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JITU PATNAIK

v.

SANATAN MOHAKUD & ORS.  
(Civil Appeal No. 2689 of 2012)

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MARCH 2, 2012

[R.M. LODHA AND H. L. GOKHALE, JJ.]

*REPRESENTATION OF THE PEOPLE ACT, 1951:*

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*s. 52(as inserted by Amendment Act 21 of 1996) read with ss.38, 83 and 100(1)(d) - State Legislative Assembly Elections - Death of an independent contesting candidate after the date of withdrawal of nomination and publication of list of contesting candidates, but before the date of polling - Election petition challenging the election of returned candidate - Held: s.52 enjoins that if a candidate set up by recognized political party dies before the poll, the poll must be adjourned; it does not provide any such obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate dies after the list of the contesting candidates as defined in s. 38 is published - The expression "contesting candidates" in paragraph 8.1, Chapter XII of the Handbook has to be given the same meaning as the contesting candidates defined in s. 38 of the Act - In this view of the matter, there was no duty imposed on the returning officer to mask the name of the independent candidate who died after publication of list of validly nominated candidates being a contesting candidate as defined in s. 38 - Moreover, the instructions in the Handbook are only guidelines - These instructions have no statutory force - There being no non-compliance with the provisions of the Constitution or the 1951 Act or any rules framed or orders made under 1951 Act by the returning officer insofar as death of independent candidate was concerned, the averments made in paragraph 7(A) of the election petition do not furnish*

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any cause of action for declaring the election of the returned candidate to be void u/s 100(1)(d)(iv) - High Court seriously erred in holding otherwise and ordering trial of the election petition on the pleadings set out in paragraph 7(A). A

s.83(1)(a) - Election petition to contain concise statement of 'material facts' - Averment in para 7(D) of the election petition alleging suppression of votes - Held: It is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies - All basic and primary facts which must be proved at the trial by a party to establish the existence of cause of action or defence are material facts - The bare allegations are never treated as material facts - The material facts are such facts which afford a basis for the allegations made in the election petition - Omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad - The averments made in paragraph 7(D) do not set out all the material facts and do not afford an adequate basis for the allegations made therein - The allegations in paragraph 7(D) do not constitute cause of action for declaring election of the returned candidate to be void -High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G) of the election petition - The remaining two paragraphs 7(A) and 7(D) do not disclose any cause of action and are liable to be struck out - After striking out paragraphs 7(A) and 7(D), nothing remains in the election petition for trial and, therefore, the election petition is liable to be rejected in its entirety - Code of Civil Procedure, 1908 - O. 6, r. 2 - Conduct of Election Rules, 1961 - r.93. B  
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**An independent candidate whose candidature had survived the scrutiny of nominations for the 14th Assembly Election to Orissa State Legislative Assembly, died on 13.4.2009, i.e. after the date of withdrawal of nominations i.e. 8.4.2009, but before the date of polling i.e. 23.4.2009. His name continued to appear in the list of** G

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A contesting candidates and was included in Electronic Voting Machine (EVM). The polling was held on 23.4.2009 and the deceased got 550 votes. Respondent no. 1 lost the election to the appellant. He filed an election petition challenging the election of the appellant. The appellant  
 B filed an application with a prayer to strike out the pleadings made in paragraphs 7(A) to 7(G) of the election petition. The High Court struck out paragraphs 7(B), 7(C) and 7(E) to 7(G) and permitted trial of the election petition on the pleadings set out in paragraphs 7(A) and 7(D). The  
 C returned candidate filed the appeal contending that paragraphs 7(A) and 7(D) of the election petition did not set out the material facts to constitute cause of action u/ ss 100(1)(d)(iii) and (iv) of the Representation of the People Act, 1951.

D The questions for consideration before the Court were: (i) "if an independent contesting candidate dies after the publication of list of contesting candidates, does the electoral law as contained in 1951 Act or the Rules framed thereunder cast any obligation upon the  
 E returning officer not to display the name of such deceased candidate in the EVM"; and (ii) "whether the pleadings in paragraph 7(D) set out the material facts to constitute cause of action u/s 100(1)(d)(iii) and/or (iv) of the 1951 Act.

F Allowing the appeal, the Court

HELD: 1.1 This Court has stated time and again that right to contest election or to question the election by means of the election petition is neither common law nor  
 G fundamental right. Instead, it is a statutory right regulated by the statutory provisions contained in the Representation of the People Act, 1951. The Act is complete and self-contained code within which the rights claimed in relation to an election or election dispute must  
 H be found. [para 19] [275-H; 276-A-B]

*N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakka, Salem Dist. and Others* 1952 SCR 218 = 1952 AIR 64 ; , *Jagan Nath v. Jaswant Singh and Others* 1954 SCR 892 =1954 AIR 210; *Jyoti Basu & others v. Debi Ghosal and Others* 1982 (3) SCR 318 = 1982 (1) SCC 691, *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* 1987 SCR 369 = 1987 Suppl. SCC 93; and *Chandra Kishore Jha v. Mahavir Prasad and Others* 1999 (2 ) Suppl. SCR 754 = 1999 (8 ) SCC 266 - referred to.

1.2 Once nomination has been filed by a candidate and on scrutiny his candidature is found proper and before the expiry of the period of the withdrawal, he has not withdrawn his candidature and his name is included in the list of validly nominated candidates prepared u/s 38 of the 1951 Act and r. 11 of the Conduct of Election Rules, 1961, if death of a contesting candidate as defined in s.38 takes place, the consequences following the death of such contesting candidate have to be found from electoral law contained in 1951 Act or the rules framed thereunder. [para 20] [276-D-E]

1.3 Section 52, after its substitution by Act 21 of 1996, takes cognizance of a death of a candidate of the recognized political party before poll and not the other two categories of the candidates classified in s. 38, namely, (one) candidates of registered political parties other than the candidates of recognized political parties and (two) other candidates (which include independent candidates). Section 52 enjoins that if a candidate set up by recognized political party dies before the poll, the poll must be adjourned; it does not provide any obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate dies after the list of the contesting candidates as defined in s. 38 is published. [para 20 and 23] [276-F-H; 280-B-C]

A 1.4 Chapter XII of the Handbook deals with  
 preparation for the poll, particularly commissioning of  
 EVMs. A careful reading of paragraph 8.1 of the  
 Handbook relied upon on behalf of respondent no. 1  
 would show that the number of candidates' buttons  
 B which should be visible should be equal to the number  
 of contesting candidates and the remaining buttons must  
 be masked. The expression "contesting candidates" in  
 paragraph 8.1 has to be given the same meaning as the  
 contesting candidates defined in s. 38 of 1951 Act. No  
 C other meaning to the expression "contesting candidates"  
 can be given. The candidates who survive the date of the  
 withdrawal of candidatures are described in s.38 as  
 'contesting candidates'. Thus, the number of candidates'  
 buttons which should be visible on EVM should be equal  
 D to the number of candidates as published in the list of  
 validly nominated candidates who have not withdrawn  
 the candidature within the period prescribed and whose  
 nominations are included in the list published u/s 38. In  
 this view of the matter, there was no duty imposed on the  
 returning officer to mask the name of the candidate at Sl.  
 E no. 9, who was an independent candidate and who died  
 on 13.4.2009 after publication of list of validly nominated  
 candidates being a contesting candidate as defined in s.  
 38. Moreover, the instructions in the Handbook are only  
 guidelines. These instructions have no statutory force.  
 F [para 16 and 25] [282-A-E]

*Ramesh Rout vs. Rabindra Nath Rout* 2012 (1) SCC 762  
 - relied on

G 1.5 There being no non-compliance with the  
 provisions of the Constitution or the 1951 Act or any rules  
 framed or orders made under 1951 Act by the returning  
 officer insofar as death of an independent candidate was  
 concerned, the averments made in paragraph 7(A) of the  
 election petition do not furnish any cause of action for  
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declaring the election of the returned candidate to be void u/s 100(1)(d)(iv). The High Court seriously erred in holding otherwise and ordering trial of the election petition on the pleadings set out in paragraph 7(A). [para 26] [283-A-B] A

2.1 As regards the pleadings in paragraph 7(D) of the election petition, it is significant to note that the first part of O. 6, r. 2 CPC is similar to clause 1(a) of s. 83 of the 1951 Act. It is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies. All basic and primary facts which must be proved at the trial by a party to establish the existence of cause of action or defence are material facts. The bare allegations are never treated as material facts. The material facts are such facts which afford a basis for the allegations made in the election petition. [para 32] [284-H; 285-A-C] B C D

*Virender Nath Gautam v. Satpal Singh and others* 2006 (10 ) Suppl. SCR 413 = 2007 (3 ) SCC 617 - relied on

*Philipps v. Philipps and Others* (1878) 4 Q.B.D. 127 and the subsequent decision in *Bruce v. Odhams Press Limited* (1936) 1 K.B. 697 - referred to E

2.2 As regards the discrepancy in the number of voters in the register of voters maintained in Form-17A and the voters shown in Form 17C, it is significant to note that the register of voters in Form-17A is not available for inspection. Rule 93 of the 1961 Rules provides for the production and inspection of election papers. Clause (dd) of r. 93(1) makes a provision that the packets containing register of voters in Form 17A, while in the custody of the district election officer or the returning officer, as the case may be, shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court. [para 36] [286-H; 287-A] F G H

A 2.3 There is no averment that the election petitioner  
 or any of his polling agents had perused the register of  
 voters maintained in Form 17A. The basis of the  
 knowledge that the register of voters maintained in Form  
 17A records that 1091 voters came to vote is not disclosed  
 B at all. Moreover, there is no pleading that 1091 voters who  
 came to vote at Booth No. 179 in fact voted. [para 37]  
 [287-B-C]

2.4 The averment that in Form-17C, certified copy, "it  
 C has been deliberately shown as 772 making a deliberate  
 suppression of 319 votes" hardly improves the pleading  
 in the election petition. There is no averment that the  
 election petitioner or his agents challenged part II of  
 Form-17C before the authorities. At least, there are no  
 D facts pleaded concerning that. There is no pleading that  
 there was any challenge by the election petitioner or his  
 agents in respect of the counting figure in Form-20. The  
 only pleading is that the illegality has been deliberately  
 committed by the counting personnel while recording the  
 counting figure in Form-20 with respect to Booth No. 179.  
 E There is, thus, no disclosure of material facts in respect  
 of the challenge to the correctness of Form-20 and Form-  
 17C. [para 38] [287-E-G]

2.5 The pleading of material facts with regard to  
 F suppression of 319 votes in paragraph 7(D) is also  
 incomplete as it has not been disclosed who suppressed  
 319 votes; who was the counting agent present on behalf  
 of the election petitioner at the time of counting; how 319  
 votes were suppressed and why recounting was not  
 G demanded. Moreover, there is no express pleading as to  
 how the result of the election has been materially affected  
 by less counting of 319 votes. Omission of even a single  
 material fact leads to an incomplete cause of action and  
 statement of claim becomes bad. [para 39-40] [287-H;  
 288-A-C]

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*Samant N. Balkrishna and Another v. George Fernandez and Others* 1969 (3) SCR 603 =1969 ( 3 ) SCC 238 - relied on. A

2.6 The other part of paragraph 7(D) relating to 462 votes is based on the preceding paragraph 7(C) which has been already struck out by the High Court. Therefore, the pleadings in paragraph 7(D) in respect of 462 votes do not survive as it is. Thus, the averments made in paragraph 7(D) do not set out all the material facts and do not afford an adequate basis for the allegations made therein. The allegations in paragraph 7(D) do not constitute cause of action for declaring election of the returned candidate to be void. [para 41-42] [288-D-E] B C

3. The High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G). The remaining two paragraphs 7(A) and 7(D) do not disclose any cause of action and are liable to be struck out. After striking out paragraphs 7(A) and 7(D), nothing remains in the election petition for trial and, therefore, the election petition is liable to be rejected in its entirety. [para 43] [288-F-G] D E

*Madan Gopal vs. Nek Ram Sharma* 25 ELR 61 - cited.

**Case Law Reference:**

25 ELR 61	cited	para 18	F
1952 SCR 218	referred to	Para 19	
1954 SCR 892	referred to	Para 19	
1982 (3) SCR 318	referred to	Para 19	
1987 SCR 369	referred to	Para 19	G
1999 (2 ) Suppl. SCR 754	referred to	Para 19	
2012 (1) SCC 762	relied on	para 25	
2006 (10 ) Suppl. SCR 413	relied on	para 32	H

A	(1878) 4 Q.B.D. 127	referred to	para 33
	(1936) 1 K.B. 697	referred to	para 33
	1969 (3) SCR 603	relied on	para 40

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2689 of 2012.

From the Judgment & Order dated 21.06.2011 of the High Court of Orissa at Cuttack in Misc. Case No. 50 of 2009 in Election Petition No. 2 of 2009.

C C.A. Sundram, Rohini Musa, Zafar Inayat, Yogesh Kotemath, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Shakti Prasad Panda, Satyajit Mohanti, Gaurav Goel for the Appellant.

D Mukul Rohatgi, Bidhyadhar Mishra, S.N. Bhat, Sanjeeb Panigrahi, Pusparaj Bharadwaj, Subhash Acharya, Shyam Mohan, Ninad Laud for the Respondents.

E The Judgment of the Court was delivered by

**R.M. LODHA, J. 1.** Leave granted.

F 2. The two paragraphs – 7(A) and 7(D) – of the election petition occupied significant time of this Court on 3 days – February 7, 2012, February 9, 2012 and February 14, 2012 – to determine the correctness of the order dated June 21, 2011 passed by the Orissa High Court whereby the High Court directed that the election petition shall proceed in respect of the pleadings contained in these two paragraphs.

G 3. On the announcement of the 14th Assembly Election to the Orissa State Legislative Assembly, insofar as it related to 25—Champua Assembly Constituency, the following schedule of election was notified:

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SCHEDULE OF ELECTION	
28.3.2009 To 4.4.2009	PERIOD PRESCRIBED FOR FILLING NOMINATION.
6.4.2009	DATE FIXED FOR SCRUTINY OF NOMINATION
8.4.2009	DATE OF WITHDRAWAL
23.4.2009	DATE OF POLLING
16.5.2009	DATE OF COUNTING/ DECLARATION OF RESULT.
28.5.2009	DATE BEFORE WHICH THE ELECTION SHALL BE COMPLETED.

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4. As per the above schedule, on expiry of the time of withdrawal on April 8, 2009, the returning officer prepared and published the following list of contesting candidates.

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Sl. No.	Name of the contesting candidate	Name of the political party	Election symbol
1.	Chitaranjan Nayek	B.S.P.	Elephant
2.	Bidyadhar Mohanta	C.P.I.	Ears of Corn and Sickle
3.	Muralimanohar Sharma	B.J.P.	Lotus
4.	Laxman Kumar Sethi	J.M.M.	Bow & Arrow
5.	Sanatan Mahakud	I.N.C.	Hand
6.	Keshab Mohanta	Samrudha Orissa	Nagara
7.	Khitish Chandra Mohanta	Orissa Mukti Morcha	Violin
8.	Jadumani Patra	Samajbadi Party	Saw
9.	Akhila Kumar Mohanta	Independent	Television
10.	Akhileswar Giri	Independent	Battery & Torch
11.	Abhimanyu Mohanta	Independent	Coconut

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A	12.	Arabinda Behera	Independent	Ripe Plantation
	13.	Ashok Mohanta	Independent	Road Roller
	14.	Kusha Apot	Independent	Scissors
	15.	Jitu Patnaik	Independent	Saucer & Plate
B	16.	Deepak Moharana	Independent	Camera
	17.	Puma Chandra Mohanta	Independent	Baloon
	18.	Prabhupada Mishra	Independent	Almirah
	19.	Buta Singh	Independent	Ceiling Fan
C	20.	Bhabani Mohanta	Independent	Candle
	21.	Manoj Kumar Mohanta	Independent	Rail Engine
	22.	Sanjita Nayek	Independent	Batsman

5. It so happened that one of the contesting candidates at Sl. No. 9, namely, Akhila Kumar Mohanta, who was an independent candidate, died on April 13, 2009. His death was allegedly informed to the returning officer. However, his name continued to appear in the list of contesting candidates and was included in Electronic Voting Machine (EVM). The polling was held on April 23, 2009 in all 218 booths of the 25-Champua Assembly Constituency through EVM. The total votes recorded in the EVMs of 218 booths were 1,25,342 and postal ballots were 10. The appellant, Jitu Patnaik who contested as an independent candidate secured 27700 votes. The first respondent, Sanatan Mohakud, a candidate of Indian National Congress, secured 27555 votes. The deceased Akhila Kumar Mohanta got 550 votes. Since the appellant secured the highest number of votes, he was declared elected from 25-Champua Assembly Constituency.

6. The first respondent (hereinafter referred to as 'election petitioner') challenged the election of the appellant (hereinafter referred to as 'returned candidate') by filing an election petition before the Orissa High Court. In paragraphs 7(A) to 7(G), the election petitioner set out the case for declaring the election of the returned candidate to be void and declare the election petitioner duly elected to the Orissa State Legislative Assembly

the returned candidate to be void and declare the election petitioner duly elected to the Orissa State Legislative Assembly from 25-Champua Assembly Constituency. A

7. On service of the notice of the election petition, the returned candidate appeared and filed his written statement/ reply traversing the pleadings set out in the election petition. B  
The returned candidate also made an application under Order VI Rule 16 read with Section 151 and Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'CPC') read with Section 86(1) of the Representation of the People Act, 1951 (for short, '1951 Act') with prayer to strike out/reject the pleadings made in paragraphs 7(A), 7(B), 7(C), 7(D), 7(E), 7(F) and 7(G) of the election petition and reject the election petition. C

8. The High Court considered the above application made by the returned candidate and, after hearing the learned counsel for the election petitioner and the returned candidate, struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G) of the election petition by invoking its jurisdiction under Order VI, Rule 16(c) of CPC. However, the High Court ordered that the election petition shall proceed in respect of the remaining pleadings. In other words, the High Court permitted trial of the election petition on the pleadings set out in paragraphs 7(A) and 7(D). D E

9. The returned candidate is aggrieved by the above order to the extent trial of the election petition on the pleadings set out in paragraphs 7(A) and 7(D) has been ordered to be continued. According to the returned candidate, these two paragraphs do not set out the material facts to constitute cause of action under Section 100 (1)(d)(iii) and/or (iv) of the 1951 Act. F

10. It may be stated immediately that the election petitioner has not challenged the order of the High Court striking out pleadings in paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G). G

11. We have heard Mr. C.A. Sundaram, learned senior counsel for the appellant – returned candidate and Mr. Mukul H

A Rohatgi, learned senior counsel for respondent – 1 – the election petitioner.

12. We shall first take up the pleadings set out in paragraph 7(A) of the election petition which reads as follows :

B “7(A) That Akhila Kumar Mohanta, who had filed nomination as an independent candidate and was assigned symbol Television died on 13.04.2009. His death was duly notified by the Returning Officer. In view of his death his name/symbol should not have been displayed in  
C the E.V.M. on the date of polling.

D Both AKhila Kumar Mohanta as well as the Election petitioner were sharing a common ideology. Both were members of Indian National Congress. But since the Election petitioner was having more support base amongst the rank and file of the party he was nominated by the I.N.C. as a party nominee to contest the Election and Akhila Kumar Mohanta filed his nomination as an independent candidate. The Voters who recorded their vote in the EVM on the date of Polling, i.e., 23.04.09, in favour of Akhila Kumar Mohanta were basically supporter of Indian National Congress. In the event Akhila Kumar Mohanta would have withdrawn from contest or otherwise his name and symbol would not have displayed on the E.V.M. on account of his death, then the voters who have recorded their votes in his  
E favour would have recorded the same in favour of the election Petitioner in view of their party affiliation. As appears from the recording in Form-20, 550 (five hundred fifty) votes have been recorded in favour of the deceased contesting candidate Akhila Kumar Mohanta. Had his  
F name been not shown/displayed on the EVM, all these 550 (Five hundred fifty) votes would have been recorded in favour of the Election petitioner. On account of the above wrong committed by the Returning Officer the prospect of  
G wining of the Election petitioner has been adversely affected and the result of Election has been materially  
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affected.”

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13. The crux of the above averments is that one of the independent candidates Akhila Kumar Mohanta had died on April 13, 2009 after the expiry of withdrawal date; his death was duly notified to the returning officer but despite that his name was displayed on the EVM on the date of the polling (although he was already dead) and had his name not been shown/ displayed on the EVM, all the 550 votes polled in his favour would have been voted in favour of the election petitioner as the deceased candidate and the election petitioner shared the common ideology and both were members of the Indian National Congress and on account of wrong committed by the returning officer, the prospect of the election petitioner has been adversely affected. In light of the above pleadings, the question that falls for determination is: if an independent contesting candidate dies after the publication of list of contesting candidates, does the electoral law as contained in 1951 Act or the Rules framed thereunder cast any obligation upon the returning officer not to display the name of such deceased candidate in the EVM.

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14. In order to answer the above question, it is appropriate to survey the scheme of the 1951 Act in regard to the conduct of elections. Part V, Chapter I of the 1951 Act is relevant in this regard. Section 30 requires the Election Commission, as soon as the notification calling upon a constituency to elect a member or members is issued, to appoint (a) the last date for making nominations, (b) the date for the scrutiny of nominations, (c) the last date for the withdrawal of candidatures, (d) the date or dates on which a poll shall, if necessary, be taken and (e) the date before which the election is to be completed. Section 31 requires the returning officer, on issue of the notification under Section 30, to give public notice of the intended election inviting nominations of candidates for such election. Sections 32 and 33, inter alia, provide for nomination of candidates for election, presentation of nomination paper

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A and requirements for a valid nomination. Under the scheme of  
 these two sections, a candidate for election has to be validly  
 nominated. As per Section 36, after the nomination papers are  
 received, on the date fixed for the scrutiny, returning officer is  
 to hold scrutiny of nominations. Immediately after all the  
 B nomination papers have been scrutinized and decisions  
 accepting or rejecting the same have been recorded, the  
 returning officer is to prepare a list of validly nominated  
 candidates and affix it on his notice board. Section 37 enables  
 any of the validly nominated candidates to withdraw his  
 candidature on or before the last date for the withdrawal of  
 C candidature.

15. Section 38 makes the provision for publication of list  
 of contesting candidates. It reads as follows :

D “S. 38. - *Publication of list of contesting candidates.*—(1)  
 Immediately after the expiry of the period within which  
 candidatures may be withdrawn under sub- section (1) of  
 section 37, the returning officer shall prepare and publish  
 in such form and manner as may be prescribed a list of  
 E contesting candidates, that is to say, candidates who were  
 included in the list of validly nominated candidates and who  
 have not withdrawn their candidature within the said period.

(2) For the purpose of listing the names under sub- section  
 (1), the candidates shall be classified as follows, namely:-

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- (i) candidates of recognised political parties;
  - (ii) candidates of registered political parties other  
 than those mentioned in clause (i);
  - G (iii) other candidates.

(3) The categories mentioned in sub- section (2) shall be  
 arranged in the order specified therein and the names of  
 candidates in each category shall be arranged in  
 H alphabetical order and the addresses of the contesting

candidates as given in the nomination papers together with such other particulars as may be prescribed.” A

16. Section 38, thus, provides that immediately after the expiry of the period within which candidatures may be withdrawn, the returning officer is to prepare and publish a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period. The candidates who survive the date of the withdrawal of candidatures are described in Section 38 as ‘contesting candidates’. The list of contesting candidates prepared and published by the returning officer contains the names of the contesting candidates in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed. B  
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17. Part V, Chapter III of the 1951 Act deals with the general procedure at elections. Section 52, after amendment in 1996, deals with the situation of a death of a candidate of a recognized political party before poll. It reads as follows :

*“S.-52. - Death of a candidate of a recognized political party before the poll.—* (1) If a candidate set up by a recognised political party,- E

- (a) dies at any time after 11 A. M. on the last date for making nominations and his nomination is found valid on scrutiny under section 36; or F
- (b) whose nomination has been found valid on scrutiny under section 36 and who has not withdrawn his candidature under section 37, dies, and in either case, a report of his death is received at any time before the publication of the list of contesting candidates under section 38; or G
- (c) dies as a contesting candidate and a report of his death is received before the commencement of the H

A poll, the returning officer shall, upon being satisfied about the fact of the death of the candidate, by order, announce an adjournment of the poll to a date to be notified later and report the fact to the Election Commission and also to the appropriate authority:

Provided that no order for adjourning a poll should be made in a case referred to in clause (a) except after the scrutiny of all the nominations including the nomination of the deceased candidate.

(2) The Election Commission shall, on receipt of a report from the returning officer under sub-section (1), call upon the recognised political party, whose candidate has died; to nominate another candidate for the said poll within seven days of issue of such notice to such recognised political party and the provisions of sections 30 to 37 shall, so far as may be, apply in relation to such nomination as they would apply to other nominations: Provided that n person who has given a notice of withdrawal of h s candidature under sub-section (1) of section 37

efore the adjournment of the poll shall be ineligible for being nominated as a candidate for the election after such adjournment.

(3) Where a list of contesting candidates had been published under section 38 before the adjournment of the poll under sub-section (1), the returning officer shall again prepare and publish a fresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under sub-section (2).

*Explanation.-* For the purposes of this section, sections 33 and 38, "recognised political party", means a political party recognised by the Election Commission under the

Election Symbols (Reservation and Allotment) Order, 1968.” A

18. There is no provision other than Section 52 in the 1951 Act which provides for the consequences following the death of a candidate after the publication of list of contesting candidates under Section 38 and before poll. The Conduct of Elections Rules, 1961 (for short, ‘1961 Rules’) also do not provide for such contingency. Mr. Mukul Rohatgi, learned senior counsel for the election petitioner, however, heavily relied upon certain instructions contained in the Handbook for Returning Officers (at elections where electronic voting machines are used) issued by the Election Commission of India in 2009 (for short, ‘the Handbook’). He referred to paragraphs 4.14 and 4.15 which deal with commissioning of machines, paragraph 6.1 that deals with preparation of ballot unit and paragraphs 8.1 and 8.2 which provide for masking of candidates’ buttons which are not to be used. Mr. Mukul Rohatgi also referred to a decision of Allahabad High Court in *Madan Gopal v. Nek Ram Sharma*<sup>1</sup> underlying philosophy of law in the case of death of a contesting candidate before poll. Learned senior counsel submitted that the law contemplates living person, and not a dead person, to be a contesting candidate and, therefore, it was obligatory on the part of the returning officer to erase or mask the name of Akhila Kumar Mohanta—an independent candidate—who died after the publication of the list of the contesting candidates but before poll and whose death was notified to the returning officer well in advance. He submitted that the margin of difference of votes between the returned candidate and the election petitioner was only 145 votes and had 550 votes not been cast in favour of the deceased candidate, the result of the election would have been otherwise. B  
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19. We are unable to accept the submission of Mr. Mukul Rohatgi. In long line of cases beginning from 1952 this Court has stated time and again that right to contest election or to

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1. 25 ELR .

- A question the election by means of the election petition is neither common law nor fundamental right. Instead, it is a statutory right regulated by the statutory provisions contained in the 1951 Act. The 1951 Act is complete and self-contained code within which the rights claimed in relation to an election or election dispute must be found. It is not necessary to refer to all such decisions in this regard but reference to few of them, namely, *N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. and Others*<sup>2</sup>, *Jagan Nath v. Jaswant Singh and Others*<sup>3</sup>, *Jyoti Basu & others v. Debi Ghosal and Others*<sup>4</sup>, *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*<sup>5</sup> and *Chandra Kishore Jha v. Mahavir Prasad and Others*<sup>6</sup> shall suffice.

20. There is no doubt that only living persons can offer themselves or be offered as candidates for membership of Parliament or State Legislatures. However, once nomination has been filed by a candidate and on scrutiny his candidature is found proper and before the expiry of the period of the withdrawal, he has not withdrawn his candidature and his name is included in the list of validly nominated candidates prepared under Section 38 of the 1951 Act and Rule 11 of the 1961 Rules, if death of a contesting candidate as defined in Section 38 takes place, the consequences following the death of such contesting candidate have to be found from electoral law contained in 1951 Act or the rules framed thereunder. Section 52, after its substitution by Act 21 of 1996, takes cognizance of a death of a candidate of the recognized political party before poll and not the other two categories of the candidates classified in Section 38, namely (one) candidates of registered political parties other than the candidates of recognized political parties and (two) other candidates (which includes independent

2. AIR 1952 SC 64.

3. AIR 1954 SC 210.

4. (1982) 1 SCC 691.

5. 1987 (supp) SCC 93.

H 6. (1999) 8 SCC 266.

candidates). Section 52 in its original form in 1951 Act was as follows:- A

*"S.-52. Death of Candidate before poll.* – If a candidate who has been duly nominated under this Act dies after the date fixed for the scrutiny of nominations and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election: B C

Provided that no further nomination shall be necessary in the case of a candidate whose nomination was valid at the time of the countermanding of the poll : D

Provided further that no person who has under subsection (1) of Section 37 given a notice of withdrawal of his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding". E

21. According to the original provision contained in Section 52, the consequence of the death of a candidate duly nominated after the scrutiny of nomination form was countermand of the poll. However, this provision was substituted by Act 2 of 1992. On substitution by Act 2 of 1992, Section 52 read as follows: F

*"S. 52. Death of candidate before the poll.* - If a candidate, set up by a recognised political party,- G

(a) dies at any time after 11 A. M. on the last date for making nominations and his nomination is found valid on scrutiny under section 36; or

(b) whose nomination has been found valid on scrutiny H

A under section 36 and who has not withdrawn his candidature under section 37, dies, and in either case, a report of his death is received at any time before the publication of the list of contesting candidates under section 38; or

B (c) dies as a contesting candidate and a report of his death is received before the commencement of the poll, the returning officer shall, upon being satisfied about the fact of the death of the candidate, by order, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election:

D Provided that no order for countermanding a poll should be made in a case referred to in clause (a) except after the scrutiny of all the nominations including the nomination of the deceased candidate.

E Provided further that no further nomination shall be necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll:

F Provided also that no person who has given a notice of withdrawal of his candidature under sub-section (1) of Section 37 before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding.

G Explanation. – For the purposes of this section, 'recognised political party' means a political party recognized by the Election Commission under the Election Symbols (Reservation and Allotment) Order, 1968".

H 22. A significant departure was thus made from the original Section 52 concerning the death of a candidate before the poll. On death of a candidate set up by recognized political party, the consequence of countermand of the poll was provided in

three situations set out therein namely; (a) a candidate dies at any time after 11 a.m. on the last date for making nominations and his nomination is found valid on scrutiny under Section 36; or (b) a candidate whose nomination has been found valid on scrutiny under Section 36 and who has not withdrawn his candidature under Section 37, dies and (c) a candidate dies as contesting candidate before the commencement of the poll. Section 52 substituted by Act 2 of 1992 provided that in any of the above situations, the returning officer upon being satisfied about the death of the candidate shall countermand the poll.

23. Section 52 which was brought in the 1951 Act by Act 2 of 1992 was further substituted by Act 21 of 1996. The substituted Section 52 by Act 21 of 1996 has already been quoted above. The provision in 1951 Act now existing takes cognizance of the death of a candidate of recognized political party before poll only in three situations as were brought by Act 2 of 1992. The significant change brought in law by 1996 amendment is that the death of a candidate of a recognized political party before poll in three situations set out in clauses (a), (b) and (c) results in adjournment of the poll to a date to be notified later and not countermand of the poll. Proviso that follows sub-section (1) of Section 52 provides that no order for adjourning poll shall be made in a case if a candidate set up by a recognized political party dies at any time after 11.00 a.m. on the last date for making nomination and his nomination is found valid on scrutiny under Section 36 except after the scrutiny of all the nominations including the nomination of the deceased candidate. Sub-section (2) of Section 52 provides that the Election Commission shall on receipt of the report of the returning officer call upon the recognized political party to nominate another candidate in place of the deceased candidate for the said poll within seven days of issue of such notice. Sections 30 to 37 shall apply in relation to such nomination as far as applicable. According to sub-section (3) in a situation where list of contesting candidates had been published under Section 38 before the adjournment of the poll under sub-section (1), the returning officer shall again prepare

A and publish a fresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under sub-section (2). Section 52 takes care of the situation in case of death of a candidate of recognized political party before poll. However, the electoral law as enacted in 1951 Act does not contemplate cognizance of the death of an independent candidate after publication of list of contesting candidates in Section 38. Section 52 enjoins that if a candidate set up by recognized political party dies before the poll, the poll must be adjourned; it does not provide any obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate dies after the list of the contesting candidates as defined in Section 38 is published.

D 24. We shall now consider the instructions provided in the Handbook, particularly paragraphs 4.14, 4.15, 6.1, 8.1 and 8.2 of Chapter XII relied upon by Mr. Mukul Rohatgi, learned senior counsel for the election petitioner. Chapter XII of the Handbook deals with preparation for the poll, particularly commissioning of EVMs. Paragraphs 4.14, 4.15, 6.1, 8.1 and 8.2 read as follows:-

F "4.14. Before a voting machine is supplied to a Presiding Officer for use at a polling station, some preparations, as detailed below, are to be made in it at your level. These preparations have to be made in the presence of the candidates and/or their agents.

G 4.15 You should decide well in advance as to when the voting machines shall be prepared as aforesaid. This will depend on the number of machines to be prepared, the time required for the movement of polling parties with the voting machines to the polling stations, the time likely to be taken in the printing of ballot papers for use on the ballot units and such other factors. In any case, all required EVMs must be duly prepared (i.e. commissioned) one week before the date of poll in the Constituencies.

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6.1 Each ballot unit has to be prepared at the Returning Officer's level by: - A

(A) Inserting and fixing ballot paper in the space meant for the purpose;

(B) Masking the candidate's buttons which are not required to be used, depending on the number of contesting candidates; B

(C) Setting the slide switch at the appropriate position, i.e., 1, 2, 3 or 4, as the case may be, according to the number of such units which are to be used depending upon the number of contesting candidates and the sequence in which each unit is to be used, and C

(D) Sealing the unit (detailed step-by-step operations during sealing of EVM may be seen at Annexure XXX). D

8.1 On the ballot unit, only those candidate's buttons should be visible which are to be used by voters. In other words, the number of candidate's buttons, which should be visible, will be equal to the number of contesting candidates. For example, if the number of candidates is nine, the first nine from the top (i.e., 1 to 9) candidates' buttons should be visible and the remaining seven buttons (i.e., 10 to 16) should be masked. E

8.2 The masking of the unwanted buttons can be done by moving the white masking tabs on to the candidate's buttons, when the ballot unit is open like a book as explained in Para 7 above". F

25. We do not think paragraphs 4.14, 4.15 and 6.1 have much relevance. Paragraphs 4.14 and 4.15 basically provide that requisite EVMs must be prepared one week before the poll in the Constituencies. Each EVM has to be prepared at the returning officer's level in the manner provided in paragraph 6.1. The emphasis of the learned counsel was on paragraph 8.1 which states that on ballot unit only those candidates' buttons should be visible which are to be used by voters and remaining H

A buttons should be masked. A careful reading of paragraph 8.1 would show that the number of candidates' buttons which should be visible should be equal to the number of contesting candidates and the remaining buttons must be masked. The expression "contesting candidates" in paragraph 8.1 has to be given the same meaning as the contesting candidates defined in Section 38 of 1951 Act. No other meaning to the expression "contesting candidates" can be given. In other words, the number of candidates' buttons which should be visible on EVM should be equal to the number of candidates as published in the list of validly nominated candidates who have not withdrawn the candidature within the period prescribed and whose nominations are included in the list published under Section 38. In this view of the matter, there was no duty imposed on the returning officer to mask the name of the candidate at Sl. no. 9, Akhila Kumar Mohanta, who was an independent candidate and who died on April 13, 2009 after publication of list of validly nominated candidates being a contesting candidate as defined in Section 38. Moreover, the instructions in the Handbook are only guidelines. These instructions have no statutory force. In a recent decision of this Court in *Ramesh Rout vs. Rabindra Nath Rout*<sup>7</sup> one of us (R.M. Lodha, J.) speaking for the Bench observed as follows:

F "14. . . . . 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".

G 26. In view of the above legal position that the Handbook

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7. 2012 (1) SCC 762.

does not have statutory character and there being no non-compliance with the provisions of the Constitution or the 1951 Act or any rules framed or orders made under 1951 Act by the returning officer insofar as death of an independent candidate was concerned, the averments made in paragraph 7(A) of the election petition do not furnish any cause of action for declaring the election of the returned candidate to be void under Section 100(1)(d)(iv). The High Court seriously erred in holding otherwise and ordering trial of the election petition on the pleadings set out in paragraph 7(A).

27. The next question remains to be seen is whether the pleadings in paragraph 7(D) set out the material facts to constitute cause of action under Section 100 (1)(d)(iii) and/or (iv) of 1951 Act.

28. Paragraph 7(D) of the election petition read as under:

"7(D). The petitioner further gives a concise statement of material fact exposing a glaring instance of illegality deliberately committed by the counting personnels while recording the counting figure in Form-20 with respect to Booth No. 179, Urdu Madrasa Champua Alinagar Booth. The total number of voters as recorded in the Electoral Roll with respect to Booth No. 179 is 1109. Whereas in Form-17C, certified copy, deliberately this figure has been shown wrongly as 1091. On the date of polling on a plain perusal of Register of Voters maintained in Form-17A, it will be abundantly clear that the total number of voters came to vote and signed 17-A Register is 1091 whereas in Form-17C certified copy, it has been deliberately shown as 772 making a deliberate suppression of 319 votes. According to the information received by the Election petitioner from his counting agents in Booth Number 179, the Election petitioner has received 462 (Four hundred sixty two) votes. The said 462 votes are to be added to the total vote of the petitioner as stated in preceeding paragraph. Thus, the petitioner has received in total  $27410+73+462+02$  (postal Ballots) = 27,947 and the first respondent having received

A \* = 27700, the Election petitioner has received 247 (Two hundred forty seven) more votes than the First respondent and is entitled to be declared elected as M.L.A. from "25-CHAMPUA" Assembly Constituency to Orissa State Legislative Assembly".

B 29. Mr. Mukul Rohatgi, learned senior counsel for the election petitioner submitted that the above pleadings are in two parts. The first part relates to suppression of 319 votes. This part begins with the start of paragraph 7(D) and ends with '.....suppression of 319 votes'. The second part relates to  
 C addition of 462 votes which is remaining part of paragraph 7(D). He would submit that all material facts concerning deliberate suppression of 319 votes have been pleaded in paragraph 7(D) and these facts constitute cause of action for declaring the election of the returned candidate to be void.

D 30. Order VI Rule 2 of CPC, to the extent it is relevant, reads as under :

E "O. VI Rule 2. Pleading to state material facts and not evidence.— (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) xxx xxx xxx

F (3) xxx xxx xxx"

31. Section 83(1)(a) of the 1951 Act is as follows :

G "S. 83. Contents of petition.—(1) An election petition—  
 (a) shall contain a concise statement of the material facts on which the petitioner relies;"

H 32. A bare perusal of the above provisions would show that the first part of Order VI Rule 2, CPC is similar to clause 1(a) of Section 83 of the 1951 Act. It is imperative for an election petition to contain a concise statement of the material facts on

which the election petitioner relies. What are material facts? A  
All basic and primary facts which must be proved at the trial  
by a party to establish the existence of cause of action or  
defence are material facts. The bare allegations are never  
treated as material facts. The material facts are such facts  
which afford a basis for the allegations made in the election B  
petition. The meaning of 'material facts' has been explained  
by this Court on more than one occasion. Without multiplying  
the authorities, reference to one of the later decisions of this  
Court in *Virender Nath Gautam v. Satpal Singh and others*<sup>8</sup>  
shall suffice. C

33. In *Virender Nath Gautam*<sup>8</sup>, this Court referred to the  
leading case of *Philipps v. Philipps and Others*<sup>9</sup> and the  
subsequent decision in *Bruce v. Odhams Press Limited*<sup>10</sup> that  
referred to *Philipps*<sup>9</sup> and observed in paragraphs 34 and 35  
(Pg. 629) of the Report as follows: D

"34. A distinction between "material facts" and "particulars",  
however, must not be overlooked. "Material facts" are  
primary or basic facts which must be pleaded by the  
plaintiff or by the defendant in support of the case set up  
by him either to prove his cause of action or defence. E  
"Particulars", on the other hand, are details in support of  
material facts pleaded by the party. They amplify, refine  
and embellish material facts by giving distinctive touch to  
the basic contours of a picture already drawn so as to  
make it full, more clear and more informative. "Particulars"  
thus ensure conduct of fair trial and would not take the  
opposite party by surprise. F

35. All "material facts" must be pleaded by the party in  
support of the case set up by him. Since the object and purpose  
is to enable the opposite party to know the case he has to meet  
with, in the absence of pleading, a party cannot be allowed to G

8. 2007 (3) SCC 617.

9. (1878) 4 Q.B.D. 127.

10. (1936) 1 K.B. 697. H

A lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.”

34. Whether the averments in the election petition constitute material facts or not would depend upon facts of each case. As stated by this Court in *Virender Nath Gautam*<sup>B</sup>, no rule of universal application can be applied in finding out whether the statements of fact made in the election petition amount to material facts or not. It is, therefore, necessary to consider the pleadings with regard to suppression of 319 votes in paragraph 7(D) of the election petition.

35. A close analysis of first part of paragraph 7(D) of the election petition would show that the statements comprise of the following facts :

- D • Illegality deliberately committed by the counting personnels while recording the counting figure in Form-20 with respect to Booth No. 179.
- E • The total number of voters as recorded in the electoral roll with respect to Booth No. 179 is 1109.
- F • Whereas in Form-17C, certified copy, deliberately this figure has been shown wrongly as 1091.
- F • On the date of polling, on a plain perusal of register of voters maintained in Form-17A, it will be abundantly clear that the total number of voters came to vote and signed 17-A register is 1091; whereas in Form-17C, it has been deliberately shown as 772 making a deliberate suppression of 319 votes.

G 36. Before we discuss the above pleadings further, it may be stated immediately that register of voters in Form-17A is not available for inspection. Rule 93 of the 1961 Rules provides for the production and inspection of election papers. Clause (dd) of Rule 93(1) makes a provision that the packets

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containing register of voters in Form 17A, while in the custody of the district election officer or the returning officer, as the case may be, shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court. A

37. We now revert back to the pleadings set out in paragraph 7(D) as analysed above. There is no averment that the election petitioner or any of his polling agents had perused the register of voters maintained in Form 17A. The basis of the knowledge that the register of voters maintained in Form 17A records that 1091 voters came to vote is not disclosed at all. Moreover, there is no pleading that 1091 voters who came to vote at Booth No. 179 in fact voted. There is no merit in the contention of Mr. Mukul Rohatgi that the facts stated in paragraph 7(D) with regard to Form 17A shall be established at the trial after Form 17A is summoned by the Court. We are afraid such fanciful imagination of proof at the trial cannot be a substitute of the pleading of material facts about the total number of voters who came to vote and in fact voted at Booth No. 179. B  
C  
D

38. The averment that in Form-17C, certified copy, it has been deliberately shown as 772 making a deliberate suppression of 319 votes hardly improves the pleading in the election petition. There is no averment that the election petitioner or his agents challenged part II of Form-17C before authorities. At least, there are no facts pleaded concerning that. There is no pleading that there was any challenge by the election petitioner or his agents in respect of the counting figure in Form-20. The only pleading is that the illegality has been deliberately committed by the counting personnels while recording the counting figure in Form-20 with respect to Booth No. 179. There is, thus, no disclosure of material facts in respect of the challenge to the correctness of Form-20 and Form-17C. E  
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39. The pleading of material facts with regard to suppression of 319 votes in paragraph 7(D) is also incomplete as it has not been disclosed who suppressed 319 votes; who H

A was the counting agent present on behalf of the election petitioner at the time of counting; how 319 votes were suppressed and why recounting was not demanded. Moreover, there is no express pleading as to how the result of the election has been materially affected by less counting of 319 votes.

B 40. In *Samant N. Balkrishna and Another v. George Fernandez and Others*<sup>11</sup> while dealing with the requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure, this Court, inter alia, expounded the legal position that omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad.

C 41. The other part of paragraph 7(D) relating to 462 votes is based on the preceding paragraph. The preceding paragraph i.e., 7(C) has been already struck out by the High Court. Therefore, the pleadings in paragraph 7(D) in respect of 462 votes do not survive as it is.

D 42. In view of the above, we have no hesitation in holding that the averments made in paragraph 7(D) do not set out all the material facts and do not afford an adequate basis for the allegations made therein. The allegations in paragraph 7(D) for the reasons noted above do not constitute cause of action for declaring election of the returned candidate to be void.

E 43. The High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G). The remaining two paragraphs 7(A) and 7(D), as noted above, do not disclose any cause of action and are liable to be struck out. After striking out paragraphs 7(A) and 7(D), we find that nothing remains in the election petition for trial and, therefore, election petition is liable to be rejected in its entirety.

F 44. In the circumstances, the appeal has to be allowed and is allowed. We do so without any order as to costs.

G R.P.

Appeal allowed.

H <sup>11</sup>. 1969 (3) SCC 238.