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THIRU JOHN & ANR.

v.

RETURNING OFFICER & ORS.

April 12, 1977

[V. R. KRISHNA IYER, R. S. SARKARIA AND JASWANT SINGH, JJ.]

B

Constitution of India, Article 84(*b*)—*Appellant who was underaged to contest Rajya Sabha elections of* 1974 *gets his age in the electoral Roll alone altered but not in other documents from* 14-5-1946 *to* 14-5-1943 *by producing an extract of the Baptism Register—Whether the result of the election materially affected on the improper acceptance of nomination—Representation of the People Act* (*Act* 43), 1951, Sections 83, 97, 100 and 101.

C

Proof of disqualifications in an election petition—Onus lies on the petitioner initially.

Evidence Act (*Act I*), 1872—*Sections* 17, 18, 19, 20 *and* 21—*Admissions made in several documents ante litem motam—Burden of proof shifts on the maker to show that they are erroneous.*

"Continuing candidate"—Requisites to be a continuing candidate—Whether non-allotment of a "basket" or "parcel" under Rule 74 *automatically excludes him—Conduct of Election Rules,* 1961—*Rules* 71(1), 74 *and* 75(3), 79, 80 *and* 81(2).

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In the biennial elections of 1974 for filling six vacancies to the Rajya Sabha from the State of Tamil Nadu, there were eight contestants, including both the appellants and one R. Mohanarangam, the petitioner in Election Petition No. 1 of 1974. The requisite quota to secure the election of a candidate was fixed at $\frac{22400}{6+1}+1=3201$ and the appellant John secured 3700 votes. While the

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appellant Subrahmanyam secured 300 votes, Mohanarangam failed to secure any. The rest of them secured more than the quota, thus leaving "surplus votes" for transfer within the meaning of Rule 71 (6) of the Conduct of Election Rules.

In the election petitions filed by Mohanarangam and Subrahmanyam, the election of Sri John was assailed on the ground that on March 12, 1974, the date of the scrutiny of the nominations, he was less than 30 years of age and as such he did not possess the qualifications as to age laid down under Art. 84(b)

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of the Constitution that the improper acceptance of John's nomination has materially affected the election. The petitioners prayed that the election of Sri John be declared void and set aside under s. 100 of the Representation of Peoples Act, 1951. Each of the petioners claimed that in the event of Sri John's election being set aside, he be declared elected under s. 101 of the Act. A recrimination petition No. 1/74 under s. 97 read with s. 83 of the Representation of Peoples Act was also filed by the appellant Subramanyam, opposing Mohanarangam's relief for the declaration under s. 101 of the Act, alleging that since the petitioner Mohanarangam in E.P. 1/74 had not secured any vote,

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he, in the event of the election of Sri John being set aside, was not entitled to be declared elected in the place of John.

The trial Judge of the High Court held that on the date of the scrutiny of nominations Sri John being less than 30 years of age was not qualified under Art. 84(b) of the Constitution to contest the election to the Rajya Sabha and accepting the election petition *pro tanto* set aside John's election. The trial Judge, however, declined to grant further declaration under s. 101 in favour of

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either of the election petitioner.

Dismissing the appeals, the Court,

HELD : (1) From the evidence on record it stood clearly established that on the date of the scrutiny of nominations Sri John was less than 30 years of age

and in view of Art. 84(b) of the Constitution he was not competent to contest the election for the Rajya Sabha. His nomination was, therefore, improperly accepted by the Returning Officer, and this improper acceptance has, in so far as it concerned the returned candidate, Sri John materially affected the result of the election. [547 F-G] A

(2) The onus of proving that on the date fixed for the scrutiny of nominations, a contestant was less than 30 years of age was on the election petitioners. In the instant case, the petitioners had amply discharged this onus by bringing on record over-whelming documentary evidence of a cogent and convincing character. This documentary evidence includes no less than a dozen previous admissions and declarations made between March 1964 and July 1973 by Sri John himself about his age, to the effect that he was born in 1946 and that his date of birth was 14.5.1946. Apart from the evidence of these prior admissions the election petitioners had brought other documentary evidence viz., the school record purportedly signed by John's guardian, Secondary School Leaving Certificate and various other documents of the educational institutions, Marriage Register, Bar Council Record and Church records etc. pointing to the conclusion that Sri John was born on 14.5.1946 and not on 14-5-1943. [542 D-H, 543 A-B- F] B C

(3) It is well-settled that a party's admission as defined in sections 17 to 20 fulfilling the requirements of section 21, Evidence Act is substantive evidence *proprio vigore*. An admission, if clearly and unequivocally made is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so" and until the presumption was rebutted the fact admitted must be taken to be established. In the instant case, there are a number of clear admissions in prior declarations precisely and deliberately made in solemn documents by Shri John. These admissions were made *ante litem motam* during the decade preceding the election in question. These admissions were entitled to great weight. They had shifted the burden on the appellant (Shri John) to show that they were incorrect. The appellant had miserably failed to show that these admissions were incorrect. [543 C-E] D

(4) Under Rule 71(1) of the Conduct of Election Rules, 1961, "Continuing candidate" means any candidate not elected and not excluded from the poll at any given time. Two elements must, therefore, be satisfied before a candidate can be said to be a Continuing candidate. He should be a 'candidate not elected" and further he must not be excluded from the poll at any given time. In the instant case Sri Mohanarangam fulfils both these conditions. [550 B, 552 C] E

(5) The contention that an essential prerequisite to the continuance of a candidate is the allotment of a "basket" or "parcel" under Rule 74 and only such candidate is entitled to the allotment of a basket who at the end of the count gets some vote to his credit and opens his account, and since Mohanarangam did not get any vote whatever he stood automatically excluded is not correct. There is nothing in Rule 74 or any other Rule which, at an election to fill more than one seat, requires or empowers the Returning Officer to exclude a candidate from the poll merely on the ground that in the counting of the first preferences, he has not received any valid vote. [552 E-H] F

(6) Sub-Rule (3) of Rule 75 which requires the Returning Officer to exclude from the poll a candidate whose score is the lowest—governs the counting of votes where only one seat is to be filled and at the end of any count, no candidate can be declared elected. Sub-Rule (3) of Rule 75 has no application to the instant case. [552 G] G

(7) Rule 80 can have no application because it comes into operation at a stage "after all surpluses have been transferred". That stage never arrived in the instant case because in the first counting itself all the six seats were filled up, six candidates (including Shri John) having received the requisite quota of first preference votes. Nor did the stage for applying Rule 81 arise, because at the end of the first count, no vacancy remained unfilled. In the instant case, Shri Mohanarangam did not get automatically excluded. Both he and Sri Subrahmanyam were "continuing candidates". Sri Subrahmanyam could not be declared elected as he had not obtained the required quota of 3201 votes. [522 H; 553 A] H

(8) The *ratio decidendi* of *Viswanatha* v. *Konappa* is applicable only where, (a) there are two contesting candidates and one of them is disqualified; (b) and the election is on the basis of single non-transferable vote. In the instant case, the election in question was not held by mode of single non-transferable vote, according to which a simple majority of votes secured ensures the success of a candidate, but by proportional representation with single transferable vote under which system the success of a candidate *normally* depends on his securing the requisite quota. Shri Subrahmanyam was not the sole surviving continuing candidate left in the field, after exclusion of the disqualified candidate, Shri John. [554 G-H, 555 A]

Viswanatha v. *Konappa* AIR 1969 S. C. 604, distinguished.

(9) All the votes that had polled in favour of Shri John who has been found by the court to be statutorily disqualified for election cannot be regarded as thrown away and in consequence, the appellant Shri Subrahmanyam who secured 300 votes as against none obtained by Shri Mohanarangam cannot be declared elected. Shri Subrahmanyam was neither the *sole* continuing candidate nor had he secured the requisite quota of votes. It is nobody's case that the electors who voted for Shri John had at the time of election knowledge or notice of the statutory disqualification of this candidate. On the contrary, they must have been under the impression that Shri John was a candidate whose nomination had been validly accepted by the Returning Officer. Had the electors notice of Shri John's disqualification, how many of them would have voted for him and how many for the other continuing candidates including Sarvashri Subrahmanyam and Mohanarangam and in what preferential order, remains a question in the realm of speculation and unpredictability. [553 B-E]

R. M. Seshadri v. *G. V. Pai* AIR 1969 SC 692 @ p. 701, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1895-1896 and 1907 of 1974.

(From the Judgment and Decree dated the 14-10-1974 of the Madras High Court in Election Petitions Nos. 1 and 2 of 1974).

R. N. Choudhary and Mrs. V. D. Khanna, for the appellant in CAs 1896/74.

Y. S. Chitley, T. N. S. Srinivasavaradacharya & G. Ramaswamy, C. Lakshminarain, S.R.L. Narain and Vineet Kumar, for the appellant in CA 1907/74.

T. N. C. Srinivasavaradacharya, S. C. Lakshminarain, S. R. L. Narayan, M. S. Narasimahan, for respondent No. 10 in CA 1895, Resp. No. 6 in CA 1896 and respondent No. 7 in CA 1907.

A. V. Rangam and *Miss A. Subshashini*, for respondent No. 1 in all the appeals and for respondent No. 2 in 1907.

J. M. Khanna, for respondent No. 8 in CAs. 1895-1896.

The Judgment of the Court was delivered by

SARKARIA, J. The basic facts giving rise to these appeals being common, the same will be disposed of under one judgment.

Notice calling for nominations to be filed before 3 P.M. on 11-3-1974, for filling six vacancies to the Rajya Sabha from the State of Tamil Nadu in the biennial elections was issued on March 4, 1974. Eleven candidates filed their nominations. On scrutiny which was held on March 12, 1974, all those nominations were found to be valid. On

14-3-1974, which was the last date fixed for withdrawal, three candidates withdrew their nominations leaving eight in the field. The poll was held on 21-3-1974. Counting of votes took place on the same date. The result was published, according to which, the contesting candidates secured the votes noted against their names as follows :

1. Shri Khadar Sha	..	3500
2. Shri Khaja Mohideen	..	3700
3. Shri V. Subrahmanyam	..	300
4. Shri C. D. Natarajan	..	3500
5. Shri R. Mohanarangam	..	Nil
6 .Shri S. Ranaganathan	..	4100
7. G. Lakshmanan	..	3600
8. D. C. John @ Valampuri John	..	3700

The requisite quota to secure the election of a candidate was fixed at

$$\frac{22,400}{6+1}+1=3201$$

and candidates mentioned at serial Nos. 1, 2, 4, 6, 7 and 8 were declared elected.

Two Election Petitions were filed by the unsuccessful candidates. Election Petition 1 of 1974 was filed by Shri R. Mohan Rangam and Election Petition 2 of 1974 by Shri V. Subrahmanyam. The petitioners prayed that the election of Shri D. C. John be declared void and set aside under s. 100 of the Representation of the People Act, 1951. Each of the petitioners claimed that in the event of Shri John's election being set aside, he be declared elected under s. 101 of the Act. In addition to the Returning Officer, the Electoral Registration Officer and the Chief Election Commissioner, all the seven contestants were impleaded as respondents.

The election of Shri John was assailed on the ground that on March 9, 1974, the date of the scrutiny of his nomination, he was less than 30 years' of age and as such, did not possess the qualification as to age laid down in Article 84(b) of the Constitution. On these premises it was pleaded that the nomination of Shri John was improperly accepted and in consequence thereof, the result of the election has been materially affected.

A recriminatory petition No. 1/74 under s. 97 read with s. 83 of the Act was also filed by Shri V. Subrahmanyam petitioner in E.P. 2/74, opposing Mohana Rangam's relief for declaration under s. 101. The recriminator alleged that since the petitioner in E.P. 1/74 had not secured any vote, he. in the event of the election of Shri John being set aside, was entitled to be declared elected in the place of Shri John.

The learned trial Judge of the High Court tried all the three petitions together and decided them by a common judgment.

A The trial Court held that on the date of the scrutiny of his nomination, Shri John being less than 30 years of age, was not qualified under Art. 84(b) of the Constitution, to contest the election to the Rajya Sabha. On this short ground his election was set aside and the Election Petitions were accepted *pro tanto*. The trial Court, however, declined to grant the further declaration under s. 101 in favour of either of the election-petitioners.

B Aggrieved by that judgment, Shri John, has filed in this Court Civil Appeals 1895-1896 of 1974, and Shri V. Subrahmanyam Civil Appeal 1907 of 1974.

The first question that falls to be determined in these appeals is : Whether Shri John was born on May 14, 1946, as has been found by the Court below, or on May 14, 1943 as contended by him?

C Mr. Chowdhary appearing for the appellant (Shri John) contends that the burden of proving that Shri John, was at the material date below 30 years of age was on the election-petitioner and that the latter had failed to discharge such burden. Further grievance of Shri Chowdhary is that the High Court had wrongly rejected the oral and documentary evidence produced by Shri John.

D We find these contentions wholly devoid of merit.

While it is true that the onus of proving that on the date fixed for the scrutiny of nominations, Shri John was less than 30 years of age, was on the election-petitioners, they had amply discharged this onus by bringing on record overwhelming documentary evidence of a cogent and convincing character. This documentary evidence includes no less E than a dozen previous admissions and declarations made by Shri John himself about his age, between March 1964 and July 1973. These documents containing such declarations constituting Shri John's admissions are :

(i) Ex.P.7—Application for Pre-University Examination.

F (ii) Ex.P-9—Application for B.A. Examination.

(iii) Ex. P-14—Application for appearing in University Examination.

(iv) Ex.P-15—Application for the first B.G.L. Examination.

(v) Ex.P-17—Application for admission to B.G.L. Exa- G mination.

(vi) Ex.P-18—Application for second B.G.L. Examination April 1972.

(vii) Ex.P-19—Application for second BGL Examination, October 1972.

H (viii) Ex.P-21—Application for admission into Law College.

(iv) Ex.-22—Application for B.L. Degree Examination.

(x) Ex.P-23(a), (b) & (c)—Applications dated 23-7-1973 for enrolment as Advocate submitted to the Bar Council. A

(xi) Ex.P-27—Voters Card containing declaration of his age as 28 years signed by Shri John.

(xii) Ex.P-87—a Book written by Shri John, containing a passage on its page 18 suggesting the inference that Shri John was born in 1946. B

All these documents aforesaid contain admissions made by Shri John that he was born in 1946. In several of these documents he declared 14-5-1946 as his date of birth.

It is well settled that a party's admission as defined in Secs. 17 to 20, fulfilling the requirements of Sec. 21, Evidence Act, is substantive evidence *proprio vigore*. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so" and until the presumption was rebutted the fact admitted must be taken to be established. C D

The above principle will apply with greater force in the instant case. Here, there are a number of clear admissions in prior declarations precisely and deliberately made in solemn documents by Shri John. These admissions were made *ante litem motam* during the decade preceding the election in question. These admissions were entitled to great weight. They had shifted the burden on the appellant (Shri John) to show that they were incorrect. The appellant had miserably failed to show that these admissions were incorrect. E

Apart from the evidence of these prior admissions the election-petitioners had brought other documentary evidence, also, pointing to the conclusion that Shri John was born on 14-5-1946 and not on 14-5-1943. F

This evidence consisted of —

1. (a) Exhibit P-1 an entry in the records of St. Xavier's College School, wherein the date of Shri John's birth is recorded as 14-5-1946;

   (b) Ex.P.3 which purports to have been signed by the guardian of Shri John, declaring his age as 14-5-1946; G

   (c) Ex.P-2, the E.Ss.L.C. signed by Rama Prabhu, the Secretary to the Commission for Government Examinations. This Certificate was issued under the authority of law. H

2. Ex.P-4—Secondary School Leaving Certificate wherein Shri John's date of birth is entered as 14-5-1946.

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3. Ex.P-50, copy of the Fort St. George Gazette, dated 19-2-1964 showing Shri John's date of birth as 14-5-1946.

4. (a) Ex.P-5 the transfer certificate issued by the St. Xavier's High School.

(b) Ex.P-10 transfer certificate issued by the Principal of the College.

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(c) Ex.P-13 entry in the admission register of the College for joining the first year B.G.L.

(d) Ex.P-16—entry in the admission register of the College, for admission to second year B.G.L. Class.

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(e) Ex. P-10—entry in admission register of the College,

5. Bar Council Records relating to Ex. P-23.

6. Marriage Register, Ex.P-29, containing in the column captioned "Age" as against the name of Shri John, the entry "26 years", and the date of his baptism as 19-10-1946.

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7. Ex.P.30, Periodical report from the Churches regarding marriages solemnised therein, required under the Indian Christian Marriage Act 1872, showing that Shri John's marriage was solemnised in St. Francis Xavier's Church, Madras, on 6-4-1972 by Fr. G. K. Swami, and that on the date of this marriage he was 26 years of age.

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8. Exhibits P11, P-11(a), P-12 and P-12(a) records of T.E.L.C. Kabis High School showing Shri John's date of birth as 14-6-1946.

9. Ex.P-28-Book—Varalatril Kalaignar Written by Shri John containing biographical sketch. Therein, his date of birth is mentioned as 14-10-1946.

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The petitioner had also examined witnesses who testified with regard to these documents and the facts appearing therein. The learned trial Judge has carefully discussed and evaluated this documentary and oral evidence. No material error or illegality on the part of the learned Judge in appreciating this evidence has been pointed out.

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The learned Judge found that the entries, Ex.P.29, in the Marriage Register are of great evidentiary value. Mr. Chaudhury assails this finding. According to him, no legal provision or rule of practice requires that the date of Baptism should be entered in such Register. Secondly, it is urged that the date of baptism given therein is 19-10-46, which stands falsified by the evidence of Rev. Fr. Rosario, the Parish Priest who had baptised Shri John about 7 days after his birth in 1943.

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It is further argued that the best evidence as to Shri John's date of birth could be that of the entry in the Public Birth Register maintained under authority of law and that the election-petitioner on whom the onus lay, did not produce that evidence.

We find no substance in these contentions. In the witness box both Shri John (RW. 1) and his elder brother (RW 3) admitted their respective signatures on this entry (Ex.P. 29) in the Marriage Register. They however, contended that the information about the date of baptism was not supplied by them to the Priest who solemnised the marriage and made this entry. The elder brother (RW. 3) however, admitted that they had signed the Register, notwithstanding the fact that the age of Shri John was mentioned therein as 26 years. Both the brothers however, admitted that Shri John's marriage was solemnised in St. Francis Xavier Church on 6-4-1972. In view of the admissions of RWs 1 and 3, the High Court was right in holding that Ex.P.29 stood proved, and the entries therein were entitled to great weight.

As regards the Birth Register of 1946, the election-petitioner made repeated attempts to get the same summoned and produced in Court. The process issued by the Court was returned with the report that the Register of 1946 was untraceable. Thereafter, a direction was issued by the Court to trace and produce it. A search for this record was made by the record remained untraceable. The Election-Petitioner contended before the High Court that Shri John had by the exercise of his influence, prevented the production of this record. The High Court found this charge to be incorrect. Nevertheless, it held that the Public Birth Register of 1946 had been lost long ago. This being the case, the non-production of the Birth Register of 1946, must be held to be a neutral circumstance.

The discrepancy pointed out by Shri Choudhury as to the date of the baptism of Shri John, takes us to the evidence produced by him. Shri John brought on the record three documents, R1, R2 and R4. R-1 is an extract from the Baptism Register kept by the Ovari-Tuticorin Diocese.

The document R-1 according to the High Court was inducted in a questionable manner, without even an application for it. This was issued by the Parish Priest, Peter Royan (RW 5), and purports to be a copy of an entry in the Baptism Register, which according to the admission wrung out from RW 5, had itself been re-written and copied from the original. The Parish Priest conceded that he had burnt the original because it was in a very bad condition. The High Court found and we think rightly—that this explanation of non-production of the original was thoroughly unsatisfactory, and unbecoming of any Christian, more so, one connected with Church affairs, that by this 'unholy act' of burning the register which was a violation of Canon 777, Paragraph 676, the witness (RW 5) had done "great disservice to Christianity and greater disservice to the cause of truth".

Since R-1 was only a copy of a copy (R 4), the preparation of which was itself suspect and the explanation about the non-production of the original was palpably unbelievable, these documents were rightly ruled out of evidence.

R.W. 2, Rev. Fr. Rosario stated that he positively remembered that in the year 1943 when he was the Parish Priest, he had baptised Shri John. The witness was an old man. He had no Baptism Regis-

A ter or any other contemporaneous record to refresh his memory with regard to an event which took place more than a quarter of a century back. He was deposing to a fact in issue merely from memory. Human memory being fallible, it was hazardous to accept his *ipse dixit*. The oral evidence of the witness could not be preferred to the entry in the Marriage Register, Ex. P 29, showing that Shri John on the date of his marriage, which took place in 1972, was 26 year old and had B been baptised in 1946. It is true that there is a slight discrepancy between the date of his baptism as entered in the Marriage Register and the date of his birth as admitted by him in the various applications he submitted for admission to various classes in College or for enrolment as an Advocate. But there is no discrepancy with regard to the *year* of birth as well as baptism being 1946. In Ex.P. 29, the date of his baptism is entered as 19-10-46. The biodata appearing in the C book Ex.P.28, which, according to the publisher, RW-4, was entered by him on the basis of information derived from Shri John, gives his date of birth as 14-10-1946, while all the numerous public records, the declarations constituting the prior admissions of Shri John, produced in evidence by the Election-Petitioner, consistently show Shri John's date of birth as 14-5-1946.

D We have been taken through the oral evidence rendered by Shri John (RW 1) and his elder brother (RW 3). Their interested testimony makes interesting reading.

Shri John was asked in cross-examination to state how he came to contest the Rajya Sabha elections? He replied that, as usual, in his village Ovari, he was having a discussion with the members of his community to settle a dispute between owners of catamaran and mecha- E nised boats. A suggestion was made to him that he should contest an election to Parliament as a representative of the fishermen community. Shri John told them that "..an election to the Council of States is fast approaching and the only thing is I cannot enter the Rajya Sabha, because I have not completed the age of 30 years."

Shri John was further questioned by the Counsel :

F "Then what happened ?"

He replied :

> "My eldest brother was one among those who were assembled there. He told me along with another elderly gentleman, whose name I am not able to recollect now :

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> "What non-sense are you talking ? You have completed 30 years positively." Moreover, they told me in addition : 'We have to refer to the Registers kept in the Church' ".

With this idea put into his head, the witness next morning along with his brother visited the village Church and met Rev. Fr. Peter H (R.W. 5) and asked for the Baptism Register relating to the witness. Rev. Fr. Peter took out the Register, Ex. R-4, and turned the leaves, and to the surprise of the witness, he saw his date of birth noted therein as 14-5-1943. Thereafter, Shri John approached the Chief

Electoral Officer, Madras, and made an application (Ex.P.23) on 26-2-1974 for correction and change of the date of his birth, as noted in the Electoral Roll, from '14-5-1946' to '14-5-1943'. His application was allowed and the entry in the Electoral Roll as to age was amended accordingly on the 6th or 7th March 1974. On further cross-examination, Shri John frankly conceded that before seeing the Baptism Register in the second week of February 1974, he had all along been under the genuine impression that he was born on 14-5-1946. It was only on seeing the Register that he came to believe that he was born in 1943.

It is to be remembered that this Baptism Register (R. 4) is the same, which was found by the High Court to be a suspicious record, prepared in suspicious circumstances, wholly unworthy of reliance.

RW. 3, the elder brother of Shri John also stated that when the elders of the village asked him to contest the election, he replied that he had not attained the proper age, *i.e.* "31 years" which was necessary to contest the election. Immediately, the witness intervened : "What non-sense you are talking ? You have attained the proper age ..... you must go and refer in the Church". About their going to Priest Rev. Fr. Peter Royan at the village Church and scrutinising the Baptism Register his version is more or less the same as of RW-1. This witness, as already noticed, admitted that at the time of his brother, Shri John's marriage, he had also signed the entry, Ex.P-29, in the Marriage Register on 6-4-1972. He further conceded that in this entry Ex. P-29, the age of the bridegroom, Shri John, was mentioned as 26 years. He further conceded that in Ex. P. 29, the date of Shri John's baptism is noted as 19-10-1946. But the witness, wanted the Court to have it believed that he had signed this entry without looking into it. This version was too incredible to be swallowed without demur. The conclusion was inescapable that on 6-4-1972, Shri J. D. Mohan, RW-3, the eldest brother of Shri John, whose parents were dead, knew that the particulars of this entry showing his age to be 26 years on 6-4-1972, and the date of his baptism in 1946, were true. That is why he and his brother John, without raising any objection, affixed their signatures thereto in token of its correctness.

We need not dilate on the question of Shri John's age further. All aspects of this issue have been discussed threadbare by the High Court. Suffice it to say, that from the evidence on record it stood clearly established that on the date of the scrutiny of the nominations, Shri John was less than 30 years of age and in view of Article 84(b) of the Constitution he was not competent to contest the election for the Rajya Sabha. His nomination was therefore improperly accepted by the Returning Officer, and this improper acceptance has, in so far as it concerned the returned candidate, Shri John, materially affected the result of the election.

Shri John's election was thus rightly set aside by the High Court.

Now we come to the second question, whether Shri V. Subramanyan, appellant in C.A. 1907 of 1974, is entitled to be declared elected in lieu of Shri John whose election has been set aside ?

A Shri Ramaswami, learned Counsel for this appellant, has advanced alternative arguments. It is submitted that since Shri Mohana Rangam did not secure any vote at all, he had ceased to be a continuing candidate and stood automatically excluded, leaving only Shri Subramanyam, sole continuing candidate in the field. It is emphasised that Shri Rangam has not filed any recriminatory petition. In this situation, it is maintained, Shri Subramanyam would be deemed to have been B elected, although he had secured only 300 votes. Reference in this connection has been made to Rule 81(2) of the Conduct of Election Rules, 1961.

The alternative argument of Shri Ramaswami is that since Shri John was not a qualified candidate, the votes cast in his favour have to be treated as thrown away, and even if both Shri Mohan Rangam C and Shri Subramanyam are assumed to be continuing candidates, the surplus votes cast in favour of the five successful candidates had to be transferred and redistributed in favour of these continuing candidates. It is urged that for this purpose the Court should send for and scrutinise the ballot papers for further counting. Shri Ramaswami further pointed out that the observations of this Court in *Viswanatha Reddy* v. *Konappa Rudrappa Nadganda*(1) to the effect, that the votes cast D in favour of the disqualified candidate are to be treated as thrown away, are equally applicable to the elections for filling vacant seats in the Council of States, notwithstanding the fact that these elections are held according to the system of proportional representation with a single transferable vote whereunder there is no question of obtaining majority of valid votes, but only the required quota.

E In support of his contentions Shri Ramaswami has copiously referred to the treatise, the Single Transferable Vote by K. V. Krishnaswamy Aiyar published in 1946, and the relevant provisions of the Conduct of Election Rules, 1961 (for short, referred to as the Election Rules).

The provisions material for our purpose are contained in Part VII of the Election Rules. Shri K. V. Krishnaswamy Aiyar in his book, The Single Transferable Vote (1946 Edn.) page 23, sums up the F general principles of this mode of election, thus :

> "The Single vote is *transferable* from one nominee to another and that takes place in two contingencies where there would otherwise be a wastage of votes.
>
> They are :
>
> G (1) when a candidate obtains more than what is required for his success and therefore has an unnecessary surplus;
>
> (2) When a candidate polls so few votes that he has absolutely no chance and therefore the votes nominating him are liable to be wasted."

H Relevant Rules in Part VII of the Election Rules are modulated on the principles enunciated by Shri Aiyar in the aforesaid book. The

(1) A.I.R. 1969 S.C. 604.

material provisions are contained in Rule 2(1)(c), 67, 70, 71, 73 to 81 and 85.

Under the scheme and system envisaged by these Election Rules, each elector has only one vote, irrespective of the number of seats to be filled. But that single vote is transferable from one candidate to another. The ballot paper bears the names of the candidates, and the elector marks on it his preferences for the candidates by denoting it with the figures 1, 2, 3, 4 and so on against the names chosen by him and this denotation is understood to be alternative in the order indicated (vide Aiyar's The Single Transferable Vote), The figure 1 set by the elector opposite the name of a candidate means "first preference"; the figure 2 set opposite the name of a candidate, the "second preference", and so on [Rule 71(ii)]. The minimum number of valid votes requisite to secure the return of a candidate at the election is called the quota. At an election where only one seat is to be filled, every ballot paper is deemed to be of the value of 1 at each count, and the quota is determined by adding the values credit to all the candidates, and dividing the total by 2, and adding 1 to the quotient, ignoring the remainder, if any, and the resulting number is the quota, vide, Rule 75(1). At an election where more than one seat is to be filled, every ballot paper is deemed of the value of 100 and the quota is determined by adding the values credited to all the candidates, and dividing the total by a number which exceeds by 1 the number of vacancies to be filled, and adding 1 to the quotient ignoring the remainder, if any, and the resulting number is the quota (Rule 76).

The computation in the preliminary process is as under :

> The returning officer first deals with the covers containing the postal ballot papers, and then opens the ballot boxes, counts the ballot papers and sorts out and rejects the ballot papers found invalid. A ballot paper is deemed invalid on which—
>
> (a) the figure 1 is not marked; or
>
> (b) the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or
>
> (c) the figure 1 and some other figures are set opposite the name of the same candidate; or
>
> (d) there is any mark or writing by which the elector can be identified (Rule 73).

After rejecting the invalid papers, the returning officer (a) arranges the remaining ballot papers in *parcels* according to the first preference recorded for each candidate; (b) counts and records the number of papers in each parcel and the total number; and (c) credits to each candidate the value of the papers in his parcel. He then determines the quota in accordance with Rule 75(1), or Rule 76, if the election is to fill one seat or more than one seat, as the case may be.

A If (at any election held for filling more than one seat) at the end of any count or at the end of the transfer of any parcel or sub-parcel of an excluded candidate the value of ballot papers credited to a candidate is equal to, or greater than the quota, that candidate shall be declared elected (Rule 78). If at the end of any count the value of the ballot papers credited to a candidate is greater than the quota, the surplus is transferred in accordance with the provisions of Rule 79, to the continuing candidates indicated in the ballot papers of that candidate as being next in order of the electors' preference [Sub-Rule (1) of Rule 79] "Surplus" means the number by which the value of the votes original and transferred, of any candidate exceed the quota [Sub-rule (6) of Rule 71]. "Continuing candidate" means any candidate not elected and not excluded from the poll at any given time [Sub-rule (1) of Rule 71]. If more than one candidate have a surplus, the largest surplus is dealt with first and the others in order of magnitude, but every surplus arising on the first count is dealt with before those arising on the second count and so on. Where there are more surpluses than one to distribute and two or more surpluses are equal, regard shall be had to the original votes of each candidate and the candidate for whom most original votes are recorded shall have his surplus first distributed; and if the values of their original votes are equal, the returning officer decides by lot which candidate shall have his surplus first distributed. [Sub-rules (2) & (3) of Rule 78]. "Original Vote", in relation to any candidate, means a vote derived from a ballot paper on which a first preference is recorded, for such candidate.

If the surplus of any candidate to be transferred arises from original votes only, the returning officer shall examine all the papers in the parcel belonging to that candidate, divide the unexhausted papers into sub-parcels according to the next preferences recorded thereon and make a separate sub-parcel of the exhausted papers [Clause (a) of sub-rule (4) of Rule 78]. "Exhausted paper" means a ballot paper on which no further preference is recorded for a continuing candidate, provided that a paper shall be deemed to have become exhausted whenever—(a) the names of two or more candidates, whether continuing or not, are marked with the same figure and are next in order of preference; or (b) the name of the candidate next in order of preference, whether continuing or not, is marked by a figure not falling consecutively after some other figure on the ballot paper or by two or more figures [Sub-Rule (3) of Rule 71]. The Returning Officer has to ascertain the value of the papers in each sub-parcel and of all the unexhausted papers. If the value of the unexhausted papers is equal or less than the surplus, he shall transfer all the unexhausted papers at the value at which they were received by the candidate whose surplus is being transferred. If the value of the unexhausted papers is greater than the surplus, he shall transfer the sub-parcels of unexhausted papers and the value at which each paper shall be transferred shall be ascertained by dividing the surplus by the total number of unexhausted papers [Sub-Rule (4) of Rule 78]. Sub-Rule (5) indicates the procedure where the surplus of any candidate to be transferred arises from transferred as well as original votes. All papers in the parcel or sub-parcel of an elected candidate not tansferred under this rule have to set apart as finally dealt with [Sub-Rule (7) of Rule 78].

Rule 80 epeaks of exclusion of candidates lowest on the poll. It reads : A

"80. Exclusion of candidates lowest on the poll. (1) If after all surpluses have been transferred as hereinbefore provided, the number of candidates elected is less than the required number, the returning officer shall exclude from the poll the candidate lowest on the poll and shall distribute his unexhausted papers among the continuing candidates according to the next preferences recorded thereon; and any exhausted papers shall be set apart as finally dealt with. B

(2) The papers containing original votes of an excluded candidate shall first be transferred, the transfer value of each paper being one hundred. C

(3) The papers containing transferred votes of an excluded candidate shall then be transferred in the order of the transfers in which, and at the value at which, he obtained them.

(4) Each of such transfers shall be deemed to be a separate transfer but not a separate count. D

(5) If, as a result of the transfer of papers, the value of votes obtained by a candidate is equal to or greater than the quota, the count then proceeding shall be completed but no further papers shall be transferred to him.

(6) The process directed by this rule shall be repeated on the successive exclusion one after another of the candidates lowest on the poll until such vacancy is filled either by the election of a candidate with the quota or as hereinafter provided. E

(7) If at any time it becomes necessary to exclude a candidate and two or more candidates have the same value of votes and are the lowest on the poll, regard shall be had to the original votes of each candidate and the candidate for whom fewest original votes are recorded shall be excluded; and if the values of their original votes are equal the candidate with the smallest value at the earliest count at which these candidates had unequal values shall be excluded. F

(8) If two or more candidates are lowest on the poll and each has the same value of votes at all counts the returning officer shall decide by lot which candidate shall be excluded." G

Rule 81 deals with the filling of the last vacancies. It may also be extracted in full because a good deal of argument is founded on it. It provides :

"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. H

A (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.

B (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."

C The stage is now set for dealing with the contentions canvassed before us. The first question that falls to be considered is : Whether Shri Mohana Rangam, on account of his failure to secure any vote in the first count is to be treated as *excluded* from the poll ? In other words, had he ceased to be a 'continuing candidate' within the contemplation of the Election Rules ?

D We have already referred to the definition of 'Continuing Candidate' in Rule 71(1). The definition has two elements which must be satisfied before a candidate can be said to be a continuing candidate. He should be a "candidate not elected" and further, he must not have been excluded from the poll at any given time. Shri Mohana Rangam fulfils both these conditions.

E Shri Ramaswami however, contended that this definition is to be interpreted and applied in the light of what has been said in Rules 74 and 81. The argument is that an essential pre-requisite to the continuance of a candidate is the allotment of a "basket" or "parcel" under Rule 74, and only such candidate is entitled to the allotment of a 'basket' who at the end of the count, gets some vote to his credit and opens his account. Since Shri Rangam—proceeds the argument— did not get F any vote whatever, he stood automatically excluded and no question of allotting any "parcel" to him arose.

The contention must be repelled.

There is nothing in Rule 74 or any other Rule which, at an election to fill more than one seat, requires or empowers the returning officer to G exclude a candidate from the poll merely on the ground that in the counting of the first preferences, he has not secured any valid vote. Sub-Rule (3) of Rule 75, to which reference was made at one stage, has no application to the instant case. That sub-rule—which requires the returning officer to exclude from the poll a candidate whose score is the lowest—governs the counting of votes where only one seat is to be filled and at the end of any count, no candidate can be declared elected. H Such is not the case before us. Rule 80 also can have no application because it comes into operation at a stage "after all surpluses have been transferred". That stage never arrived in the instant case because in the first counting itself, all the six seats were filled up, six candidates

(including Shri John) having secured the requisite quota of first preference votes. Nor did the stage for applying Rule 81 arise, because at the end of the first count, no vacancy remained unfilled. A

We therefore, repel the contention of the learned counsel and hold that Shri Mohana Rangam did not get automatically excluded. Both he and Shri Subramanyan were 'continuing candidates'. Shri Subramanyan could not be declared elected as he had not obtained the required quota of 3,201 votes. B

This takes us to the next question. Should all the votes that had polled in favour of the candidate (Shri John) who has been found by the Court to be statutorily disqualified for election, be regarded as thrown away, and in consequence, the appellant, Shri Subramanyan, who secured 300 votes as against none obtained by Shri Mohana Rangam, be declared elected ? C

Again, the answer to this question, in our opinion, must be in the negative. It is nobody's case that the electors who voted for Shri John, had at the time of election, knowledge or notice of the statutory disqualification of this candidate. On the contrary, they must have been under the impression that Shri John was a candidate whose nomination had been validly accepted by the returning officer. Had the electors notice of Shri John's disqualification, how many of them would have voted for him and how many for the other continuing candidates, including Sarv Shri Subramanyan and Mohan Rangam, and in what preferential order, remains a question in the realm of speculation and unpredictability. D

E

In the view we take, we are fortified by the observations in this Court's decision *in R. M. Seshadri* v. *G. V. Pai* (1). In that case, the election of R. M. Seshadri to the Madras Legislative Council was set aside on the ground that he was guilty of the corrupt practice of hiring or procuring motor vehicles to carry voters. The total votes polled were 12,153. Since the voting was by a single transferable vote, three out of the five candidates were eliminated at different counts with the result that their votes were transferred to the second candidate named in the ballot. At the final count Seshadri received 5643 votes and his nearest rival, G. V. Pai received 5388 votes. The number of the voters who were carried in the hired or procured vehicles could not be ascertained. F

Before this Court, it was contended that the election of Seshadri having been set aside, G. V. Pai, who had polled the next highest number of votes should be declared elected. Hidayatullah C.J. speaking for the Court, rejected this contention with these observations : G

> "This (question) will depend on our reaching the conclusion that but for the fact that voters were brought through this corrupt practice to the polling booths, the result of the election had been materially affected. In a single transferable vote, it is very difficult to say how the voting would have gone, H

(1) AIR 1969 S.C. 692, at page 701

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> because if all the votes which Seshadri had got, had gone to one of the other candidates who got eliminated at the earlier counts, those candidates would have won. We cannot order a recount because those voters were not free from complicity. It would be speculating to decide how many of the voters were brought to the polling booths in car. We think that we are not in a position to declare Vasanta Pai as elected, be-

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> cause that would be merely a guess or surmise as to the nature of the voting which would have taken place if this corrupt practice had not been perpetrated."

The position in the instant case is no better. It is extremely difficult, if not impossible, to predicate what the voting pattern would have been if the electors knew at the time of election, that Shri John was not

C

qualified to contest the election. In any case, Shri Subramanyan was neither the *sole* continuing candidate, nor had he secured the requisite quota of votes. He cannot therefore, be declared elected.

The dictum of this Court in *Viswanatha* v. *Konappa* (supra) does not advance the case of the appellant, Shri Subramanyan. In that case,

D

the election in question was not held according to the system of a single transferable vote. There were *only two* candidates, in the field for a *single seat, and one of them* was *under a statutory disqualification,* Shah J. (as he then was) speaking for the Court, held that the votes cast in favour of the disqualified candidate may be regarded as thrown away, even if the voters who had voted for him were unaware of the disqualification, and the candidate securing the next highest number of votes

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was declared elected. The learned Judge was however careful enough to add :

> "This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next

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> highest number of votes will be declared elected. In such a case, question of notice to the voters may assume, significance, for the voters may not, if aware of the disqualification, have voted for the disqualified candidate."

The *ratio decidendi* of *Viswanatha* v. *Konappa* is applicable only

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where (a) there are *two* contesting candidates and one of them is disqualified, (b) and the election is on the basis of single *non-transferable* vote. Both these conditions do not exist in the present case. As already discussed, Shri Subramanyan appellant was not the sole surviving continuing candidate left in the field, after exclusion of the disqualified candidate, Shri John. The election in question was not held by mode of single transferable vote according to which a simple majority

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of votes secured ensures the success of a candidate, but by proportional representation with single transferable vote, under which system the success of a candidate *normally* depends on his securing the requisite quota.

However, the principle underlying the *obiter* in *Viswanatha* v. *Konappa,* which we have extracted, is applicable to the instant case because here, after the exclusion of the disqualified candidate, *two* continuing candidates were left in the field. A

For all the reasons aforesaid, the appeals fail and are dismissed. In the peculiar circumstances of the case the parties are left to their own costs. B

S.R. *Appeals dismissed*