of statutory provisions by the RO [Section 100(1)(d)(iv)]. Petitioner has impugned the procedure applied by the RO that was legally flawed.

4(v)(b). It was Section 65 of the Act and not Rules 75 and 81 of the Rules that were required to be followed. The RO was under an obligation to conduct draw of lots as per Section 65 of the Act in order to decide the elected candidate. The RO not only erroneously invoked Rules 75(3), 75(4) and 81(3) of the Rules, but even these were applied incorrectly.

By incorrectly applying the Rules, by illegally overlooking the statutory provisions, the petitioner was

¹⁶ Manu/TN/0700/1978

¹⁷ 2019 SCC OnLine Bom 4950

wrongly excluded pursuant to his name appearing in the chit in the draw of lots instead of declaring him as elected under Section 65 of the Act. Cause of action is, therefore, available to the petitioner and has been properly pleaded.

4(v)(c). The flawed application of Rules 75(4) and 81(3) of the Rules and non-application of statutory provisions by the RO has materially affected the result of election to the Council of States and in turn benefitted the respondent. The requirements of Section 83(1)(a) of the Act stands fully satisfied. All material facts have been pleaded. They constitute and give cause of action to the petitioner for filing the election petition.

4(v)(d). Inquiry under Order 7 Rule 11 CPC is limited only to the extent whether the facts pleaded in the petition disclose a cause of action and not complete cause of action.

4(v)(e). The submissions of the respondent are actually the grounds taken in defense to oppose the election petition on merits. These submissions/grounds cannot be gone into at this stage.

4(v)(f). Reliance in support of the above submissions was placed upon ***Dahiben Versus Arvinbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives and others¹¹; Srihari Hanumandas Totala Versus***

Hemant Vithal Kamat and others¹⁸; Eldeco Housing and Industries Limited Versus Ashok Vidyarthi and others¹⁹, Ashraf Kokkur Versus K.V. Abdul Khader and others²⁰; Bhim Rao Baswanth Rao Patil Versus K. Madan Mohan Rao and others²¹; Shivaji Laxman Sahane Versus Jaywantrao Pundalikrao Jadhav²²; Krishnaswami Reddiar v. Nedukalayan and another²³; A.C. Jose Versus Sivan Pillai and others²⁴; and Harbans Singh versus State of Punjab & others²⁵.

4(vi). Consideration (Cause of action):-

Respondent's contention is that election petition be rejected as it does not give out any cause of action, which is required to be disclosed in terms of following provision of Order 7 Rule 11(a) CPC:-

*"11. Rejection of plaint.- The plaint shall be rejected in the following cases:-
(a) where it does not disclose a cause of action;..."*

4(vi)(a). Authoritative judicial pronouncements on the subject as cited by learned counsel on both sides have by now well settled the law that:-

¹⁸ (2021) 9 SCC 99

¹⁹ 2023 SCC OnLine SC 1612

²⁰ (2015) 1 SCC 129

²¹ 2023 SCC OnLine SC 871

²² 2015 SCC OnLine Bom 155

²³ (1962) 75 LW 409 Madras

²⁴ (1984) 2 SCC 656

²⁵ 1982 SCC OnLine P&H 67

- Conferment of power under Order 7 Rule 11(a)

CPC is to ensure that a meaning plaint or a litigation, which does not disclose any cause of action, is shown the door at the threshold. Having regard to the sanctity of the election process, any vexatious challenge to an election is to be rejected at the outset. An election petition can be summarily dismissed if it does not furnish cause of action.

- Therefore, a duty is cast upon the Court to determine whether the plaint/petition discloses a cause of action in relation to the subject matter relied upon by the petitioner. So long as the claim discloses some cause of action or raises questions fit to be decided, the mere fact that the case is weak and not likely to succeed is no ground to strike it out.

- Cause of action would mean facts to be proved, if traversed in order to support the right to the judgment of the Court. It consists of a bundle of material facts, which taken with the law applicable to them, gives the plaintiff/petitioner a right to the relief claimed. Function of a party is to present a full picture of cause of action with such further information so as to make the opposite party understand the case he will have to meet.

- Cause of action is determined by scrutinizing only the averments in the plaint read in conjunction with the documents relied upon. Pleas taken in the written statement and the application seeking rejection of the plaint are wholly immaterial for determining the cause of action.

4(vi)(b). In the backdrop of above settled legal position, the election petition may now be examined to determine the pleaded cause of action:-

i). Petitioner's pleaded case is that the RO had erred in applying Rules 75(3), 75(4) and 81(3) of the Rules for resolving the situation that had developed due to equality of votes between the petitioner and respondent. That these rules had no applicability to the fact situation. Para 6 of the election petition in this regard reads as under:-

"6. That at the outset, it is stated that the R.O. has grossly erred in applying the wrong provision of law in order to resolve a situation of equality of votes between the Petitioner and the Respondent, inasmuch as, Rule 75(3), Rule 75(4) and Rule 81(3) of the Rules had no application to the situation dealt by the returning officer in the subject election."

ii). Para 8 of the election petition states that draw of lot was to be conducted as per Section 65 of the R.P. Act 1951 and reads as under:-

“8. Be that as it may, since there was an Equality of Votes between the two candidates (Petitioner and the Respondent) i.e. 34 votes each and an addition of one vote would have entitled any of the candidates to be declared elected, the R.O. was under an obligation to conduct a draw of lots as mandated under Section 65 of the Representation of Peoples Act, 1951 in order to decide the elected/successful candidate. In this context it is essential to refer to Section.65 of the Representation of Peoples Act, 1951, which is reproduced hereinafter:

“65. Equality of votes.-If, after the counting of the votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will entitle any of those candidates to be declared elected, the returning officer shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote.”

(emphasis added)”

iii). According to the petitioner, the RO had misapplied Rules 75(4) and 81(3) of the Rules by ignoring Section 65 of the R.P. Act 1951 for holding that the candidate upon whom the draw of lot falls would be excluded or in other words, the candidate other than that on whom draw of lot falls, shall stand elected. Rule 75(4) does not prescribe the method of how the RO shall decide by lot as to which of the candidate having equal number of votes shall be excluded. Rule 75(4) does not stipulate the exclusion of the candidate upon whom draw of lot falls. It does not even lay down that candidate on whom draw of lot does not fall, is to be excluded. The method of deciding by draw of lots is prescribed by the parent statute under

Section 65 of the R.P. Act 1951. The RO was not free to adopt the procedure, which is *ex-facie* contrary to the spirit of Section 65 of the R.P. Act 1951. Since draw of lot fell upon the name of the petitioner, he was to be declared elected. These submissions as made in paras 9 to 12 of the petition are as under:-

- “9. That whilst Section 65 of the RP Act also contemplates draw of lots, it pertinently goes on to provide that the candidate on whom the lot ‘falls’ “shall” receive an ‘additional vote’. However, the RO by misapplying Rule 75(4) and 81(3) of the Rules has held that the candidate other than the one on whom the lot falls shall stand elected.
10. That Rule 75(4) does not prescribe the method of how the R.O. shall decide by lot which of the candidates having equal number of votes shall be excluded. In other words, Rule 75(4) does not stipulate whether the candidate on whom the draw of lot falls is to be excluded; or whether the candidate on whom the draw of lot does not fall is to be excluded.
11. The method of ‘deciding by lot’ is prescribed by the parent Statute in Sec. 65 and the R.O. is not free to adopt a method which is *ex facie* contrary to the letter and spirit of Section 65 of the R.P. Act, 1951. In other words, when the R.O. must decide by lot, that decision can only be by following the substantive method prescribed under Section 65 i.e. the candidate on whom the lot falls is entitled to an additional vote and therefore deserves to be declared elected.
12. In the present case, admittedly, when the lot was picked by the R.O., the name of the Election Petitioner i.e. Dr. Abhishek Manu Singhvi, came out and as such he was entitled to be declared elected. However, the R.O. in a manner completely contrary to Section 65 of the R.P. Act, 1951, declared the name of the Respondent on whom admittedly the lot did not fall i.e. whose name was not picked up.”

iv). The RO had wrongly resorted to Rules 75 and 81 of the Rules on the ground that where two or more candidates secure equal number of votes, these rules would have to be applied to break the tie. Since there was an equality of votes between the petitioner and respondent, the RO ought to have followed Section 65 of the R.P. Act 1951 and should not have taken recourse to Rules 75(3), 75(4) and 81(3) of the Rules. These pleadings in paragraphs 13 to 16 of the petition read as under:-

- "13. That the returning officer grossly ignored Section 65 of the R.P. Act, 1951, and resorted to Rule 75 and Rule 81 of the Conduct of Election Rules, 1961, and asserted that in elections to the Council of States (Rajya Sabha) if there is a situation where two or more candidates secure equal number of votes, Rule(s) 75(3), 75(4) and 81(3) would apply to break the tie.*
- 14. Since there was an equality of votes (34 each) between the Petitioner and the Respondent, the R.O. ought to have followed Section 65 of the RP Act and should not have taken recourse to Rule 75(3), 75(4) and 81(3) of the Election Rules in the first place itself.*
- 15. That a bare perusal of Rule 81 {or Rule 81(3)} of the Rules as referred to by the R.O. would show that it is a provision under the chapter/marginal heading - "Counting of votes when more than one seat is to be filled" and, therefore, is not applicable in context to the present election wherein only one seat (of Council of States/Rajya Sabha) was to be filled from the State of Himachal Pradesh. Hence the R.O. grossly erred in adverting to the aforesaid Rule 81(3) of the Election Rules in determining the result of draw of lots.*
- 16. That even Rule 75(4) of the Election Rules, as resorted to by the R.O. has no application in the present election as, inter alia, the same is applicable only where there are more than two candidates and also since it is settled law that the system of proportional representation does not apply where there are only two*

candidates, having equal number of first preference votes and no second preference vote being casted in the said election. Since in the present case, there were only two candidates i.e. the Petitioner and the Respondent, and both of them received 34 first preference votes, each, there was no question to adverting to the procedure of counting meant for proportional representation/preferential voting and therefore the RO wrongly excluding the candidate in whose favour the lot was drawn. Hence the RO's reliance on Rule 75(4) and Rule 81(3) was wholly misplaced and, the same has materially affected the result of the above election, which ought to have been declared in favour of the Petitioner."

v). Even if Rule 75 is to be assumed to be applicable, then also its invocation/application had to be in keeping with the letter and spirit of Section 65 of the R.P. Act 1951 and not contrary thereto. Pleadings in this regard in paragraphs 7, 17 and 18 are as under:-

- "7. Even otherwise, it is submitted that even if Rule 75(4) is held to be applicable, it cannot be invoked in abject negation and contravention of the substantive provision i.e. Section 65 of the RP Act, 1951.*
- 17. Be that as it may, as alternatively submitted, even if Rule 75(4) is assumed to be applicable, the invocation/application thereof by an R.O. has to be keeping in line with the letter and spirit of Section 65 and in no manner contrary to it.*
- 18. That in case of a tie after counting of all the first preference votes, which resulted in 34 votes each in favour of the Petitioner as well as the Respondent, the only procedure mandated under the RP Act, 1951, was recourse to Section 65 of the RP Act."*

vij). The grievance of the petitioner as projected in the election petition in paras 19 to 21 is as follows:-

- "19. That in the present case, in order to break the tie of 34 votes each between the Petitioner and the Respondent,*

the R.O. conducted the draw of lots and admittedly chit containing the name of the Petitioner was drawn by the R.O. in the presence of the candidates and their agents. As a natural corollary of the same and as mandated by Section 65 of the RP Act, the R.O. ought to have credited an additional vote in favour of the Petitioner and thereby making the Petitioner's finally tally (post draw of lots) as 35 (thirty-five) votes making him the elected candidate. However, the R.O. erroneously invoked Rule 75(4) and 81(3) and accordingly devised his own procedure contrary to the law, thereby, excluding the Petitioner from the winning criterion, even though the lot was drawn in favour of the Petitioner.

20. *That even though the Petitioner had won the draw of lots, as the lot had fallen on him (in other words, chit containing the name of the Petitioner was taken out), the R.O. erred in declaring the Respondent as the successful/elected candidate and thereby violating the mandatory provision with impunity.*
21. *That non-compliance of the provisions of the RP Act, 1951, and/or the completely flawed invocation of Rule 75(4) of the 1961 Rules by the R.O. has materially affected the result of the above election in so far as the Respondent being wrongly declared as the returned/successful candidate. Whereas, the Petitioner, in terms of Section 65 of the Act had received the majority of valid votes and ought to have been declared elected/returned by the R.O."*

4(vi)(c). Part V of the R.P. Act 1951 pertains to 'Conduct of Elections' and has 8 chapters. Section 65 of the R.P. Act 1951 falls under Chapter V that goes with the heading 'Counting of Votes'. The section reads as under:-

"65. Equality of votes.- If, after the counting of the votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will entitle any of those candidates to be declared elected, the returning officer shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote."

Contention of the respondent/applicant is that above extracted Section 65 will not apply in the instant case as it only deals with the elections through single ballot without transferability of vote. That instant case is covered by Section 169(2)(f) of the R.P. Act 1951 read with Part VI and Part VII of the Rules. Section 169(2)(f) reads as under:-

“169. *Power to make rules.- (1) The Central Government may after consulting the Election Commission, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.*
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-
(f) the procedure as to voting to be followed at elections held in accordance with the system of proportional representation by means of the single transferable vote.”

Rules 75 and 81 of the Rules fall under Part VII under the head ‘Counting of Votes at Elections by Assembly Members or in Council Constituencies’ and read as under:-

“75. *Counting of votes where only one seat is to be filled.—*
(1) At any election where only one seat is to be filled, every valid ballot paper shall be deemed to be of the value of 1 at each count, and the quota sufficient to secure the return of a candidate at the election shall be determined as follows:—
(a) add the values credited to all the candidates under clause (c) of rule 74;
(b) divide the total by 2; and
(c) add 1 to the quotient ignoring the remainder, if any, and the resulting number is the quota.
(2) If, at the end of the first or any subsequent count, the total value of the ballot papers credited to any candidate is equal to, or greater than, the quota or there is only one continuing candidate, that candidate shall be declared elected.

(3) *If, at the end of any count, no candidate can be declared elected, the returning officer shall—*

- (a) *exclude from the poll the candidate who up to that stage has been credited with the lowest value;*
- (b) *examine all the ballot papers in his parcels and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of papers in each such sub-parcel and credit it to the candidate for whom such preference is recorded, transfer the sub-parcel to that candidate, and make a separate sub-parcel of all the exhausted papers; and*
- (c) *see whether any of the continuing candidates has, after such transfer and credit, secured the quota.*

(4) *If, when a candidate has to be excluded under clause (a) of sub-rule (3), two or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the lowest number of original votes are recorded shall be excluded, and if this number also is the same in the case of two or more candidates, the returning officer shall decide by lot which of them shall be excluded.*

81. *Filling the last vacancies.—(1) When at the end of any count the number of continuing candidates is reduced to the number of vacancies remaining unfilled, the continuing candidates shall be declared elected.*

(2) When at the end of any count only one vacancy remains unfilled and the value of the papers of some one candidate exceeds the total value of the papers of all the other continuing candidates together with any surplus not transferred, that candidate shall be declared elected.

(3) *When at the end of any count only one vacancy remains unfilled and there are only two continuing candidates and each of them has the same value of votes and no surplus remains capable of transfer, the returning officer shall decide by lot which of them shall be excluded; and after excluding him in the manner aforesaid, declare the other candidate to be elected.*

Election petitioner has made out a cause of action that according to him, in the attending facts, the

mechanism to proceed further was not provided under Rule 75. Rule 75(4) of the Rules as resorted to by the RO is applicable only where there are more than two candidates. The system of proportional representation does not apply where there are only two candidates, having equal number of first preference votes and no second preference vote being casted; Therefore, there was no question for adverting to the procedure of counting meant for proportional representation. Hence, the RO wrongly excluded the candidate in whose favour the lot was drawn. The RO's reliance on Rules 75(4) and 81(3) was misplaced. It has materially affected the result of election. The RO ought to have acted as per mandate of Section 65 of the Act. The RO had erroneously invoked Rules 75(4) & 81(3) and devised his own procedure contrary to law, thereby excluding the petitioner even when the lot was drawn in his favour.

Further, according to the petitioner, Rule 75(4) only provides when a candidate has to be excluded. Under Clause (a) of Sub-Rule (3) of Rule 75, when two or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the lowest number of original votes are recorded shall be excluded and if this number also is the same in the case of two or more

candidates, the returning officer shall decide by lot which of them shall be excluded. Rule 81(3) of the Rules states that when at the end of any count only one vacancy remains unfilled and there are only two continuing candidates and each of them has the same value of votes and no surplus remains capable of transfer, the returning officer shall decide by lot which of them shall be excluded; and after excluding him in the manner aforesaid, declare the other candidate to be elected.

It has also been submitted for the petitioner that even if Rule 75(4) is assumed to be applicable, then also its application has to be keeping in line with letter & spirit of Section 65 of the Act and not contrary to it. The exclusion of the name of the person on whom draw of lot falls, was in teeth of Section 65. This section contemplates draw of lots and provides that the candidate on whom the lot falls, shall receive an additional vote. However, the RO by misapplying Rules 75(4) and 81(3) of the Rules has held that the candidate other than the one on whom the lot falls shall stand elected.

Whether the exclusion should be of the candidate upon whom the draw of lot fell or other than the candidate upon whom the draw of lot fell, is the question

raised and cause of action set up in the instant petition. The petitioner has invoked Section 65 of the R.P. Act 1951 to contend that in the given facts, the petitioner upon whom draw of lot fell cannot be excluded, rather, it is he who is to be declared elected and not the other candidate-the respondent. In view of the interplay of Rules 75 & 81, Section 65 and other provisions of the Statute and the Rules invoked by the parties, it cannot be said that there is no cause of action available to the petitioner. Petition discloses cause of action.

Significantly, as noticed above, the respondent/applicant in his application has undertaken a painstaking exercise to contend that Section 65 of the R.P. Act 1951 will not be applicable to the facts of the case and therefore, was justly not applied by the RO. Further, that it is only Rules 74, 75 and 81 of the Rules that would govern the factual scenario of the case and thus, were justly invoked by the RO. That the petitioner, whose name appeared on the chit in the draw of lots, therefore, was rightly excluded.

The above contentions, however, need not be gone into at this stage. Merits of the contentions are to be deliberated at an appropriate stage of the petition. Defenses of the respondent to the election petition on the merits of

petitioner's contentions are not relevant for deciding the application under Order 7 Rule 11 CPC.

Point is answered accordingly.

4C. Barred by Principle of Waiver/Estoppel:-

4(vii)(a). It has been **contended for the respondent/applicant** that the procedure intended to be applied, i.e. application of Rules 75 and 81 of the Rules, had clearly been explained to the candidates by the RO. It had also been detailed that the candidate whose name would appear on the chit during draw of lots would stand excluded. The petitioner had agreed to the above procedure disclosed by the RO before conducting the draw of lots and appended his signatures in acceptance thereof. The procedure as explained by the RO was followed for drawing the lots. The petitioner had consented to and accepted the procedure being fully aware that the procedure was in conformity with the constitutional scheme as also the provisions of the Act and the Rules. After drawing of lots, in which the name of the petitioner figured in the chit and he was consequently excluded & respondent was declared the returned candidate, the petitioner accepted the result and appended his signatures at the second stage of the conduct of proceedings.

The contention raised for the respondent/applicant is that in view of above narration of facts, where the petitioner had expressly acknowledged and accepted the procedure as being in compliance with the applicable legal provisions, he is estopped from challenging the procedure adopted by the RO having expressly consented thereto before the draw of lots was carried out and even subsequent thereto. It was further submitted for the respondent that without prejudice to the foregoing, the conduct of the petitioner also constitutes waiver and thus, disentitles him from raising any grievance/contention against the procedure for draw of lots applied by the RO. In fact, during hearing of the case, a prayer was also made for watching a video purported to be the official recording of the Proceedings of Counting of Votes, contained in a Pen Drive, in support of the contention that the actions & conduct of the petitioner during the proceedings cannot be construed to be anything else, but consent to the procedure applied by the RO and thus, would debar the petitioner from challenging such procedure in election petition.

4(vii)(b). Learned Senior Counsel for the petitioner/non-applicant refuted the above submissions and submitted that the actions interpreted by the respondent as

consent of the petitioner do not constitute consent. Even otherwise, there cannot be any constitutional waiver. There is no estoppel against the Statute. That a consent wrongly given against the provisions of the Statute is no consent in law.

4(vii)(c). Consideration (Estoppel/Waiver):-

Petitioner has admitted having appended his signatures on the Proceedings for Counting of Votes (Annexure P-5). This, however, according to him, does not amount to consent to the procedure applied by the RO. Whether in the given facts, signatures of the petitioner on the Proceedings for Counting of Votes would amount to consent on part of the petitioner or not, is to be considered during trial/at an appropriate stage of the petition. The next question that even if it is held to be consent on part of the petitioner, what would be the effect thereof on petitioner's case- can only be considered at an appropriate stage. At this juncture, suffice to note that the petitioner has projected a case that there is no estoppel against the Statute; It is not for the parties to agree out of the Statute; The RO also cannot act contrary to the Statute. What was the legal provision that should have been applied by the RO, whether the RO applied correct provision or not and

other related questions, can only be deliberated upon at an appropriate stage of the election petition. It cannot be said at this stage that petitioner's actions and their interpretation as consent by the respondent would debar the petitioner from laying challenge to the procedure applied by the RO during counting of votes.

It is also worth noticing here that the petitioner having allegedly consented to the application of procedure as per Rules 75 and 81 of the Rules, is a fact pleaded by the respondent. It is not the case set up by the petitioner. It will be for the respondent to prove that the petitioner had consented for applying the procedure in terms of Rules 75 and 81 of the Rules and for the Court to deliberate thereupon and consider its consequential effects. The video recording being sought to be played by the respondent, cannot be permitted at this stage. It is a matter of evidence to be considered at an appropriate stage.

Point is answered accordingly.

4D. No material effect upon result of the election:-

4(viii)(a). Respondent contends that non-compliance or violation of provisions of the Acts/Rules would not by itself be a permissible ground to pray for setting aside the

election unless it also materially affects the election result. The issue of - on whom the lot falls and whether the candidate upon whom the lot falls should be excluded is inherently a matter of interpretation and procedural formality. The interpretation does not undermine the integrity or outcome of the election as statutory requirement was fulfilled by the RO by conducting the draw of lots in a transparent and fair manner. Provisions of Section 100(1)(d)(iv) of the R.P. Act 1951 do not get attracted.

4(viii)(b). The petitioner has contested the above submissions. According to the petitioner, result of election has been materially affected by non-compliance with statutory provisions of Section 65 of the Act read with flawed invocation of Rules 75(3), 75(4) and 81(3) of the Rules by the RO.

4(viii)(c). Consideration (Material effect on election result):-

Section 100(1)(d)(iv) of the R.P. Act 1951 reads as under:-

“100. Grounds for declaring election to be void.- (1) Subject to the provisions of sub-section (2) if the High Court is of opinion-
(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(iv) *By any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void."*

Petitioner has *inter-alia* pleaded in the election petition as under:-

- “19. *That in the present case, in order to break the tie of 34 votes each between the Petitioner and the Respondent, the R.O. conducted the draw of lots and admittedly chit containing the name of the Petitioner was drawn by the R.O. in the presence of the candidates and their agents. As a natural corollary of the same and as mandated by Section 65 of the RP Act, the R.O. ought to have credited an additional vote in favour of the Petitioner and thereby making the Petitioner's finally tally (post draw of lots) as 35 (thirty-five) votes making him the elected candidate. However, the R.O. erroneously invoked Rule 75(4) and 81(3) and accordingly devised his own procedure contrary to the law, thereby, excluding the Petitioner from the winning criterion, even though the lot was drawn in favour of the Petitioner.*
20. *That even though the Petitioner had won the draw of lots, as the lot had fallen on him (in other words, chit containing the name of the Petitioner was taken out), the R.O. erred in declaring the Respondent as the successful/elected candidate and thereby violating the mandatory provision with impunity.*
21. *That non-compliance of the provisions of the RP Act, 1951, and/or the completely flawed invocation of Rule 75(4) of the 1961 Rules by the R.O. has materially affected the result of the above election in so far as the Respondent being wrongly declared as the returned/successful candidate. Whereas, the Petitioner, in terms of Section 65 of the Act had received the majority of valid votes and ought to have been declared elected/returned by the R.O."*

The petitioner has specifically pleaded that the result of election petition has been materially affected due to flawed invocation of Rules 75 & 81 of the Rules and non-

compliance of Section 65 of the Act that provides for the manner in which a candidate is to be declared elected in case of equality of votes. It is the case of the petitioner that in case the name on the chit drawn in the lot had been given one vote as per Section 65 of the Act, then, he would have been declared elected and not the respondent. In view of the case set up by the petitioner, it cannot be said at this stage that the result of the election had not been materially affected by the alleged non-compliance of the provisions.

Point is answered accordingly.

5. Conclusion:-

The upshot of above discussion is that:-

- (i).** Election petition discloses all material facts as are required to be disclosed in law. No material fact upon which the petitioner/non-applicant relies, be it positive or negative, has been concealed in the petition. Law does not obligate the petitioner to project respondent's case in his petition.
- (ii).** Petitioner/Non-applicant has made out a cause of action in his petition. Petitioner has alleged non-compliance of statutory provisions by the Returning Officer. According to the case set up by the petitioner: the RO had not acted as per mandate of Section 65 of the Representation of the People Act, 1951; It is only this provision

that expressly provides for the manner in which a candidate is to be declared elected in the given case of equality of votes. According to the petitioner, the Returning Officer had erroneously invoked Rules 75(4) and 81(3) of the Conduct of Election Rules, 1961 during Proceedings for Counting of Votes and has further pleaded that even these Rules were also not correctly applied. A clear cause of action has been pleaded.

(iii). The question as to whether the actions of the petitioner during Proceedings for Counting of Votes, amount to consent/acceptance on his part to the procedure applied by the RO, and if so, what would be its effect upon the relief claimed by him; whether the petitioner is debarred in law to take the pleas/plead cause of action that: the RO had infringed Section 65 of the Representation of the People Act, 1951; The RO had erroneously applied Rules 75(4) & 81(3) of the Conduct of Election Rules; and even the application of Rules applied by the RO was flawed; are to be considered & deliberated upon at an appropriate stage of the trial/petition.

(iv). The case projected by the petitioner, viz. non-compliance of the provisions of the R.P. Act 1951 and/or completely flawed invocation of Rule 75(4) & 81(3) of the Conduct of Election Rules, 1961 by the RO, if ultimately found to be correct & legitimate, would definitely materially affect the result of election as in that situation,

the declaration of respondent as the returned candidate would become illegal.

In view of above discussion, I find no merit in any of the contentions raised by the respondent/applicant for rejecting the election petition filed by the petitioner/non-applicant. Consequently, this application moved by the respondent/applicant under Order 7 Rule 11 Civil Procedure Code read with Section 151 CPC and Sections 81, 83, 86 & 87 of the Representation of the People Act, 1951 is dismissed.

September 16, 2024
Mukesh

Jyotsna Rewal Dua
Judge