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For the reasons given above, this petition is allowed, the orders of the assessing authority cancelling both the registration certificates granted under the State and the Central Act are quashed. In view of the difficult nature of the matter involved, there will be no order as to costs.

R.S.

FULL BENCH

Before Mehar Singh, Inder Dev Dua and Daya Krishan Mahajan, JJ.

DR. ANUP SINGH,—*Appellant.*

versus

ABDUL GHANI AND OTHERS,—*Respondents.*

First Appeal From Order No, 3-E of 1962.

1963

May., 30th,

Representation of the People Act (XLIII of 1951)—Ss. 81 and 90—Election petition not complying with S. 81(3)—Whether to be dismissed—Provisions of S. 81 (3)—Whether mandatory or directory—Conduct of Election Rules, 1961—Rules 71(4) and 73(2)—Mark or writing on the ballot-paper in addition to the mark required to signify intention to vote—Whether invalidates the vote.

Held, that the mandatory provisions of a statute must be complied with exactly, whereas in the case of a directory provision substantial compliance is enough. In considering whether or not a provision is mandatory or directory, the object of the provision is a guiding factor. The object of sub-section (3) of section 81 of the Representation of the People Act, 1951, is that a respondent to an election petition should have a true copy of the petition so as to enable him to make his defence and the further object is that the Election Commission should be in a position to proceed with the election petition expeditiously avoiding delay in preparing copies as it had to do previous to the introduction of this provision. Now, in this case correct copies of requisite number have been

supplied by the petitioners and each page of each copy is signed by the respective petitioner. There is no allegation on the part of the appellant or any other respondent to the election petitions that the copies are not correct and true copies of the election petitions nor is there any complaint that there has been prejudice to them in their defence to the election petitions. The requirement in this provision that attestation on each copy must be in the words "attested to be true copy of the petition" is not mandatory but is directory and substantial compliance of it, as in this case, will meet the object of the provision, especially when there has been no prejudice to any respondent to the election petition in his defence.

Held by majority (Mehar Singh and Mahajan, JJ.—Dua, J., Contra)—that in so far as any mark, other than writing, on a ballot-paper in addition to the mark required to signify intention to vote, is concerned, its peculiarity as a mark of identification, can only invalidate a ballot-paper if there is evidence of arrangement to vote in that peculiar manner to enable identification; but in the case of initials or handwriting on a ballot-paper the same is by itself evidence of the identity of the voter, the handwriting providing the evidence of such identity. In the latter case the only question that remains on the facts of a particular case is the sufficiency and adequacy of the writing to support an inference that the handwriting amounts to identification of the voter. It is upon this consideration that in some of the cases referred to, a type of writing has been held not to invalidate a ballot-paper. But that obviously must be a question for consideration in the facts and circumstances of each particular case. The writing of the words 'one', 'two', and 'three' along with the figures '1', '2', and '3' against the names of the candidates to indicate preferences invalidates the ballot-paper as the handwriting of the voter has provided evidence of identity.

Held, (by Dua, J.).—That the ballot-paper, containing a mark or writing other than the mark required to signify intention to vote, will be invalid only if there is evidence of arrangement to vote in that particular manner so as to enable identification of the elector. But it is doubtful, if the initials of the elector and his handwriting can safely, according to the legislative intent, be equated, and, considered at par, for the purposes of Rule 73(2)(d) of the

Conduct of Election Rules, 1961. The writing of the words 'one, 'two', and 'three' along with the figures '1', '2', and '3' against the names of the candidates to indicate preferences does not invalidate the ballot-paper.

First Appeal from the Order of Shri Balram Upadhya, Member, Election Tribunal II, Chandigarh, dated the 23rd November, 1962, setting aside the election of Dr. Anup Singh, to the Council of States and declaring Shri Abdul Ghani, petitioner in Petition No. 346 of 1962 as elected to Council of States and dismissing the Petition Nos. 345 and 346 of 1962 against M/s Chaman Lal and Surjit Singh.

S. M. SIKRI, ADVOCATE-GENERAL, J. N. KAUSHAL, ACHHRA SINGH and M. R. AGNIHOTRI, ADVOCATES, for Appellant.

R. SACHAR, A. S. AMBALVI, and ABNASHA SINGH, ADVOCATES, for the Respondents.

JUDGMENT

Mehar Singh, J. MEHAR SINGH, J.—These two appeals, F.A.O. Nos. 3-E and 4-E of 1962, are against the order, dated November 23, 1962, of the Election Tribunal II, at Chandigarh, whereby two election petitions, No. 345 of 1962 by Shri Lachhman Singh, respondent and No. 346 of 1962, by Shri Abdul Ghani, respondent, were partly accepted inasmuch as the election of the appellant, Dr. Anup Singh, to the Council of States was set aside and declared void and Shri Abdul Ghani, respondent was declared elected in his place, the two petitions having been dismissed against the other two respondents, namely, Shri Chaman Lal and Shri Surjit Singh, who were also elected to the Council of States at the same election.

The Legislative Assembly of Punjab was to return three elected members to the Council of States and the polling took place on March, 29, 1962. The

candidates polled first preference votes, according to the first count, as below—

(1) Dr. Anup Singh	..	36
(2) Shri Chaman Lal	..	38
(3) Shri Abdul Ghani	..	35
(4) Shri Surjit Singh	..	33
(5) Shri Krishnamurthy	..	4

This was on the basis of valid votes after dropping the rejected ballot-papers. The returning officer then proceeded to transfer preferences and in consequence of that he arrived at this result:—

(1) Dr. Anup Singh	..	36.5
(2) Shri Chaman Lal	..	36.51
(3) Shri Surjit Singh	..	38.19
(4) Shri Abdul Ghani	..	35

Accordingly he declared the first three to have been duly elected to the Council of States.

Two election petitions were filed, which ultimately came to be heard by the learned Tribunal, challenging the election of the three elected candidates, one petition was by Shri Lachhman Singh respondent and the other by Shri Abdul Ghani, respondent. In the end both the petitions were, for all practical purposes, dropped and not pressed in regard to the election of Shri Chaman Lal and Shri Surjit Singh and consequently the same were dismissed so far as these two respondents are concerned. There remained the claim of Shri Lachhman Singh and Shri Abdul Ghani, respondents, against the appellant, Dr. Anup Singh.

A large number of grounds were taken in the petitions, including those based on an appeal to the

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electorate on ground of religion against Shri Abdul Ghani, respondent, and a number of corrupt practices, but none of those grounds survives and is relevant so far as these two appeals are concerned, and the only ground which has really been a matter of controversy between the parties even before the learned Tribunal is that three votes, Exhibits P. 1 to P. 3, cast in favour of Shri Abdul Ghani, respondent were wrongly and improperly rejected and five votes, Exhibits P. 73 to P. 77, cast for the appellant were wrongly and improperly accepted, having been cast on invalid ballot-papers. The only other question that comes in for consideration in these appeals is the claim of the appellant that both the election petitions are liable to dismissal under sub-section (3) of section 90 because of non-compliance of sub-section (3) of section 81 of the Representation of the People Act, 1951 (Act 43 of 1951).

The last question was considered as one of the preliminary questions by the learned Tribunal and disposed of by its order of November 9, 1962. The objection on the side of the appellant was that while in the case of each petition there were as many copies with it as the number of the respondents and each copy was signed by the respective petitioner making the petition, but not one copy with either election petition was attested by the petitioner under his own signature to be the true copy of the petition within the meaning of sub-section (3) of section 81. The learned Tribunal found that the copies appeared to be the carbon copies of the election petition in each case, that each page of each copy bears the signature of the particular petitioner, and that the appellant or any other respondent to any of the two election petitions has not suggested that the copies supplied by each petitioner with the election petition are not true copies of the particular election petition. In the cir-

cumstances the learned Tribunal was of the opinion that the objects of sub-section (3) of section 81 being availability of correct copies of an election petition so as to enable the respondents to make proper defence and saving of time of the Election Commission in making copies for the purpose and enabling it to expedite the trial of such petition, the true copies having been supplied in these petitions and each copy having been on each page signed by the particular petitioner, there has been substantial compliance with sub-section (3) of section 81 with no prejudice to the appellant or any other respondent to the election petitions in the making of his defence and, therefore, on this ground the election petitions could not be dismissed.

On the first matter of the validity or otherwise of the ballot-papers, to which the parties took objection, the learned Tribunal has found that ballot-papers, Exhibits P. 1 to P. 3, cast in favour of Shri Abdul Ghani, respondent, were rightly rejected by the returning officer as invalid, but out of the five ballot-papers cast in favour of the appellant it was conceded on his behalf that one ballot-paper, Exhibit P. 75, was in fact invalid and the learned Tribunal has found two more to be invalid, which are Exhibits P. 74 and P. 76, upholding the validity of the remaining two ballot-papers. The learned Tribunal then reduced the votes cast in favour of the appellant by three with the result that the votes in favour of the appellant have come down to 33.3, but the votes in favour of Shri Abdul Ghani, respondent remain 35. It is upon this conclusion that the learned Tribunal has accepted the election petitions of respondents, Shri Lachhman Singh and Shri Abdul Ghani, setting aside the election of the appellant and declaring in his place elected to the Council of States, Shri Abdul Ghani, respondent.

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In regard to ballot-papers, Exhibits P. 1 to P. 3, the learned Tribunal found that Exhibit P. 1, has only a cross mark (X) against the name of Shri Abdul Ghani respondent, with no mark against the name of any other candidate, Exhibit P. 2 has also a cross mark (X) against the name of Shri Abdul Ghani, respondent and figure '2' against the name of Shri Surjit Singh respondent, with no other mark against the name of any other co-candidate, and Exhibit P. 3 has figure '1' against the names of Shri Abdul Ghani, respondent and Shri Harbans Singh, with some mark, not quite clear, against the name of Shri Sohan Lal. In this last ballot-paper, Exhibit P. 3, figure '1' appears against the names of two candidates. Rule 71(4) of the Conduct of Election Rules, 1961, which deals with how preferences are to be shown in the matter of voting on a ballot-paper, says—

> " 'first preference' means the figure 1 set opposite the name of a candidate;
>
> 'second preference' means the figure 2 set opposite the name of a candidate;
>
> 'third preference' means the figure 3 set opposite the name of a candidate, and so on;"

and rule 73(2) of the same says—

> "73. (2) A ballot-paper shall be invalid on which—
>
> (a) the figure 1 is not marked; or
>
> (b) the figure 1 is set opposite the names 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 same candidate; or
>
> (d) there is any mark or writing by which the elector can be identified."

The learned Tribunal found the rejection of the three ballot-papers, Exhibits P. 1 to P. 3, correct, because Exhibits P. 1 and P. 2 contravened rule 73(2)(a) and Exhibit P. 3 contravened rule 73(2)(b). It, therefore, repelled the claim of Shri Abdul Ghani respondent that these ballot-papers should not have been rejected as invalid. In so far as the objection to the five ballot-papers cast in favour of the appellant, Exihibits P. 73 to 77, is concerned, it has been pointed out that in regard to Exihibit P. 75 it was conceded before the learned Tribunal that it was an invalid vote. As to the remaining four ballot-papers the learned Tribunal found Exhibits P. 73 and P. 77 to be valid votes but Exhibits P. 74 and P. 76 to be invalid votes. There has been no controversy in regard to Exhibits P. 73 and P. 77. Exhibit P. 74 has figure '1' against the name of Dr Anup Singh, appellant, figure '2' against the name of Shri Surjit Singh, respondent, and figure '3' against the name of Shri Chaman Lal respondent, but, in addition, with each figure there is a cross mark (X). The other ballot-paper, Exhibit P. 76, has figure '1' against the name of Dr. Anup Singh appellant, figure '2' against the name of Shri Surjit Singh, respondent, and figure '3' against the name of Shri Chaman Lal, respondent, and in addition respectively, are written the word 'one', 'two' and 'three' along with the figures '1', '2', and '3', against the name of each one of these three candidates and further there is also a cross mark (X) against the name of each one of these candidates. The marking against the name of Dr. Anup Singh appellent is 'X' one '1', against the name of Shri Surjit Singh respondent 'X two 2', and against the name of Shri Chaman Lal, respondent, 'X three 3'. Although *Woodward* v. *Sarsons* (1), and some other cases were cited before the learned Tribunal with the object of showing that such additional markings on

(1) (1874-75) L.R. 10 Common Pleas 933.

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the ballot-papers do not invalidate the same, the learned Tribunal felt bound by the decision in *Pala Singh* v. *Nathi Singh* (2), of this Court, a decision by me sitting with Shamsher Bahadur, J. That was a case challenging the validity of an election to a Panchayat Samiti Block and rule 17 of the Punjab Panchayat Samitis (Primary Members) Election Rules, 1961, provides that—

> "Any ballot-paper which bears any mark or signature by which the voter can be identified * * * * * * shall be invalid."

There were four ballot-papers in which the electors had placed the mark (X) not in the column of the ballot-paper meant for such a mark indicating intention to vote for a particular candidate, but on the symbol of the candidate. An argument urged in that case that in this manner of voting the elector could inform the candidate that he had voted in a particular manner and could thus disclose his identity was accepted. The report of this case shows that no discussion of the matter took place with reference to decided cases, as will presently appear in the present case, and the opinion was arrived at as an immediate impression from the wording of said rule 17. As stated, the learned Tribunal, following this case, has found ballot-papers, Exhibits P. 74 and P. 76, in favour of the appellant invalid.

As already stated, the appellant in these appeals is Dr. Anup Singh, whose election has been set aside and declared void by the order of the learned Tribunal. The main respondent in the two appeals is Shri Abdul Ghani, who has been declared elected in place of the appellant, though the other candidates, who contested the election, are also shown as respondents.

(2) I.L.R. (1963) Punj. 49=1962 P.L.R. 1110.

In these appeals there are only two questions for consideration, as in the end was almost the case before the learned Tribunal, and those question are—

(a) Whether the election petitions of respondents, Shri Lachhman Singh and Shri Abdul Ghani, are to be dismissed under sub-section (3) of section 90 of the Representation of the People Act, 1951, for non-compliance with sub-section (3) of section 81 of that Act? and

(b) Whether three ballot-papers, Exhibits P. 1 to P. 3, cast in favour of Shri Abdul Ghani respondent, have been rejected as invalid contrary to law and two ballot-papers, Exhibits P. 74 and P. 76, in favour of the appellant, have not been rightly declared as invalid ballot-papers?

In so far as the first question is concerned, leaving out the proviso, which is not material here, section 85 of Act 43 of 1951 says—

"85. If the provisions of section 81 or section 82 or section 117 have not been complied with, the Election Commission shall dismiss the petition:"

and sub-section (3) of section 90, omitting the Explanation which again is not material, provides—

"90. (3) The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 notwithstanding that it has not been dismissed by the Election Commission under section 85".

and sub-section (3) of section 81 is—

"81. (3) Every election petition shall be accompanied by as many copies thereof as there

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are respondents mentioned in the petition and one more copy for the use of the Election Commission and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

The requirements of the last provision are—

(a) that as many copies of an election petition shall accompany it as there are respondents and one copy for the Election Commission, and

(b) (i) that every such copy shall be attested by the petitioner to be a true copy of the petition, and

(ii) that every such attestation shall be under the petitioner's signature.

In the election petitions of respondents, Shri Lachhman Singh and Shri Abdul Ghani, only condition (b)(i) is not found to have been complied with. The copies supplied are of requisite number and are correct copies of the respective election petitions. Each page of each copy is signed by the particular petitioner. What is missing is an attestation by the petitioner that the copy is 'a true copy of the petition'. It is contended on behalf of the appellant that article 329(b) of the Constitution provides that—

"Notwithstanding anything in this Constitution, no election to either House of Parliament * * * * shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature",

and further that section 80 in Chapter II of Part VI, which is headed 'Disputes regarding Elections', in Act 43 of 1951 says that—

> "No election shall be called in question except by an election petition prescribed in accordance with the provisions of this part."

and that as the election petitions have not complied with sub-section (3) of section 81, so the same have not been presented in accordance with Part VI of the Act, with the result that dismissal must follow under sub-section (3) of section 90. It is also urged that sub-section (3) of section 81 is mandatory and not directory because (i) if a petitioner making an election petition signs not true copies contrary to sub-section (3) of section 81, that will amount to an offence under section 197 of the Penal Code as appears clear from *The Crown* v. *Dewa Singh* (3), and so penal consequence is provided for contravention of this provision, (ii) sub-section (3) of section 81 requires attestation by the petitioner himself under his own signature and where the Act has permitted an act to be done by another person it has so provided as in section 81(2)(a)(ii). and (iii) requirement of sub-section (3) of section 81 is similar in nature as the requirement of rule 1 of Order 41 of the Code of Civil Procedure of accompanying of a copy of the decree appealed from with the memorandum of appeal and in the latter case filing of an uncertified copy with the memorandum of appeal renders the appeal incompetent: *Reasant Aali Khan* v. *Mahfuz Ali Khan* (4), and *Khadim Ali* v. *Jagannath* (5).

The requirements of sub-section (3) of section 81 have already been referred to above. The question is whether all the requirements are mandatory or directory? It is settled that mandatory provisions

(3) 15 P.R. 1879.
(4) A.I.R. 1929 Lahore 771.
(5) A.I.R. 1941 Oudh. 77.

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must be complied with exactly, whereas in the case of a directory provision substantial compliance is enough. In considering whether or not a provision is mandatory or directory, the object of the provision is a guiding factor. It is apparent that the object of this particular provision is that a respondent to an election petition should have a true copy of the petition so as to enable him to make his defence and the further object is that the Election Commission should be in a position to proceed with the election petition expeditiously avoiding delay in preparing copies as it had to do previous to the introduction of this provision. Now, in this case correct copies of requisite number have been supplied by the petitioners and each page of each copy is signed by the respective petitioner. There is no allegation on the part of the appellant or any other respondent to the election petitions that the copies are not correct and true copies of the election petitions nor is there any complaint that there has been prejudice to them in their defence to the election petitions. The contention that is pressed on behalf of the appellant is that in addition to all this there must have been attestation of each copy by the particular petitioner concerned with the words 'attested to be a true copy of the petition'. It has been urged that if the attestation does not take this form the copies are not supplied according to sub-section (3) of section 81 and this defect being not curable the petitions must be dismissed. If this argument was to prevail then attestation in defective words or in insufficient words would have the very same result as for instance if the attestation is just this—'attested to be a true copy', it would not comply with this provision for the simple reason that the words 'of the petition' remain omitted. The Parliament could not possibly have intended summary dismissal of an election petition upon the basis of such hyper-technical omission. This

rather extreme example shows that this particular requirement in this provision is not mandatory but is directory and substantial compliance of it, as in this case, will meet the object of the provision. In *Collector of Manghyr* v. *Keshav Prasad Goenka* (6), their Lordships observe—"The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specified provision which, for instance, sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof". Somewhat similar view has prevailed in *The King* v. *Lincolnshire Appeal Tribunal* (7), in which notice of appeal was not given in the form and within the time required by the regulation applicable and the argument that there was no jurisdiction in the Appellate Tribunal to hear the appeal was negatived on the ground that in spite of such an omission the opposite party had within the required time oral notice of the intention to file an appeal which satisfied the object of the particular regulation. Section 85 gives power to the Election Commission to dismiss an election petition for non-compliance with section 117 as for non-compliance with section 81 and in the event of the Election Commission not doing so previously the Tribunal was also enjoined to dismiss an election petition on the same ground under sub-section (3) of section 90. *K. Kamaraja Nadar* v. *Kunju Thevar* (8), was a case of non-compliance with the provisions of section 117 inasmuch as while treasury receipt of deposit of security for costs had been duly obtained and was produced but it was not in favour of the Secretary to the Election Commission,

(6) (1962) 2 S.C.A. 708 at p. 718.
(7) (1917) 1 K.B. 1.
(8) 1958 S.C. 687.

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and the argument was that the receipt was defective and no proper deposit had been made with the result that there was non-compliance of the mandatory provisions of section 117 which must lead to the dismissal of the election petition. Their Lordships observed that if the argument was to prevail, a deposit duly made in favour of the Election Commission but not in favour of the Secretary to the Election Commission would lead to the dismissal of an election petition and it was said that the contention had only to be stated in order to be negatived. So their Lordships held that the words 'in favour of the Secretary to the Election Commission' in section 117, as the section was at the time, were directory and not mandatory. Their Lordships pointed out that it was the essence of the provisions contained in the section that the petitioner should furnish security for the costs of the petition and enclose a Government treasury receipt showing the deposit with the election petition and as that essential requirement had been complied with the deposit was available to meet the costs of the election petition for payment to the successful party which was a sufficient compliance with section 117 and no literal compliance was at all necessary. This case is analogous to the present case in which having regard to the object and purpose of sub-section (3) of section 81 there has been substantial compliance of this provision with no prejudice to the appellant or any other respondent to the election petition in their defence by the omission of the signature and attestation of the particular petition being not accompanied with the words 'attested to be a true copy of the petition'. On behalf of the appellant reliance in this respect has been placed upon *Sardar Mal* v. *Gayatri Devi* (9), and *Babu Ram* v. *Prasani* (10). The argument in the

(9) 1963 Doabia's Election cases 41.
(10) A.I.R. 1959 S.C. 93.

first of these cases was the same as in the present case on behalf of the appellant and *K. Kamaraja Nadar's* case was cited before the learned member of the Election Tribunal. However, all that the learned member has said with regard to this case is that it was under section 117 and it was difficult to apply its principles to a case like the present. With all respect to the learned member to my mind the analogy of that case with the facts of the present case is very close. The second case was one of non-compliance with section 33(5) inasmuch as a copy of the electoral roll of the constituency or a certified copy of the relevant entries in such roll was not filed with the nomination paper which was accordingly rejected under section 36(2)(b) as that provision says that a returning officer shall reject any nomination paper on the ground 'that there has been failure to comply with any of the provisions of section 33 or section 34'. It was in these circumstances that their Lordships held that whenever a statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence. Their Lordships further observed that there is no doubt that the essential object of the scrutiny of nomination papers is that the returning officer should be satisfied that the candidate who is not an elector in the constituency in question, is in fact an elector of a different constituency. The satisfaction of the returning officer is thus the matter of substance in these proceedings. Section 33(5) requires the candidate to supply the prescribed copy and section 36 (2)(b) provides that on his failure to comply with the said requirement his nomination paper is liable to be rejected. Their Lordships said that in other words. this is a case where the statute requires a candidate to produce the prescribed evidence

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and provides a penalty for his failure to do so. If the candidate fails to produce the relevant copy, the consequence prescribed by setcion 36(2) (b) must inevitably follow. It is clear that on facts this is entirely a different case though there appears to be a seeming analogy between the two cases. The object of the requirement of section 33(5) is to make available to the returning officer evidence on the particular matter so that he may immediately proceed to decision on an objection to a nomination paper and if such evidence is not available the inevitable result follows. The position is not quite the same in the circumstances of the present case. These two cases, therefor, do not further the argument on behalf of the appellant. Reference to the provisions of section 197 of the Penal Code does not advance the matter further because in the first place, where there has been substantial compliance of sub-section (3) of section 81, no offence under section 197 of the Penal Code will be made out, and secondly, every certificate not given or signed according to law does not lead to an offence under that section for it is requirement of that section that for an offence to be made out under it the certificate has to be false in a material point. If the certificate is not false in a material point, even though it is not given or signed as required by law, it would still not bring the case under section 197 of the Penal Code. In *Birendra Nath Chatterjee* v. *Umananda Mukherjee* (11), Suhrawardy, J., has come so far as to say that the certificate contemplated by section 197 of the Penal Code is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. In the present case the copies required to be supplied by the petitioner with the election petition are not to be used as evidence in the trial of such a petition. Thus

(11) A.I.R. 1926 Cal. 258.

the argument in reference to section 197 of the Penal Code is of no avail to the appellant. It has not been quite clear how reference to section 81(2)(a)(ii) helps the appellant because in the present case the correct copies have been supplied signed by each petitioner, as contemplated by sub-section (3) of section 81. It is not a case of the copies having been supplied by somebody else. As there has been substantial compliance of sub-section (3) of section 81, the analogy of rule 1 of Order 41 Civil Procedure Code, is apparently not of assistance to the appellant because an appeal becomes incompetent only when there is not proper compliance with rule 1 of Order 41. But *Wazira* v. *Mt. Nandan* (12), is an instance where there had not been strict compliance of rule 1 of Order 41, yet the appeal was held to be competent because there had been substantial compliance and the element of non-compliance was beyond the control of the appellant. This argument on behalf of the appellant that the election petitions are liable to dismissal under sub-section (3) of section 90 because of non-compliance with sub-section (3) of section 81, therefore, cannot prevail because there has been substantial compliance of sub-section (3) of section 81 and there has been no prejudice to the appellant or any other respondent to the election petitions in their defence to the same. This argument thus fails.

There is no substance in the claim by Shri Abdul Ghani respondent, as regards ballot-papers Exhibits P. 1 to P. 3 because the first two of those ballot-papers clearly contravene the express provisions of rule 73(2)(a) and the third contravenes the express provision of rule 73(2)(b). The provisions of the rules are clear and imperative because the same provides that the ballot-paper is invalid if figure 1 is not marked or

(12) A.I.R. 1933 Lahore 938.

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if that figure is set opposite the name of more than one candidate, and this is exactly what has happened in the case of these three ballot-papers. These ballot-papers were thus rightly rejected by the returning officer and that decision has obviously correctly been maintained by the learned Tribunal. So this claim by Shri Abdul Ghani respondent cannot possibly be accepted and is rejected.

This leaves for consideration two ballot-papers, Exhibits P. 74 and P. 76, cast in favour of the appellant but found by the learned Tribunal to be invalid. As already stated the learned Tribunal has proceeded to find those ballot-papers to be invalid following *Pala Singh* v. *Nathi Singh* (2). It becomes, therefore, necessary to go into the cases cited at the hearing for a different view based on concensus of judicial opinion. The first case is *Wigtown case* (12), in which it was held that any substantial and separate addition to the voter's mark, not attributable to mere carelessness or want of skill—as for instance, a line on the back, or crosses, circles, or ovals on the front—invalidated the votes, on the ground that additional marks might lead to the identification of the voter. This was, however, the majority opinion. In *Woodward* v. *Sarsons* (1), the *Wigtown case* (13), was not approved and Lord Coleridge, C.J., at page 748, observes—"The result seems to be, as to writing or mark on the ballot-paper, that, if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot-paper is void, and is not to be counted: or, to put the matter affirmatively, the paper must be marked so as to shew that the voter intended

(13) (1874) 2 O'M & H 215.

to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to shew that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted." With regard to a ballot-paper on which the name of the candidate was written it was said—"We, with some hesitation disallow Nos. 844 and 889. There is no cross at all: and we yield to the suggestive rule that the writing by the voter of the name of the candidate may give to much facility, by reason of the handwriting, to identify the voter." The placing of two crosses instead of one was held not to vitiate the ballot-paper unless, so it was pointed out, "there were evidence of an arrangement that the voter would place two marks, so as to indicate that it was he, that voter, who had used that ballot-paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses is not in our judgment a substantial breach of the statute." It was further held that mere fact of additional mark on the ballot-paper did not invalidate it though in such cases also intrinsic evidence of arrangement might make such peculiarities indications of identity. A ballot-paper with initials was also rejected. To my mind this case decides that where there is writing on a ballot-paper or initials suggestive of the voter, such a ballot-paper is invalid as such without more, but in the case of a ballot-paper on which there is no writing but other marks such as additional crosses or lines, ovals or dots or something similar showing a peculiarity of marking, then the ballot-paper is only

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invalid if there is evidence of arrangement that the voter would so mark the ballot-paper as to lead to his identity. The third case is *Stepney case* (14), in which upon the back of the ballot-paper was written 'John Michett' with a cross, and the question was whether this writing invalidated the ballot-paper. The learned Judges apparently differed on this matter. Field, J., said—"Now it is argued that the man who gave this vote, whoever he was, ought to be disfranchised, because upon the back of the ballot-paper is a piece of writing in no way connected with him, and I am unable as a judge of fact to come to the conclusion that this was written by the voter." Later in the judgment also the learned Judge points out that if there were any evidence to suppose that the name had been written by the voter, or if that writing suggested who the voter was, it would have made a great difference. So the learned Judge was not satisfied that the writing on the back of the ballot-paper was in fact writing by a voter. Denman, J., taking a different view and following *Woodward* v. *Sarsons,* held—"Now I take the decision in *Wood-ward* v. *Sarsons*, to amount to this, not that every departure from a simple cross is a mark by which the voter can be identified—a double cross for instance was allowed by the Court—but that where the name of the candidate, not of the voter, is written in full upon the ballot-paper, the vote shall be invalid, because that is a mark by which the voter can be identified. The principle is this : that where a man has once written a name in full upon a paper it is evidence of his handwriting, and evidence of this handwriting is evidence of the identity of the man. It is also held that where a man makes the proper mark on his ballot-paper—if he puts his initials by the side of that mark—that upon the same principle is evidence by which the

(14) (1886) 40 M&H 34.

voter can be identified, and in the present case, it appears to me, that principle applies. * * * *

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The interpretation placed upon this section by the Court was not a mark by which the particular voter can be proved to be the man and identified, but the sort of mark by which the voter can be identified, that is to say, a mark which is made in such a way as to afford a reasonable possibility of identifying him. I take it that the real object of the statute is to prevent people agreeing together beforehand to something in the nature of a signature by which it may be known afterwards which were their ballot-papers." Field, J., then said that he did not dissent from *Woodward* v. *Sarsons*, but pointed out that his difficulty in that case was to connect 'John Mitchett' with the cross, so as to identify the voter. The difference between the two learned Judges proceeded on the basis whether the name written on the back of the ballot-paper was written by the voter or not, but they did not differ upon the principle laid down in *Woodward* v. *Sarsons*. Denman, J., makes it clear that writing on a ballot-paper is itself evidence of the handwriting of the voter which handwriting is then evidence of the identity of the voter. These opinions have been expressed by the learned Judges at pages 40 to 43 of the report. At page 37 there is another instance of a vote having been objected to on the ground that the voter had put a circle instead of a cross, and that by this it might be identified, Denman, J., observed on this objection—"The question here is whether a ballot-paper is good, in which the voter, instead of making a cross or a mark of the ordinary kind straight with his pen, deliberately makes a circle. If a man does that, he really must do it either with some sinister object, or it is so perversely and absurdly in deviation from the directions of the Ballot Act as to make it a

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case in which he ought really to be held to have thrown away his vote. If he does it purposely—and one cannot understand a man supposing that a cross is a circle,—he has done it perversely, and done it in such a way as again to legitimately forfeit his vote. If he does it purposely, knowing that his vote may be thrown away, then he really has not indicated an intention to vote for the candidate against whose name has placed the mark; so that in any case there is no good ground for holding that a circle is a cross within the meaning of the Ballot Act." The vote was struck off. In *Buckrose case* (15), the objection was similar, that is to say, on the ground that the ballot-paper had been marked with a circle instead of a cross but this objection was not accepted although Baron Pollock, J., referred to the remarks of Denman, J., as above. It was pointed out that the precise character of the circle in *Stepeny case,* was not before the learned Judge. In the *Buckrose case,* another ballot-paper was objected to which may be stated in the form in which it is given in the report at page 112—"Mr. Pope objected to a vote on the ground that the only mark on the paper was a cross made immediately upon the name of Mr. Sykes, in such a way as to make it appear possible that he intended to strike the name out. The vote was disallowed. "In *Cirencester case* (16), the objection was to the ballot-paper on the ground that the voting paper contained marks which might lead to the identification of the voter, and Hawkins, J., held—"We have felt a little difficulty in dealing with several cases in which it was argued that although the paper itself indicated clearly for which candidate the voter intended to vote, it contained also upon it something which could lead to the identification of the voter. That would be a serious objection if it were maintained—indeed the Statute enacts that

(15) (1886) 4 O'M & H 110 at page 12.
(16) (1893) 4 O'M & H 194 at page 198.

it shall render the vote void. It was argued before us that if the marks were such as might lead to the identification of the voter that would be quite sufficient to vitiate and render void the vote. That is not our opinoin. It is not a question whether by some accident or a challenged mark might possibly lead to the identification of the voter. If that were so it would be necessary to fix some simple well-defined cross or other mark, by which alone every ballot-paper should be marked, to indicate the vote; but this would render strict compliance with the requirement of the law extremely difficult and practically impossible. Very few persons, none with unsteady hands would be capable of making a definite mark with strict accuracy, and yet any deviation from it might lead to the identification of the voter. But that in our opinion is not the way in which these objections ought to be dealt with. We think we ought to adhere to the language of the Statute itself, which says that the mark must be a mark by which the voter can (not might possibly) be identified; whether the mark is such, is a matter of fact." The learned Judge then further held that the marks that the ballot-paper bore were not of the type from which the only conclusion was that such marks standing alone could lead to the identification of the voter. This case does not concern objection in regard to handwriting but is confined only to objection in regard to marks in addition to the cross which marks it was said might lead to identification of the voter. In the *Exeter case* (17), ballot-papers containing a cross and another mark were allowed as valid. One ballot-paper with a cross and the words "Up, Duke," in the space opposite Duke's name was disallowed to Duke "for marks of identification" and with regard to this Channell, J., at pages 231 and 232, observes—"It

(17) (1911) 6 O'M & H 228.

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seems to me that the cases establish this. It is obvious, to begin, that the mitakes that illiterate and unskilled persons may make in filling up their ballot-papers are almost infinite, but it is equally true that the devices that fraudulent people may arrange between themselves for identification are also infinite; and it seems to me that what you have to do when you have got ballot-papers of the kind such as we have been considering, some for the purpose of seeing for whom they voted, and some for the purpose of seeing whether there are marks of identification on them—it seems to me that what you have got to do is to look at the paper and to form your own opinion upon looking at it whether what is there is put there by the voter for the purpose of indicating for whom he votes. Then if he has not done it in the proper way, if he has put something which is not exactly a cross, if he has put two crosses, or if he has done anything of that sort—it is perfectly true those marks might be a matter of arrangement between some person who has induced him for some reason or other to give his vote in that particular way, and promised him something if he satisfies the person promising that he has so voted; it is perfectly possible that two crosses, or anything of that sort, may be used as devices for that purpose. It is possible; but if you come to the conclusion on looking at the paper that the real thing that the man has been doing is to try badly and mistakenly, not understanding the Act of Parliament—to try to give his vote and to make it clear whom he votes for, if you come to the conclusion that that is what it is, then those marks are not to be considered to be marks of identification unless you have positive evidence of some agreement that there was a person going about and bribing voters and saying, "Now, you shall have so much for your vote, but to satisfy me you must not only vote for that particular candidate, but you must put two crosses to make it clear," and if such an agreement

as that was proved, then the two crosses would become a matter of identification. But that is a thing which you do not get. That sort of thing may take place, but the one place where it is difficult to prove it is in the Election Court, and you do not know of such things. I think that that must be what the judges were referring to in speaking of evidence of an agreement which would make a particular mark an identification,—because it had been so arranged. But I think that the statute makes void all ballot-papers which have on them marks other than those which indicate the intention to vote for a particular person, and which may be indications of the identity of the voter. And it seems to me that when you find a ballot-paper which has got something clearly going beyond the intention to indicate for whom he votes, then you must hold that to be bad. You may say, according to that rule, "Up, Duke." is merly a written intention to vote for that person, but it goes beyond that, and it seems to me that if one wants authority, the case of *Woodward* v. *Sarsons*, where the name of "Sarsons" was written, is a case distinctly in point. I think that that goes beyond the mere case where the judges thought something or another upon a particular paper: I think there they laid down the principle by which we ought to be bound. Therefore, although one does it always with some regret, because it is very likely indeed—in fact, more likely than not—that he was a too enthusiastic supporter of Mr. Duke, I think he has managed by his enthusiasm to spoil his vote." This was a case of both marks which were pressed as leading to identity of the voter as also the writing by the voter. In regard to marks other than writing evidence of agreement to mark the ballot-paper in a peculiar manner so as to facilitate identify was considered imperative before the ballot-paper could be held invalid, but in the case of writing by the voter, in spite of the fact that the voter by writing the words

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objected to emphasise his vote for the particular candidate, it was held that in his enthusiasm he had spoiled his vote by providing means of identification by his handwriting. In *North-Eastern Derbyshire case* (18), the learned counsel stated the objection in this way—"Mr. Slesser then dealt with the remainder of the sixty-three ballot-papers in favour of the respondent, Mr. Lee, which were objected to by the petitioner. Many objections were similar to those made against the petitioner. The following irregularities were also objected to:—That a paper on which a number and not a cross had been placed opposite the name of a candidate could not be counted; that the drawing of a cross through the name of the candidate Lee showed an intention on the part of the voter to ballot against him and not in his favour; that a number scribbled over, as well as a cross in the space reserved for the vote, operated as a mark of identification, and, therefore, the vote could not be counted." These objections were over-ruled and the votes held valid. At page 103 of Rogers on Elections, Volume II, 1928 Edition, there is reference to this case in this manner. "In *North-Eastern Derbyshire,* ballot-papers were rejected which contained the words "lest we forget", "with luck", "nap", two crosses, one marked "in error", the other marked "vote to count", a mark which appeared illegible, one with a number only, and one with a "1" put opposite one name and "2" opposite another." This is not to be found in the report already referred to but this very part is reproduced in notes (c) and (d) at page 139 of Halsbury, 3rd Edition, Volume 14. The last English case cited is *Lewis* v. *Shepperdson* (19), in which initials were written in addition to the mark made by the voter and the ballot-paper was held to be invalid following *Woodward* v. *Sarsons.*

(18) (1923) 39 Times Law Reports at page 424.
(19) (1948) 2 All. E.R. 563.

In *Mayberry* v. *Sinclair* (20), the objection is disposed of thus—"Exhibit 24. This ballot has the word "for" written after the cross. I do not think this voids the ballot. See *Woodward* v. *Sarsons* (1), the *Lennox case* (21), *Re North Grey* (22), the *West Huron Case* (23), *Jenkins* v. *Brecken* (24). In *Bennett* v. *Shaw* (25), appears this passage—" In *Hawkins* v. *Smith* : *The Bothwell Election case* (26), Ritchie, C. J., at page 696, formulated a rule that where a voter had placed upon his ballot a mark indicating "a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or a round O, then such non-compliance with the law, in my opinion, renders the ballot null." There is only one branch of the rule enunciated there by Ritchie, C.J., with the object of providing a formula capable of practical application in determining the sufficiency or insufficiency of the marking of a disputed ballot. It is implied in what the Chief Justice says that it is essential that the mark shall be something capable of being described as a cross; he finds it impossible, he says, to lay down a hard and fast rule by which it can be determined whether a mark is a good or a bad cross and the test is, he thinks, to be found in the answer to the inquiry whether "the mark evidences an attempt or an intention to make a cross—" That is the inquiry the result of which determines whether or not the mark is a sufficiently good cross. If there is evidence of such an attempt, then the ballot is to be counted, unless the mark or marks on the paper are of such a character as to exhibit an intention to provide means for identification, in which case the ballot should be

(20) (1914) 20 D.L.R. 752 at page 757.
(21) (1902) 4 O.L.R. 378.
(22) 4 O.L.R. 286.
(23) (1898) 2 Ont. Elec. cas. 58.
(24) (1883) 7 S.C.R. 247.
(25) (1922) 70 D.L.R. 348.
(26) (1884) Can. S.C.R. 676.

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rejected. But a mark made with the intention of making a cross is essential, and a straight line is, therefore, insufficient as clearly shewing an intention not to do what the law requires, to make a cross." In this case the opinion that prevailed was that any other mark than a cross such as a straight line invalidates a ballot paper.

In *Blundell* v. *Vardon* (27), the objection to some ballot-papers is dealt with in this way—"Some ballot-papers had three crosses in squares, and the word "yes" written on top of each of the crosses, or opposite one or all of the crosses in the open space on the right hand side of the paper. These were allowed, the intention being clear, and there being no evidence that these marks were intended to lead, or would probably lead, to the identification of the voter within the meaning of section 158 (a) on the authority of *Cirencestor Case* (15). Then citation is given from that case. But it has already been pointed out that that case does not concern the matter of handwriting on a ballot-paper and yet in the above case there was the word "yes" written on the ballot-papers and in spite of that the ballot-papers were held valid. In this same volume there is the case of *Kennedy* v. *Palmer* (28), in which at pages 1484-5 the objection is decided in this way—"In the one instance I have felt myself justified in allowing a paper which has in addition to the cross the word "yes", both within the square; and another paper which reads thus: to the left of a candidate's name a cross was properly placed in the printed square, to the right and opposite there was a cross, the word "yes", and a pencilled square. The other candidate's name was struck through, and opposite was written the word "no". But the handwriting of the "yes" and the "no" is like

(27) (1907) 4 C.L.R. 1463 at p. 1475.
(28) (1893) 4 O'M & H 1481 at p. 1484-85.

a thousand others, and so far from the marks justifying an opinion that they "will enable" anyone to identify the voter, there is scarcely room for even surmise on the point, in the absence of a shred of evidence pointing to any improper practice or plan. "In *Kean* v. *Kerby* (29), an instance of writing on a ballot-paper was considered by Issacs, J. The duty of the Presiding Officer was to write the name of the Division and the names of the candidates in the case of an absent voter, for some other Division in the State and to hand the ballot-paper to the voter. What happened was that the Presiding Officer wrote in ink the name of the Division but omitted to fill in the names of the candidates. The voter, apparently thinking that he himself had to fill in the name of the candidate he wished to vote for wrote "McGrath" and filled in the figure 1, thus showing his preference. The objection was that in this way the voter having written the name provided a means of identifying himself and the vote should be disallowed. The learned Judge considered *Wigtown* (12), *Stepeny* (13), *Buckrose* (14), *Cirencester* (15) and *Exeter cases* (16), and observed that "the law in forbidding identification marks does not contemplate shutting out a transparently honest attempt to vote rendered necessary by the neglect of an official. This vote should be allowed to McGrath." I think the learned Judge clearly proceeded on the basis that the defect in the ballot-paper was due to the neglect of the official concerned and for that the paper could not be invalidated.

In *Vidrine* v. *Eldred* (30), the ballot-papers were rejected on these considerations—"Some of these votes were signed by the voter. Some of them contained other marks than the cross mark in the square opposite the names of candidates, as for instance, the

(29) (1920) 27 C.L.R. 449 at p. 446 and 447.
(30) (1923) 96 Southern Reporter 566.

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names of candidates written, or additional cross marks or checks or lines outside of the square, some contained visible erasures. All these votes we reject as containing marks capable of serving as identification marks, though perhaps not so intended by the voter." This case is consistent with the English cases already referred to so far as the matter of handwriting on a ballot-paper is concerned but it goes beyond those cases in so far as additional mark other than the required mark on a ballot-paper is concerned.

In the *Punjab South-East Towns Case* (31), in *Mohammad Ibrahim* v. *Abbas Ali Khan Sahib* (32), *and in Raja Ghazanfar Ali* v. *Chaudhri Bahawal Bux* (33). Urdu words or letters on a ballot-paper in addition to cross mark have been held to invalidate such a paper.

The position in law that now emerges on consideration of all these cases seems to me to be this: In so far as any mark, other than writing, on a ballot-paper in addition to the mark required to signify intention to vote, is concerned, its pecularity as a mark of identification can only invalidate a ballot-paper if there is evidence of arrangement to vote in that peculiar manner to enable identification; but in the case of initials or handwriting on a ballot-paper the same is by itself evidence of the identity of the voter, the handwriting providing the evidence of such identity. In the latter case the only question that remains on the facts of a particular case is the sufficiency and adequacy of the writing to support an inference that the handwriting amounts to identification of the voter. It is upon this consideration that in some of the cases referred to a type of writing has been held not to invalidate a ballot-paper. But that

(31) 1 Hammond 165 at p. 169.
(32) 2 Hammond 180.
(33) 2 Hammond 218 at p. 242.

obviously must be a question for consideration in the facts and circumstances of each particular case.

Now in *Pala Singh's* (2), case the ballot-paper were held to be invalid because the cross marks appeared on the symbol of the candidate and not in the place meant for making such a mark so as to indicate intention to vote. Those ballot-papers were held invalid on the ground that the voter could disclose his identity. The decision in this case may be supported by *Buckrose case* (15) at page 112 of the report and *Stepney* case (14) at page 37. However, I consider that on the whole *Pala Singh's* case is not a good instance and, in the wake of the cases mentioned above, it has not been correctly decided on this particular aspect.

In so far as ballot-paper Exhibit P. 74 is concerned, as against the name of each one of the three candidates for whom the voter intended to vote the figures "1", "2" and "3" have been rightly set according to the rules, but in addition with each figure there is a cross mark (X). That additional cross mark merely emphasises the intention of the voter to vote for the candidates against whose names he has made such a mark in addition to the figures referred to. There is no evidence and not even a suggestion that this was done by the voter as a pre-arrangement of a pecularity of marking so as to facilitate his identity. Obviously this ballot-paper Exhibit P. 74 has to be held to be a valid vote for the appellant. The only other ballot-paper that remains for consideration is Exhibit P. 76. In this ballot-paper, as has already been detailed above, in addition to the figures 1, 2 and 3 and with each figure a cross mark, the voter has written the words 'one', 'two' and 'three'. In this manner the voter has given his handwriting on this ballot-paper providing evidence of identity. The question then is: is this sufficient and adequate writing by the voter from which conclusion is available

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in regard to identity? The circumstances of the case have to be taken into consideration in this respect. It has been stated at the bar that the Punjab Legislative Assembly Constituency for election to the Council of States consists of members of the Legislative Assembly and further that on the relevant date the sitting members were 152, out of which 150 actually voted. The Secretary of the Legislative Assembly was the returning officer. There is no evidence, but it is apparent that he must be conversant with every member and since he corresponds with every member he must be conversant with the handwriting of every member. It is a small and a rather limited constituency with the electrorate of which the returning officer is fairly closely in touch and must be so in the circumstances. It is in these circumstances that conclusion has to be arrived at whether the writing provided by the voter on ballot-paper Exhibit P .76 is sufficient for identity. No doubt, the intention of the voter is obvious that by writing his preferences not only in figures but in words as well in addition to crosses he was emphasising his choice, but in my opinoin, consistent with the approach of Channel, J., in *Exeter case* (17), he carried his enthusiasm so far as to spoil his vote because he went beyond expressing the intentoin to vote by providing evidence of identity in his handwriting. It is upon this consideration alone that ballot-paper Exhibit P. 76 has to be held to be invalid. To this extent the decision of the learnd Tribunal is maintained, but on a different approach.

The consequence then is that while the votes cast, after transferring preferences, in favour of Shri Abdul Ghani respondent remain 35, in the case of the appellant the same are reduced from 36.5 to 34.5 because ballot-paper Exhibit P. 76 in his favour has been found to be invalid. In this way Shri Abdul Ghani respondent still has larger number of votes in his favour than the appellant.

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The appeals of the appellant thus fail and are dismissed, but, in the circumstances of these appeals, the parties are left to their own costs.

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DUA, J.—I have read the judgment prepared by my learned brother Mehar Singh, J., with care. The facts have been stated in that judgment and need not be repeated; the decided cases cited at the bar have also been considered therein in detail and I need not deal with them either. Exhibit P. 76 is the only ballot-paper in regard to which I desire to express my views, because I agree with my learned brother's conclusions that Exhibit P. 74 is a valid vote.

I also agree with my learned brother that in the case of a mark, the ballot-paper concerned would be invalid only if there is evidence of arrangement to vote in that particular manner so as to enable identification of the elector. I am, however, doubtful if initials of the elector and his handwriting can safely, according to the legislative intent, be equated, and, considered at par, for the purposes of Rule 73(2)(d) of the Conduct of Election Rules, 1961. I would feel inclined to place initials on a higher footing than mere handwriting for this purpose.

According to the conclusions of my learned bother on the legal position stated by him the additional writing of the words "one" "two" and "three" along with the figure "I" "II" and "III" has invalidated this ballot-paper. This conclusion is based, as put by him, on taking into consideration the circumstances of this case which were stated by the respondent's learned counsel at the bar in this Court; and they are, that the Punjab Legislative Assembly Constituency for election to the Council of State consists of the members of the Legislative Assembly and further that on the relevant date the sitting members

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were 152 out of whom 150 actually voted. The Secretary of the Legislative Assembly was the Returning Officer. Now admittedly, there is no evidence on the record showing that the Secretary who acted as the Returning Officer was conversant with the handwriting in English language of the elector in question and, therefore, in a position to identify the English handwriting of the elector who himself filled the ballot-paper Exhibit p. 76. Such a finding would obviously require consideration of more aspects than one. How often do individual members of the Legislative Assembly write to the Secretary in the usual course of business, and in which language? Does the Secretary himself deal with all such correspondence, or his assistants—if any—or other subordinates in the office, dispose it of according to the office practice? Did the elector in question actually write to the Secretary in English language frequently enough and were the writings lengthy enough to enable the latter to identify the former's handwriting by just casually looking at it? Is the elector's handwriting in English mature and stable enough and has it developed marked characteristics to facilitate identification? Did the mere writings "One" "two" and "three" constitute sufficient material for the Secretary in question to be able to identify the elector concerned by just looking at them in the discharge of his duties as Returning Officer? Has the Secretary been noticing and carefully observing the handwriting of the elector so as to be able to identify his handwriting? This would incidentally also raise the question as to how recent did he have the opportunities of carefully observing the elector's handwriting? Last but not the least: Had the elector in question been an elected member of the Assembly long enough so as to justify the assumption that he must have written to the Secretary who acted as Returning Officer verey frequently or was he only recently elected in 1962 elections and also as to

for how long had the Returning Officer acted as Secretary? These, among others, would be some of the aspects which one has to bear in mind and take into consideration for satisfactorily determining the question whether the impugned ballot paper violated the doctrine of secrecy of ballot; they are, in my opinion, largely matters of fact essentially depending on evidence led by the parties in each case. The conclusion of my learned brother that these writings bring the ballot-paper in question within the mischief of Rule 73(2)(d) is based on the assumption that it is apparent that the Secrteary who acted as Returning Officer must be knowing every member of the Legislative Assembly and since every member corresponds with him he must also be conversant with the handwriting of every member. In the small and rather limited constitutency, as the one in question, this circumstance has been considered to be sufficient for the Returning Officer to identify the elector who filled the ballot-paper Exhibit p. 76. Speaking with the greatest respect, I must confess that I entertain serious doubts if on a bare statment of the kind made at the bar before us it is permissible for this Court on appeal to base the holding about the invalidity of the impugned ballot paper. This appears to me to be essentially and primarily a question of fact depending on evidence and, therefore, it should have been founded it on a proper pleading on which evidence should have been led and arguments addressed before the tribunal. Merely because the Secretary of the Legislative Assembly was the Returning Officer does not by itself necessarily lead to the inference or conclusion that he was in a position to identify the handwriting in English of the various electors even though they are only 152 in number from the bald writings "one" "two" and "three". Here, it may be observed that these three words may—or may not—constitute sufficient material to enable handwriting experts to com-

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pare them with the admitted writings of the writer but what we are concerned with is whether these three words can be considered on the existing record to constitute writings from which the Returning Officer in question could identify the elector whose ballot paper is Exhibit p. 76. Again, it would largly depend on the power and habits of the individual Secretary in accurately observing with attention the peculiarities of the penmanship of those who may write to him; and also on the other circumstances, for instance, as to how far this particular elector has had opportunities of writing in English language to the Secretary who acted as Returning Officer and with how much frequency so as to justify the assumption that the Secretary has thereby formed a standard in his own mind of the general character or peculiarities of this particular elector's handwriting in English. Several factors would, from the very nature of things, fall for consideration for coming to the conclusion that the Secretary acting as Returning Officer was so very familiar with the English handwriting of the elector concerned that he could without reasonable hesitation or doubt identify his handwriting merely by looking at the ballot paper in question while discharging his official duties as Returning Officer. It may be remembered that in the State of Punjab English is not the only language in which members of the legislative Assembly may write to the Secretary; Hindi and Punjabi are the other two languages in which also they may—and perhaps a large number of them do—correspond with the Secretary. Increasing importance it may be mentioned, is now, as a matter of policy being given to Hindi and Punjabi languages in this State. It may at this stage be recalled that the learned Tribunal mainly relied on *Pal Singh's* case (2) in invalidating p. 76. Now the ratio of that decision in its entirety has not been approved by my learned brother and I am inclined to agree with him in this

respect. I am also not quite sure if the real *ratio decidendi* of the English decision in *Sarsoon's case* (1) is of much useful guidance or assistance in dealing with the problem with which we are faced in the case in hand. One may perhaps have to consider the question of comparative literacy in English language in England and India at the relevant points of time for appreciating the cogency and relevancy of the dicta of the above decision as applied to the case in hand. It can hardly be ignored that in this country there must be a large number of persons who just scrawl some words in English language without having acquired a marked character of handwriting. It is, however, unnecessary to say anything more on this point, for, in my humble opinion, the question arising before us poses and depends on various aspects depending on evidence which is non-existant on this record.

Another aspect which may also call for consideration is as to how far the doctrine of secrecy of ballot-paper as embodied in Rule 73(2)(d) embraces officers like the Returning Officer, who are apparently also under a statutory obligation to maintain secrecy,—(*vide* section 128, R.P. Act). The Conduct of Election Rules also appear to countenance in certain contingencies the Presiding Officer of a polling station actually recording vote on a ballot-paper,—(*vide* Rule 40). This aspect was undoubtedly not canvassed at the bar, but as at present advised, I think this aspect may not be wholly irrelevant and may perhaps have to be kept in view for a proper determination of the question as to how far the mere possibility of a Returning Officer being able in certain circumstances to identify an elector would invalidate the vote as contemplated by Rule 73(2)(d).

And finallly the rule that elections are not to be lightly set aside on grounds which do not clearly show

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their illegality or establish corrupt practices also cannot be ignored and this rule deserves to be borne in mind while dealing with attack on elections. The right of franchise in a democratic system of representative government founded on election by adult citizens of their chosen representatives is a valuable basic right which should not be too readily denied, negatived or restricted.

As already observed, therefore, and I speak with all due respect—I entertain grave doubts about the desirability and propriety of relying on the statements at the bar on appeal, like those made before us, and basing thereon the holding that the ballot-paper in question violates the doctrine of secrecy of ballot as contained in Rule 73(2) (d) and I am unable to say that those doubts have been removed by the judgment of my learned brother which I have read with great care and attention. I am fully conscious of the fact that both of my learned brethern, for the opinions of both of whom I have great respect, are of identical views different from mine, as was apparent during our discussion at Chandigarh soon after the arguments, but I regret not to have been able to persuade myself to agree with the views expressed by my learned brother Mehar Singh, J., in his judgment and I am constrained to record my respectful dissent.

In my opinion, Exhibit P. 76, is a valid vote and its invalidity has not been brought out on the existing record.

In regard to the question relating to non-compliance with section 81(3) of the R.P. Act, it appears that the petitioner signed each copy of the petition at the time of its presentation in the presence of the Under-Secretary. This would appear to me to be a substantial compliance with the attestation provision contained in the said section. I would thus agree

that the election petition was rightly not dismissed for non-compliance with this provision of law.

In the result I am constrained to hold Exhibit P. 76 to be a valid vote and on this finding the votes cast in favour of the appellant would be 35.5 (P. 74 having been held by my learned brother also to be valid), with the result that he must be considered to have been validly elected. On this ground the appeal would, in my opinion, succeed and allowing the same I would set aside the order of the Election Tribunal and dismiss the election petition leaving the parties to bear their own costs.

Mahajan, J.

MAHAJAN, J.—I have read the judgment prepared by my learned brother Mehar Singh, J., as well as by my learned brother Dua, J. I entirely agree with the judgment proposed to be delivered by my learned brother Mehar Singh, J., and with utmost respect to Dua, J., I am unable to subscribe to his observations. Dua, J., has differed from Mehar Singh, J., on the question of the rejection of the ballot-paper, Exhibit P. 76. The reason which has impelled Mehar Singh, J., to reject it shortly stated is that the writing by the elector of the words 'one', 'two' and 'three' on the ballot-paper in question provides enough material for its rejection as invalid, inasmuch as on it there is writing by which the elector can be identified. Dua, J., does not dispute that if initials of the voter appeared instead of the present writing the vote will be invalid. I do not see how initials stand on a higher footing than any other identifiable writing. It is a matter of common knowledge that persons with whom one is connected in every day life and with whose handwriting one is familar do not normally make a mistake in identifying that person's handwriting. Each person has some peculiar characteristic in his handwriting which differentiates it from that

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of another person. It is very seldom, unless it is a case of perfect forgery, that two handwriting are identical. The words 'one', 'two' and 'three' on the ballot-paper in question, in my view, provide enough material for a discerning eye to fix the identity of the elector. It is not a case of a solitary word being used or where the letters of the alphabet have not been repeated more than once. All individuals have some peculiarity in writing each letter of the alphabet. It is this peculiarity which according to the experts gives out the writer. In the present case, for instance, the letters 'o' and 't' are twice repeated and the letter 'e' is three times repeated. Any person who is conversant with the handwriting of the elector of ballot-paper, Exhibit P. 76, can easily fix his identity. It is common ground that the number of electors is very very restricted, being only 152. These electors, as will be presently shown, have fairly intimate connection with the returning officer, who is the Secretary of the body.

At this stage I proceed to draw from Official publications material on which I base my decision that the Secretary of the Legislative Assembly as well as other people in his office would be in a position to identify from the words 'one', 'two' and 'three' on ballot-paper, Exhibit P. 76, as to who is the elector who has written them. Reference in this connection may be made to Rule 9 of the Punjab Legislative Assembly (Allowances of Members) Rules, 1957. Rule 9 is in these terms:—

> "9. Bills for Compensatory, Travelling, Halting and Incidental Allowance shall be prepared in duplicate on the forms set out in Schedules I and II annexed to these Rules, which shall be filled and sent to the Secretary in duplicate, one copy being stamped

and receipted and the same will be returned to the member duly counter-signed by the Secretary for encashment. Payments will be made, at the option of the member either at the headquarters of the Government or at a District Treasury or a Sub-Treasury (to be specified in the bill). The member may, at his option, endorse the bill in favour of his bankers for collecting and crediting the proceedings of the bill to his accounts:

Provided that claims on account of Travelling, Halting and Incidental allowances of members for attending the meetings of Committees appointed by Government shall be paid after pre-audit by the Accountant-General, Punjab."

The forms prescribed in Schedules I and II are as under :—

[His Lordship set out the Forms and proceeded:]

There is a Handbook for Members of the Punjab Vidhan Sabha published by the Punjab Vidhan Sabha Secretariat, Chandigarh, on the 1st March, 1962, under the authority of the Secretary of the Vidhan Sabha. The following passages from this Handbook may be quoted with advantage:—

"**Page** 4.—Attendance Register.

A Member is required to sign the Attendance Register on each day of his attendance in the presence of an official of the Vidhan Sabha Secretariat. The Register is kept just outside the Vidhan Sabha Chamber. This serves as the record of

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the attendances of the Members and is consulted when their compensatory allowance is worked out. It may be added that absence from Vidhan Sabha apart from affecting the compensatory allowance admissible to a Member may have repercussions on his Membership if this is prolonged for a period of sixty days computed in the manner provided in Article 190(4) of the Constitution without the permission of House.

Page 11.—Form of notice.

A notice must be given in writing, signed by Member giving notice and addressed to the Secretary. It may be delivered to the Superintendent of the Notice Office to avoid its misplacement at any time on a working day before 3.00 p.m. if, however, it is delivered after 3.00 p.m. on a working day or on a holiday, it will be deemed to have been delivered on the next working day. A notice or communication which is not legibly written or which is unsigned is not accepted.

Page 25—Indication of Priorities.

Members who have given notices of more than one resolution are advised to indicate in writing the priority in which they want their resolutions to be taken up in case their numbers are balloted. In the absence of such authority the date of the receipt of the resolution, and if more than one resolution is received on the same date, then the order in which they are received, is kept in view in determining their relative priority".

Relevant "Rules of Procedure and Conduct of Business in the Punjab Legislative Assembly," Published by the Punjab Vidhan Sabha Secretariat, Chandigarh, on the 2nd March, 1962, may be reproduced below:—

"42. Notice of a question shall be given in writing to the Secretary and shall specify the official designation of the Minister to whom it is addressed.

57. (2) A member wishing to raise such a matter shall give notice in writing to the Secretary one day in advance of the day on which the matter is desired to be raised, and shall shortly specify the point or points that he wishes to raise:

Provided * * * * * * * *

58. (1) As soon as may be the Speaker shall after he has received intimation in writing form a member under his hand resigning his seat in the Assembly inform the House that such and such a member has resigned his seat in the Assembly:

* * * * * *

65. (1) A motion expressing want of confidence in or disapproving the policy in a particular respect of a Minister or the Ministry as a whole, may be made, subject to the following restrictions, namely,—

(a) * * * * * * *

(b) the member asking for leave just before the commencement of the sitting of the day leave with the Secretary a written notice of the motion which he proposes to make.

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67. (1) Notice of an adjournment motion shall be given in writing not less than one and a half hours before the commencement of the sitting on the day on which the motion is proposed to be made to each of the following—

(i) Speaker;

(ii) Minister concerned or Chief Parliamentary Secretary;

(iii) Secretary.

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74. Every notice required by the Rules shall be given in writing addressed to the Secretary and shall be delivered at the Assembly Office. If it is delivered between 10 a.m and 3 p.m. on a day when the office is open it shall be treated as delivered on that day. If it is delivered at any later time or on any holiday it shall be treated as delivered on the day on which the office next opens A notice or communication which is not legibly written may, and if it is not signed by the member sending it, shall be rejected.

78. Save as otherwise provided in these rules a member who wishes to move a motion shall give in the case of a substantive motion at least seven clear days' and in the case of an amendment at least two clear days' notice in writing of his intention to the Secretary:

Provided * * * * *

All the above rules and forms, etc., indicate that there are a variety of ways in which a member of the Assembly is dealing with the Assembly Secretariat

and the Secretary of the Assembly. These persons, with whom such member is dealing in the very nature of things, would be competent to identify his hand-writing. It cannot be disputed that the elector who filled in the ballot-paper, Exhibit P. 76, is very well conversant with the English language. He has not only marked his preference in the Roman numerals but has also put down the words 'one', 'two', and 'three', in English language and, therefore, it is idle to speculate that he is not a person who is not corresponding with the Assembly Secretariat in English language or is not signing his name or his requisitions in the English language. In my view, Mehar Singh, J., is perfectly right in accepting the statements at the bar made by the learned counsel for the respondents, and I am in respectful agreement with him. In my view, these appeals must fail and the parties left to bear their own costs.

COURTS ORDER

The appeals are dismissed in view of the majority judgment. Parties are left to their own costs.

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