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December 9

HARI VISHNU KAMATH
v.
SYED AHMAD ISHAQUE AND OTHERS.

[MEHR CHAND MAHAJAN C. J., MUKHERJEA, S. R. DAS, VIVIAN BOSE, BHAGWATI, JAGANNADHADAS AND VENKATARAMA AYYAR JJ.]

Constitution of India, Art. 226—Powers of High Court thereunder—Writ of certiorari *against Election Tribunals after they become* functus officio—Certiorari *against Record—Distinction between writ of prohibition and writ of* certiorari—*Art. 227 of the Constitution—Superintendence of High Court over Election Tribunals—Superintendence—Judicial as well as administrative*—Certiorari—*Scope and character of—Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951—Rule 47(1)(c)—Whether mandatory or directory—Error manifest on the face of record—Interference by* certiorari.

Article 226 of the Constitution confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified, and Election Tribunals functioning within the territorial jurisdiction of the High Courts would fall within the sweep of that power. The power of the High Court under Art. 226 to issue writ of *certiorari* against decisions of Election Tribunals remains unaffected by Art. 329(b) of the Constitution.

The High Courts have power under Art. 226 of the Constitution, to issue writs of *certiorari* for quashing the decisions of Election Tribunals, notwithstanding that they become *functus officio* after pronouncing the decisions.

The writ of *certiorari* for quashing the offending order or proceeding is directed against a record, and as a record can be brought up only through human agency, it is ordinarily issued to the person or authority whose decision is to be reviewed. If it is the record of the decision that has to be removed by *certiorari*, then the fact that the tribunal has become *functus officio* subsequent to the decision could have no effect on the jurisdiction of Court to remove the record.

As the true scope of the writ of *certiorari* to quash is that it merely demolishes the offending order, the presence of the offender before the court, though proper, is not necessary for the exercise of the jurisdiction or to render its determination effective. The writ of *certiorari* being in reality directed against the record, there is no reason why it should not be issued to whosoever has the custody thereof.

The writ of *certiorari* is directed to the body or officer whose determination is to be reviewed, *or to any other person having the custody of the record or other papers to be certified.*

The scope of Art. 226 of the Constitution is firstly that it confers on the High Courts power to issue writs and directions and secondly it defines the limits of that power. This latter it does by enacting that it could be exercised over any person or authority within the territories in relation to which it exercises its jurisdiction. The emphasis is on the words "within the territory", and their significance is that the jurisdiction to issue writs is co-extensive with the territorial jurisdiction of the court. The reference is not to the nature and composition of the court or tribunal but to the area within which the power could be exercised.

There is one fundamental distinction between a writ of prohibition and a writ of *certiorari*. A writ of prohibition will lie when the proceedings are to any extent pending and a writ of *certiorari* for quashing will lie after the proceedings have terminated in a final decision. If a writ of prohibition could be issued only if there are proceedings pending in a court, it must follow that it is incapable of being granted when the court has ceased to exist, because there could be then no proceeding on which it could operate. But it is otherwise with a writ of *certiorari* to quash, because it is directed against a decision which has been rendered by a Court or tribunal, and the continued existence of that court or tribunal is not a condition of its decision being annulled.

Election Tribunals are subject to the superintendence of the High Courts under Art. 227 of the Constitution and that superintendence is both judicial and administrative. While in a *certiorari* under Art. 226 the High Court can only annul the decision of the Tribunals, it can, under Art. 227 do that, and also issue further directions in the matter.

As respects the character and scope of the writs of *certiorari* the following propositions may be taken as well established:

(1) *Certiorari* will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) *Certiorari* will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

(3) The court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of facts reached by the inferior Court or Tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of "certiorari" if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by "*certiorari*" but not a mere wrong decision. What is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element

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of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.

It is well-established that an enactment in form mandatory might in substance be directory, and that the use of the word "shall" does not conclude the matter. There are well-known rules for determining when a statute should be construed as mandatory and when directory. All of them are only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context.

The word "shall" in Rule 47(1)(c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 which enacts that "a ballot paper contained in a ballot box shall be rejected if it bears any serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot box in which it was found was used", cannot be construed as meaning "may". The provisions of Rule 47(1)(c) are mandatory like the provisions of Rule 47(1)(a), Rule 47(1)(b) and Rule 47(1)(d).

Held, that in maintaining the election of the first respondent in the present case on the basis of the 301 votes which were liable to be rejected under Rule 47(1) (c) the Tribunal was plainly in error. As the error was manifest on the face of the record, it called for interference in *certiorari.*

Held further, that the prayer of the appellant to be declared elected must be refused under s. 97, as the respondent had pleaded in his recrimination petition that there had been violation of Rule 23, and that by reason thereof the election of the appellant was liable to be set aside, if he had been declared elected and that that plea had been established.

In the result the entire election was set aside.

N. P. Ponnuswami v. *Returning Officer, Namakkal Constituency and Others* ([1952] S.C.R. 218), *Durga Shankar* v. *Raghuraj Singh* ([1955] S.C.R. 267), *T. C. Basappa* v. *T. Nagappa* ([1955] S.C.R. 250), *Clifford O'Sullivan* ([1921] 2 A.C. 570), *Rex* v. *Electricity Commissioners* ([1924] 1 K.B. 171), *R.* v. *Wormwood Scrubbs (Governor)* ([1948] 1 All E.R. 438), *Waryam Singh and another* v. *Amarnath and another* ([1954] S.C.R. 565), *Parry & Co.* v. *Commercial Employees' Association, Madras* ([1952] S.C.R. 519), *Veerappa Pillai* v. *Raman and Raman Ltd. and Others* ([1952] S.C.R. 583), *Ibrahim Aboobaker* v. *Custodian General* ([1952] S.C.R. 696), *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw* ([1951] 1 K.B. 711; [1952] 1 K.B. 338), *Rex* v. *Nat Bell Liquors Ltd.* ([1922] 2 A.C. 128), *Batuk K. Vyas* v. *Surat Municipality* (A.I.R. 1953 Bom. 133), *Julius* v. *Bishop of Oxford* ([1880] L.R. 5 A.C. 214), *Woodward* v. *Sarsons* ([1875] L.R. 10 C.P. 733), *Vashist Narain* v. *Dev Chandra* ([1955] S.C.R. 509) and *In Re South Newington Election Petition* ([1948] 2 A.E.R. 503), referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 61 of 1954.

Appeal under Article 132(1) of the Constitution of India from the Judgment and Order dated the 4th November 1953 of the High Court of Judicature at Nagpur in Civil Miscellaneous Petition No. 174 of 1953.

N. C. Chatterjee, Bakshi Tek Chand and *Veda Vyas,* (*S. K. Kapur* and *Ganpat Rai,* with them), for the appellant.

G. S. Pathak, (*Rameshwar Nath* and *Rajinder Narain,* with him), for respondent No. 1.

1954. December 9. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—The appellant and respondents 1 to 5 herein were duly nominated for election to the House of the People from the Hoshangabad Constituency in the State of Madhya Pradesh. Respondents 4 and 5 subsequently withdrew from the election, leaving the contest to the other candidates. At the polling the appellant secured 65,201 votes, the first respondent 65,375 votes and the other candidates far less; and Returning Officer accordingly declared the first respondent duly elected. The appellant then filed Election Petition No. 180 of 1952 for setting aside the election on the ground *inter alia* that 301 out of the votes counted in favour of the first respondent were liable to be rejected under Rule 47(1) (c) of Act No. XLIII of 1951 on the ground that the ballot papers did not have the distinguishing marks prescribed under Rule 28, and that by reason of their improper reception, the result of the election had been materially affected. Rule 28 is as follows :

"The ballot papers to be used for the purpose of voting at an election to which this Chapter applies shall contain a serial number and such distinguishing marks as the Election Commission may decide".

Under this rule, the Election Commission had decided that the ballot papers for the Parliamentary Consti-

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tuencies should bear a green bar printed near the left margin, and that those for the State Assembly should bear a brown bar.

What happened in this case was that voters for the House of the People in polling stations Nos. 316 and 317 in Sobhapur were given ballot papers with brown bar intended for the State Assembly, instead of ballot papers with green bar which had to be used for the House of the People. The total number of votes so polled was 443, out of which 62 were in favour of the appellant, 301 in favour of the first respondent, and the remaining in favour of the other candidates. Now, Rule 47(1) (c) enacts that "a ballot paper contained in a ballot box shall be rejected if it bears any serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot box in which it was found was used". In his election petition, the appellant contended that in accordance with this provision the ballot papers received at the Sobhapur polling stations not having the requisite mark should have been excluded, and that if that had been done, the first respondent would have lost the lead of 174 votes, and that he himself would have secured the largest number of votes. He accordingly prayed that he might be declared duly elected.

The first respondent contested the petition. He pleaded that the Returning Officer at Sobhapur had rightly accepted the 301 votes, because Rule 47 was directory and not mandatory, and that further the votes had been accepted as valid by the Election Commission, and the defect, if any, had been cured. He also filed a recrimination petition under section 97 of Act No. XLIII of 1951, and therein pleaded *inter alia* that at polling station No. 299 at Malkajra and at polling station No. 371 at Bammangaon ballot papers intended for use in the State Legislature election had been wrongly issued to voters to the House of the People by mistake of the polling officers, that all those votes had been wrongly rejected by the Returning Officer, and that if they had been counted, he would

have got 117 votes more than the appellant.. He accordingly challenged the right of the appellant to be declared elected.

The Election Tribunal held by a majority that Rule 47(1) (c) was mandatory, and that the 301 ballot papers found in the box of the first respondent bearing the wrong mark should not have been counted; while the third Member was of the opinion that that rule was merely directory, and that the Returning Officer had the power to accept them. The Tribunal, however, was unanimous in holding that the result of the election had not been materially affected by the erroneous reception of the votes, and on that ground dismissed the petition.

The appellant then moved the High Court of Nagpur under articles 226 and 227 of the Constitution for the issue of a writ of *certiorari* or other order or direction for quashing the decision of the Election Tribunal on the ground that it was illegal and without jurisdiction. Apart from supporting the decision on the merits, the first respondent contended that having regard to article 329 (b) the High Court was not competent to entertain the petition, as in substance it called in question the validity of an election. The petition was heard by a Bench consisting of Sinha, C. J., Mudholkar and Bhutt, JJ., who differed in their conclusions. Sinha, C. J., and Bhutt, J., held that no writ could be issued under article 226, firstly because the effect of article 329 (b) was to take away that power, and secondly, because the Election Tribunal had become *functus officio* after the pronouncement of the decision, and that thereafter there was no Tribunal to which directions could be issued under that article. Mudholkar, J., agreed with this conclusion, but rested it on the second ground aforesaid. As regards article 227, while Sinha, C. J. and Bhutt, J. held that it had no application to Election Tribunals, Mudholkar, J. was of the view that they were also within the purview of that article, but that in view of article 329 (b), no relief could be granted either setting aside the election of the first respondent, or declaring the appellant elected, and that the only

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order that could be made was to set aside the decision of the Tribunal. On the merits, Sinha, C.J. and Bhutt, J. took the view that the decision of the Tribunal that the result of the election had not been materially affected by the erroneous reception of votes was one within its jurisdiction, and that it could not be quashed under article 226, even if it had made a mistake of fact or law. But Mudholkar, J. held that as in arriving at that decision the Tribunal had taken into consideration irrelevant matters, such as the mistake of the polling officer in issuing wrong ballot papers and its effect on the result of the election, it had acted in excess of its jurisdiction. He was accordingly of opinion that the decision should be quashed leaving it to the Election Commission "to perform their statutory duties in the matter of the election petition". The petition was dismissed in accordance with the majority opinion. The learned Judges, however, granted a certificate under article 132(1), and that is how this appeal comes before this Court.

The first question that arises for decision in this appeal is whether High Courts have jurisdiction under article 226 to issue writs against decisions of Election Tribunals. That article confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified, and Election Tribunals functioning within the territorial jurisdiction of the High Courts would fall within the sweep of that power. If we are to recognise or admit any limitation on this power, that must be founded on some provision in the Constitution itself. The contention of Mr. Pathak for the first respondent is that such a limitation has been imposed on that power by article 329(b), which is as follows :

"Notwithstanding anything in this Constitution—

no election to either House of Parliament or to the House or either House of Legislature of a State 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".

Now, the question is whether a writ is a proceeding in which an election can properly be said to be called in question within the meaning of article 329(b). On a plain reading of the article, what is prohibited therein is the *initiation* of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as provided therein. A suit for setting aside an election would be barred under this provision. In *N. P. Ponnuswami* v. *Returning Officer, Namakkal Constituency and Others*(1) it was held by this Court that the word "election" in article 329(b) was used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate, and that an application under article 226 challenging the validity of any of the acts forming part of that process would be barred. These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in article 329(b). But when once proceedings have been instituted in accordance with article 329(b) by presentation of an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. There being no dispute that they are subject to the supervisory jurisdiction of the High Courts under article 226, a writ of *certiorari* under that article will be competent against decisions of the Election Tribunals also.

The view that article 329(b) is limited in its operation to initiation of proceedings for setting aside an election and not to the further stages following on the decision of the Tribunal is considerably reinforced, when the question is considered with reference to a candidate, whose election has been set aside

(1) [1952] S.C.R. 218.

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by the Tribunal. If he applies under article 226 for a writ to set aside the order of the Tribunal, he cannot in any sense be said to call in question the election; on the other hand, he seeks to maintain it. His application could not, therefore, be barred by article 329(b). And if the contention of the first respondent is well-founded, the result will be that proceedings under article 226 will be competent in one event and not in another and at the instance of one party and not the other. Learned counsel for the first respondent was unable to give any reason why this differentiation should be made. We cannot accept a construction which leads to results so anomalous.

This question may be said to be almost concluded by authority. In *Durga Shankar* v. *Raghuraj Singh*(1) the contention was raised that this Court could not entertain an appeal against the decision of an Election Tribunal under article 136 of the Constitution, as that would be a proceeding in which an election is called in question, and that that could be done only before a Tribunal as provided in article 329(b). In overruling this contention, Mukherjea, J. observed :

"The 'non-obstante' clause with which article 329 of the Constitution begins and upon which the respondent's counsel lays so much stress, debars us, as it debars any other court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised".

By parity of reasoning it must be held that the power of the High Court under article 226 to issue writ of *certiorari* against decisions of Election Tribunals remains equally unaffected by article 329(b).

It is next contended that even if there is jurisdic-

(1) [1955] S.C.R. 267.

tion in the High Court under article 226 to issue *certiorari* against a decision of an Election Tribunal, it is incapable of exercise for the reason that under the scheme of Act No. XLIII of 1951, the Tribunal is an *ad hoc* body set up for determination of a particular election petition, that it becomes *functus officio* when it pronounces its decision, and that thereafter there is no authority in existence to which the writ could be issued. The question thus raised is of considerable importance, on which there is little by way of direct authority; and it has to be answered primarily on a consideration of the nature of a writ of *certiorari* to quash. At the outset, it is necessary to mention that in England *certiorari* is issued not only for quashing decisions but also for various other purposes. It is issued to remove actions and indictment pending in an inferior court for trial to the High Court; to transfer orders of civil courts and sentences of criminal courts for execution to the superior court; to bring up depositions on an application for bail when the prisoner has been committed to the High Court for trial; and to remove the record of an inferior court when it is required for evidence in the High Court. These are set out in Halsbury's Laws of England, Volume IX, pages 840 to 851. It is observed therein that the writ has become obsolete in respect of most of these matters, as they are now regulated by statutes. That that is also the position in America appears from the following statement in Corpus Juris Secundum, Volume 14, at page 151:

"At common law the writ of *certiorari* was used both as a writ of review after final judgment and also to remove the entire cause at any stage of the proceeding for hearing and determination in the superior court. In the United States it is now the general rule that the writ will be refused where there has been no final determination and the proceedings in the lower tribunal are still pending".

As we are concerned in this appeal with *certiorari* to quash a decision, it is necessary only to examine whether having regard to its nature such a writ for

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quashing can be issued to review the decision of a Tribunal, which has ceased to exist.

According to the common law of England, *certiorari* is a high prerogative writ issued by the Court of the King's Bench or Chancery to inferior courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction. To this end, they were commanded to transmit the records of a cause or matter pending with them to the superior court to be dealt with there, and if the order was found to be without jurisdiction, it was quashed. The court issuing *certiorari* to quash, however, could not substitute its own decision on the merits, or give directions to be complied with by the court or the tribunal. Its work was destructive; it simply wiped out the order passed without jurisdiction, and left the matter there. In *T. C. Basappa* v. *T. Nagappa*(1), Mukherjea, J. dealing with this question observed:

"In granting a writ of '*certiorari*' the superior court does not exercise the power of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own view for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the deteriment of any person. Vide per Lord Cairns in *Walsall's Overseers* v. *L. and N. W. Ry. Co.*(2)".

In Corpus Juris Secundum, Volume 14 at page 123 the nature of a writ of *certiorari* for quashing is thus stated:

"It is not a proceeding against the tribunal or an individual composing it, it acts on the cause or proceeding in the lower court, and removes it to the superior court for reinvestigation".

The writ for quashing is thus directed against a record, and as a record can be brought up only

(1) [1955] S.C.R. 250. (2) [1879] 4 A.C. 30, 39.

through human agency, it is issued to the person or authority whose decision is to be reviewed. If it is the record of the decision that has to be removed by *certiorari,* then the fact that the tribunal has become *functus officio* subsequent to the decision could have no effect on the jurisdiction of the court to remove the record. If it is a question of issuing directions, it is conceivable that there should be in existence a person or authority to whom they could be issued, and when a *certiorari* other than one to quash the decision is proposed to be issued, the fact that the tribunal has ceased to exist might operate as a bar to its issue. But if the true scope of *certiorari* to quash is that it merely demolishes the offending order, the presence of the offender before the court, though proper, is not necessary for the exercise of the jurisdiction or to render its determination effective.

Learned counsel for the first respondent invites our attention to the form of the *order nisi* in a writ of *certiorari,* and contends that as it requires the court or tribunal whose proceedings are to be reviewed, to transmit the records to the superior court, there is, if the tribunal has ceased to exist, none to whom the writ could be issued and none who could be compelled to produce the record. But then, if the writ is in reality directed against the record, there is no reason why it should not be issued to whosoever has the custody thereof. The following statement of the law in Ferris on the Law of Extraordinary Legal Remedies is apposite:

"The writ is directed to the body or officer whose determination is to be reviewed, or *to any other person having the custody of the record or other papers to be certified*".

Under section 103 of Act No. XLIII of 1951 the Tribunal is directed to send the records of the case after the order is pronounced either to the relative District Judge or to the Chief Judge of the Court of Small Causes, and there is no legal impediment to a writ being issued to those officers to transmit the record to the High Court. We think that the power to issue a

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writ under article 226 to a person as distinct from an authority is sufficiently comprehensive to take in any person who has the custody of the record, and the officers mentioned in section 103 of Act No. XLIII of 1951 would be persons who would be amenable to the jurisdiction of the High Court under the article.

It is argued that the wording of article 226 that the High Court shall have power to issue writs or directions to any person or authority within its territorial jurisdiction posits that there exists a person or authority to whom it could be issued, and that in consequence, they cannot be issued where no such authority exists. We are of opinion that this is not the true import of the language of the article. The scope of article 226 is firstly that it confers on the High Courts power to issue writs and directions, and secondly, it defines the limits of that power. This latter it does by enacting that it could be exercised over any person or authority within the territories in relation to which it exercises its jurisdiction. The emphasis is on the words "within the territory", and their significance is that the jurisdiction to issue writ is co-extensive with the territorial jurisdiction of the court. The reference is not to the nature and composition of the court or tribunal but to the area within which the power could be exercised.

The first respondent relied on the decision in *Clifford O'Sullivan*(1) as authority for the position that no writ could be issued against a Tribunal after it had ceased to exist. There, the facts were that the appellants had been tried by a military Court and convicted on 3-5-1921. They applied on 10-5-1921 for a writ of prohibition against the officers of the Court, and that was refused on the ground that they had become *functi officio*. The respondent contended that on the same reasoning *certiorari* against the decision of an Election Tribunal which had become *functus officio* should also be refused, and he further relied on the observations of Atkin, L.J. in *Rex* v. *Electricity Commissioners; London Electricity Joint Committee Co. (1920), Ex parte*(2) as establishing that there was no

(1) [1921] 2 A.C. 570. (2) [1924] 1 K.B. 171, 204, 205.

difference in law between a writ of prohibition and a writ of *certiorari*. What is stated there is that both writs of prohibition and *certiorari* have for their object the restraining of inferior courts from exceeding their jurisdiction, and they could be issued not merely to courts but to all authorities exercising judicial or quasi-judicial functions. But there is one fundamental distinction between the two writs, and that is what is material for the present purpose. They are issued at different stages of the proceedings. When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition, and on that, an order will issue forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears that cause or matter and gives a decision, the party aggrieved would have to move the superior court for a writ of *certiorari,* and on that, an order will be made quashing the decision on the ground of want of jurisdiction. It might happen that in a proceeding before the inferior court a decision might have been passed, which does not completely dispose of the matter, in which case it might be necessary to apply both for *certiorari* and prohibition—*certiorari* for quashing what had been decided, and prohibition for arresting the further continuance of the proceeding. Authorities have gone to this extent that in such cases when an application is made for a writ of prohibition and there is no prayer for *certiorari,* it would be open to the Court to stop further proceedings which are consequential on the decision. But if the proceedings have terminated, then it is too late to issue prohibition and *certiorari* for quashing is the proper remedy to resort to. Broadly speaking, and apart from the cases of the kind referred to above, a writ of prohibition will lie when the proceedings are to any extent pending and a writ of *certiorari* for quashing after they have terminated in a final decision.

Now, if a writ of prohibition could be issued only if there are proceedings pending in a court, it must follow that it is incapable of being granted when the

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court has ceased to exist, because there could be then no proceeding on which it could operate. But it is otherwise with a writ of *certiorari* to quash, because it is directed against a decision which has been rendered by a court or tribunal, and the continued existence of that court or tribunal is not a condition of its decision being annulled. In this context, the following passage from Juris Corpus Secundum, Volume 14, page 126 may be usefully quoted:

"Although similar to prohibition in that it will lie for want or excess of jurisdiction, *certiorari* is to be distinguished from prohibition by the fact that it..... is *directed to the cause or proceeding in the lower court* and not to the court itself, while prohibition is a preventive remedy issuing to restrain future action and is directed *to the court* itself".

The decision in *Clifford O'Sullivan*(1) which was concerned with a writ of prohibition is, therefore, inapplicable to a writ of *certiorari* to quash. It has also to be noted that in that case as the military Court had pronounced its sentence before the application was filed, a writ of prohibition was bound to fail irrespective of the question whether the Tribunal was *functus officio* or not, and that is the ground on which Viscount Cave based his decision. He observed:

"A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail. [See *In re Pope*(2) and *Chabot* v. *Lord Morpeth*(3)]".

In this connection, reference must be made to the decision in *R.* v. *Wormwood Scrubbs* (*Governor*) (4). There, the applicant was condemned by a court martial sitting in Germany, and in execution of its sentence, he was imprisoned in England. He applied for a writ of *habeas corpus,* and contended that the military Court had no jurisdiction over him. The Court

(1) [1921] 2 A.C. 570.
(2) [1833] 5 B. & Ad. 681.
(3) [1848] 15 Q. B. 446.
(4) [1948] 1 All E. R. 438.

agreed with this contention, and held that the conviction was without jurisdiction and accordingly issued a writ of *habeas corpus*. But as he was in the custody of the Governor of the Prison under a warrant of conviction, unless the conviction itself was quashed no writ of *habeas corpus* could issue. In these circumstances, the Court issued a writ of *certiorari* quashing the conviction by the court martial. It is to be noted that the military Court was an *ad hoc* body, and was not in existence at the time of the writ, and the respondents to the application were the Governor and the Secretary for War. The fact that the court martial was dissolved was not considered a bar to the grant of *certiorari*.

Our attention has also been invited to a decision of this Court in *The Lloyds Bank Ltd.* v. *The Lloyds Bank Indian Staff Association and others* (1). In that case, following the decision in *Clifford O'Sullivan* (2) the Calcutta High Court had refused applications for the issue of writs of *certiorari* and prohibition against the decision of the All India Industrial Tribunal (Bank Disputes) on the ground, amongst others, that the Tribunal had ceased to exist. In appeal to this Court against this judgment, it was contended for the appellant that on a proper construction of section 7 of the Industrial Disputes Act, the Tribunal must be deemed to be not an *ad hoc* body established for adjudication of a particular dispute but a permanent Tribunal continuing "in a sort of suspended animation" and "functioning intermittently". This Court agreeing with the High Court rejected this contention. But the point was not argued that *certiorari* could issue even if the Tribunal had become *functus officio*, and no decision was given on the question, which is now under consideration.

Looking at the substance of the matter, when once it is held that the intention of the Constitution was to vest in the High Court a power to supervise decisions of Tribunals by the issue of appropriate writs and directions, the exercise of that power cannot be

(1) Civil Appeal No. 42 of 1952.

(2) [1921] 2 A.C. 570.

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defeated by technical considerations of form and procedure. In *T. C. Basappa* v. *T. Nagappa*(1), this Court observed:

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *'certiorari'* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law".

It will be in consonance with these principles to hold that the High Courts have power under article 226 to issue writs of *certiorari* for quashing the decisions of Election Tribunals, notwithstanding that they become *functus officio* after pronouncing the decisions.

We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under article 227 of the Constitution, and that that superintendence is both judicial and administrative. That was held by this Court in *Waryam Singh and another* v. *Amarnath and another*(2), where it was observed that in this respect article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a *certiorari* under article 226 the High Court can only annul the decision of the Tribunal, it can, under article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of *certiorari* and for other reliefs was maintainable under articles 226 and 227 of the Constitution.

Then the question is whether there are proper grounds for the issue of *certiorari* in the present case.

(1) [1955] S.C.R. 250. (2) [1954] S.C.R. 565.

There was considerable argument before us as to the character and scope of the writ of *certiorari* and the conditions under which it could be issued. The question has been considered by this Court in *Parry & Co.* v. *Commercial Employees' Association, Madras*(1), *Veerappa Pillai* v. *Raman and Raman Ltd. and Others*(2), *Ibrahim Aboobaker* v. *Custodian General*(3) and quite recently in *T. C. Basappa* v. *T. Nagappa*(4). On these authorities, the following propositions may be taken as established: (1) *Certiorari* will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) *Certiorari* will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The Court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence, and substitute its own findings in *certiorari*. These propositions are well settled and are not in dispute.

(4) The further question on which there has been some controversy is whether a writ can be issued, when the decision of the inferior Court or Tribunal is erroneous in law. This question came up for consideration in *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw*(5), and it was held that when a Tribunal made a "speaking order" and the reasons given in that order in support of the decision

(1) [1952] S.C.R. 519. (2) [1952] S.C.R. 583.
(2) [952] S.C.R. 696. (4) [1955] S.C.R. 250.
(5) [1951] 1 K.B. 711.

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were bad in law, *certiorari* could be granted. It was pointed out by Lord Goddard, C. J. that that had always been understood to be the true scope of the power. *Walsall Overseers* v. *London and North Western Ry. Co.*(1) and *Rex* v. *Nat Bell Liquors Ld.*(2) were quoted in support of this view. In *Walsall Overseers* v. *London and North Western Ry. Co.*(1), Lord Cairns, L.C. observed as follows:

"If there was upon the face of the order of the court of quarter sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it".

In *Rex* v. *Nat Bell Liquors Ld.* (2) Lord Sumner said:

"That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".

The decision in *Rex* v. *Northumberland, Compensation Appeal Tribunal; Ex parte Shaw*(3) was taken in appeal, and was affirmed by the Court of Appeal in *Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw*(4). In laying down that an error of law was a ground for granting *certiorari,* the learned Judges emphasised that it must be apparent on the face of the record. Denning, L.J. who stated the power in broad and general terms observed:

"It will have been seen that throughout all the cases there is one governing rule: *certiorari* is only available to quash a decision for error of law *if the error appears on the face of the record*".

The position was thus summed up by Morries, L.J.:

"It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law *where revealed on the face of an order or decision,*

(1) [1879] 4 A.C. 30.
(2) [1922] 2 A.C. 128.
(3) [1951] 1 K.B. 711.
(4) [1952] 1 K.B. 338.

or irregularity, or absence of, or excess of, jurisdiction where shown".

In *Veerappa Pillai* v. *Raman & Raman Ltd. and Others*(1), it was observed by this court that under article 226 the writ should be issued "in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is *an error apparent on the face of the record*". In *T. C. Basappa* v. *T. Nagappa*(2) the law was thus stated:

"An error in the decision or determination itself may also be amenable to a writ of *'certiorari'* but it must be a *manifest error apparent on the face of the proceedings,* e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by *'certiorari'* but not a mere wrong decision".

It may therefore be taken as settled that a writ of *certiorari* could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record ? Learned Counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, C. J. in *Batuk K. Vyas* v. *Surat Municipality*(3) that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in

(1) [1952] S.C.R. 583. (2) [1955] S.C.R. 250.
(3) A.I.R. 1953 Bom. 133.

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which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.

These being the principles governing the grant of *certiorari,* we may now proceed to consider whether on the facts found, this is a fit case for a writ being issued. The Tribunal, as already stated, held by a majority that Rule 47(1) (c) was mandatory, and that accordingly the 301 ballot papers found in the box of the first respondent should have been rejected under that rule on the ground that they had not the distinguishing marks prescribed by Rule 28. It had also held under section 100(2) (c) of Act No. XLIII of 1951 that the result of the election had not been materially affected by the failure of the Returning Officer to comply with Rule 47(1) (c). It accordingly dismissed the petition. Now the contention of Mr. N. C. Chatterjee for the appellant is that in reaching this conclusion the Tribunal had taken into account matters which are wholly extraneous to an enquiry under section 100(2) (c), such as the mistake of the polling officer in issuing wrong ballot papers and its possible effect on the result of the voting, and that accordingly the decision was liable to be quashed by *certiorari* both on the ground of error of jurisdiction and error in the construction of section 100(2) (c) apparent on the face of the record. The first respondent, on the other hand, contended that the decision of the Tribunal that the 301 ballot papers found in his box should have been rejected under Rule 47(1) (c) was erroneous, because that rule was only directory and not mandatory and because the Election Commission had validated them, and that its decision was final. He also contended that even if the ballot papers in question were liable to be rejected under Rule 47(1) (c), for the purpose of deciding under section 100(2) (c)

whether the result of the election had been materially affected the Tribunal had to ascertain the true intention of the voters; and the mistake of the polling officer under Rule 23 and its effect on the result of the election were matters which were within the scope of the enquiry under that section. The correctness of these contentions falls now to be determined.

On the question whether Rule 47(1) (c) is mandatory, the argument of Mr. Pathak is that notwithstanding that the rule provides that the Returning Officer shall reject the ballot papers, its real meaning is that he has the power to reject them, and that on that construction, his discretion in the matter of accepting them is not liable to be questioned. He relies on certain well-recognised rules of construction such as that a statute should be construed as directory if it relates to the performance of public duties, or if the conditions prescribed therein have to be performed by persons other than those on whom the right is conferred. In particular, he relied on the following statement of the law in Maxwell on Interpretation of Statutes, 10th Edition, pages 381 and 382:

"To hold that an Act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would in effect, put it in the power of the person charged with the duty of preparing it to disfranchise the electors, a conclusion too unreasonable for acceptance".

He contended that to reject the votes of the electors for the failure of the polling officer to deliver the correct ballot papers under Rule 23 would be to disfranchise them, and that a construction which involved such a consequence should not be adopted.

It is well-established that an enactment in form mandatory might in substance be directory, and that the use of the word "shall" does not conclude the matter. The question was examined at length in *Julius* v. *Bishop of Oxford*(1), and various rules were

(1) [1880] 5 A.C. 214.

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laid down for determining when a statute might be construed as mandatory and when as directory. They are well-known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context. What we have to see is whether in Rule 47 the word "shall" could be construed as meaning "may". Rule 47(1) deals with three other categories of ballot papers, and enacts that they shall be rejected. Rule 47(1) (a) relates to a ballot paper which "bears any mark or writing by which the elector can be identified". The secrecy of voting being of the essence of an election by ballot, this provision must be held to be mandatory, and the breach of it must entail rejection of the votes. That was held in *Woodward* v. *Sarsons*(1) on a construction of section 2 of the Ballot Act, 1872. That section had also a provision corresponding to Rule 47(1) (b), and it was held in that case that a breach of that section would render the vote void. That must also be the position with reference to a vote which is hit by Rule 47(1) (b). Turning to Rule 47(1) (d), it provides that a ballot paper shall be rejected if it is spurious, or if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established. The word "shall" cannot in this sub-rule be construed as meaning "may", because there can be no question of the Returning Officer being authorised to accept a spurious or unidentifiable vote. If the word "shall" is thus to be construed in a mandatory sense in Rule 47(1) (a), (b) and (d), it would be proper to construe it in the same sense in Rule 47(1) (c) also. There is another reason which clinches the matter against the first respondent. The practical bearing of the distinction between a provision which is mandatory and one which is directory is that while the former must be strictly observed, in the case of the latter it is sufficient that it is substantially complied with. How is this rule to be worked when the Rule provides that a ballot paper shall be rejected? There can be no degrees

(1) [1875] L.R. 10 C.P. 733.

of compliance so far as rejection is concerned, and that is conclusive to show that the provision is mandatory.

It was next contended that the Election Commission had validated the votes in question, and that in consequence the acceptance of the ballot papers by the Returning Officer under Rule 47 (1) (c) was not open to challenge. It appears that interchange of ballot papers had occurred in several polling stations where election was held both for the House of the People and the State Assembly, and the Election Commission had issued directions that the rule as to the distinguishing mark which the ballot paper should bear under Rule 28 might be relaxed, if its approval was obtained before the votes were actually counted. The Returning Officer at Hoshangabad reported to the Chief Electoral Officer, Madhya Pradesh that wrong ballot papers had been issued owing to the mistake of the polling officers, and obtained the approval of the Commission for their being included, before the votes were counted. It is contended by Mr. Pathak that the power of the Election Commission to prescribe a distinguishing mark includes the power to change a mark already prescribed, and substitute a fresh one in its stead, and that when the Election Commission approved of the interchange of ballot papers at Hoshangabad, it had, in effect, approved of the distinguishing mark which those ballot papers bore, and that they were therefore rightly counted as valid by the Returning Officer.

There is no dispute that the Election Commission which has the power to prescribe a distinguishing mark for the ballot papers has also the power to change it. But the question is, was that done? The Commission did not decide in terms of Rule 28 that the ballot paper for election to the House of the People should bear a brown bar and not a green bar. The green bar continued to be the prescribed mark for the election under that rule, and the overwhelming majority of the ballot papers bore that mark. What the Commission has done is to condone the defects in a specified number of ballot papers issued in the

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Hoshangabad polling stations. That is not prescribing a distinguishing mark as contemplated by Rule 28, as that must relate to the election as a whole. There can be no question of there being one distinguishing mark for some of the voters and another for others with reference to the same election and at the same polling station.

There is another difficulty in the way of accepting the contention of the first respondent. The approval of the Election Commission was subsequent to the actual polling, though it was before the votes were counted. Rule 23 throws on the polling officer the duty of delivering a proper ballot paper to the voter. If a distinguishing mark had been prescribed under Rule 28, the ballot paper to be delivered must bear that mark. Therefore, if any change or alteration of the original distinguishing mark is made, it must be made before the commencement of the poll, and the ballot paper should contain the new distinguishing mark. The approval by the Election Commission subsequent, to the polling, therefore, cannot render valid the 301 ballot papers which did not bear the distinguishing mark prescribed for the election, and they are liable to be rejected under Rule 47(1) (c). The conclusion of the majority of the Tribunal that in accepting the ballot papers in question the Returning Officer had contravened that rule must therefore be accepted.

It remains to deal with the contention of the appellant that the decision of the Election Tribunal under section 100(2) (c) that the result of the election had not been materially affected is bad, as it is based on considerations extraneous to that section. This opens up the question as to the scope of an enquiry under section 100(2) (c). That section requires that before an order setting aside an election could be made, two conditions must be satisfied: It must firstly be shown that there had been improper reception or refusal of a vote or reception of any vote which is void, or non-compliance with the provisions of the Constitution or of the Act (No. XLIII of 1951) or any rules or orders made under that Act or of any other Act or rules re-

lating to the election or any mistake in the use of the prescribed form. It must further be shown that as a consequence thereof the result of the election had been materially affected. The two conditions are cumulative, and must both be established, and the burden of establishing them is on the person who seeks to have the election set aside. That was held by this Court in *Vashist Narain* v. *Dev Chandra*(1). The Tribunal has held in favour of the appellant that Rule 47 (1) (c) is mandatory, and that accordingly in accepting the 301 ballot papers which had not the requisite distinguishing marks the Returning Officer had contravened that rule. So, the first condition has been satisfied. Then there remains the second, and the question is whether the appellant has established that the result of the election had been materially affected by contravention of Rule 47(1) (c). The contention of Mr. Chatterjee is that when once he has established that the Returning Officer had contravened Rule 47 (1) (c), he has also established that the result of the election had been materially affected, because the marginal difference between the appellant and the first respondent was only 174 votes, and that if the ballot papers wrongly counted under Rule 47(1) (c) had been excluded and the valid votes alone counted, it was he and not the first respondent that should have been declared elected under Rule 48, and that the result of the election had thus been materially affected.

In reply, Mr. Pathak contends that this argument, though it might have proved decisive if no other factor had intervened, could not prevail in view of the other facts found in this case. He argued that Rule 47 was not the only rule that had been broken; that owing to the mistake of the polling officer wrong ballot papers had been issued, and thus Rule 23 had been broken; that the printing of the distinguishing mark was faint and that Rule 28 had not also been properly complied with; that there was thus a chain of breaches all linked together, the final phase of it being the breach of Rule 47(1) (c) and the effective cause thereof being the violation of Rule 23, and that

(1) [1955] S.C.R. 509.

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in judging whether the result of the election had been affected, these were matters relevant to be taken into consideration. The object of the election, he contended, was to enable the majority of the voters to send a representative of their choice and for that purpose it was necessary to ascertain the intention of the voters from the ballot papers, irrespective of the question whether they were formally defective or not; that it was accordingly open to the Tribunal to look behind the barriers created by Rules 23, 28 and 47(1) (c), discover the mind of the voters, and if that was truly reflected in the result of the election as declared under Rule 48, dismiss the petition under section 100 (2) (c).

Mr. Chatterjee disputes this position, and contends that the enquiry under that section must be limited to the matters raised in the election petition, and that as there was no complaint about the breach of Rule 23 in that petition, it was outside the scope of the enquiry. It is unnecessary to consider whether it was open to the Tribunal to enquire into matters other than those set out in the petition, when the returned candidate merely seeks to support the declaration. He has in this case presented a recrimination petition under section 97 raising the question of breach of Rule 23, and that is therefore a matter which has to be determined. The Tribunal has gone into that question, and has held that there was a violation of that rule, and its conclusion is not open to attack in these proceedings, and has not, in fact, been challenged. The real controversy is as to the effect of that finding on the rights of the parties. The answer to this is to be found in section 97. Under that section, all matters which could be put forward as grounds for setting aside the election of the petitioner if he had been returned under Rule 48 could be urged in answer to the prayer in his petition that he might be declared duly elected. And the result of this undoubtedly is that the first respondent could show that if the appellant had been returned under Rule 48 his election would have been liable to be set aside for breach of Rule 23, and that therefore he should not be declared

elected. That according to the Tribunal having been shown, it is open to us to hold that by reason of the violation of Rule 23, the appellant is not entitled to be declared elected.

Can we go further, and uphold the election of the first respondent under section 100(2) (c) on the ground that if Rule 23 had not been broken, the wasted votes would have gone to him ? The argument of the appellant is that that would, in effect, be accepting the very votes which the Legislature says in Rule 47(1) should be rejected, and that it is not warranted by the scheme of the Act. We think that this contention is well-founded. Section 46 of the Act provides that "when the counting of the votes has been completed, the Returning Officer shall forthwith declare the result of the election in the manner provided by this Act or the rules made thereunder". The rule contemplated by this section is Rule 48. That provides that the Returning Officer should after counting the votes "forthwith declare the candidate or candidates to whom the largest number of *valid* votes has been given, to be elected". Under this rule quite clearly no candidate can be declared elected on the strength of votes which are liable to be rejected under Rule 47. The expression "the result of the election" in section 100(1) (c) must, unless there is something in the context compelling a different interpretation, be construed in the same sense as in section 66, and there it clearly means the result on the basis of the valid votes.

This conclusion is further fortified when the nature of the duties which a Returning Officer has to perform under Rule 47 is examined. Under that Rule, the Returning Officer has to automatically reject certain classes of votes for not being in conformity with the rules. They are set out under Rule 47(1) (b) and (c). In other cases, the rejection will depend on his decision whether the conditions for their acceptance have been satisfied. Thus in Rule 47(1) (a) he must decide whether the mark or writing is one from which the elector could be identified; under Rule 47(1) (d),

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whether the ballot paper is spurious or mutilated beyond identification; and under Rule 47(2), whether more than one ballot paper has been cast by the voter. Rule 47(4) is important. It provides that "the decision of the Returning Officer as to the validity of a ballot paper.....shall be final subject to any decision to the contrary given by a Tribunal on the trial of an election petition calling in question the election". Under this provision, the Tribunal is constituted a Court of appeal against the decision of the Returning Officer, and as such its jurisdiction must be co-extensivem with that of the Returning Officer and cannot extend further. If the Returning Officer had no power under Rule 47 to accept a vote which had not the distinguishing mark prescribed by Rule 28 on the ground that it was due to the mistake of the presiding officer in delivering the wrong ballot paper—it is not contended that he has any such power, and clearly he has not—the Tribunal reviewing this decision under Rule 47(4) can have no such power. It cannot accept a ballot paper which the Returning Officer was bound to reject under Rule 47.

It is argued with great insistence that as the object of the Election Rules is to discover the intention of the majority of the voters in the choice of a representative, if an elector has shown a clear intention to vote for a particular candidate, that must be taken into account under section 100(2) (c), even though the vote might be bad for non-compliance with the formalities. But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a Court of law, in the same position as an intention not expressed at all

The decision in *Woodward* v. *Sarsons*(1) was cited in support of the contention that for deciding whether the result of the election had been affected it was permissible to take into account votes which had been rendered invalid by the mistake of the polling officer. That was a decision on section 13 of the Ballot Act,

(1) [1875] L.R. 10 C.P. 733.

1872 which provided that no election should be declared invalid by reason of non-compliance with the rules, if it appeared to the Tribunal "that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election". What happened in that case was that all the ballot papers issued at polling station No. 130 had been marked by the polling officer and had become invalid under section 2 of the Act. It was contended on behalf of the unsuccessful candidate that the mistake of the polling officer rendered the whole election void, without reference to the question whether the result of the election had been affected. In repelling this contention, the Court observed at page 750:

"Inasmuch, therefore, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations No. 130 and No. 125 did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and therefore that the election cannot be declared void by the common law applicable to parliamentary elections".

This was merely a decision on the facts that the departure from the prescribed rules of election at the polling stations was not so fundamental as to render the election not one "conducted in accordance with the principles laid down under the body of this Act".

Reliance was placed on certain observations in *Re South Newington Election Petition*(1). In that case, the ballot paper had been rejected by the Returning Officer on the ground that it did not bear the requisite official mark. The Court in a petition to set aside the election held on an examination of the ballot paper that the official stamp had been applied, though imperfectly, and that it should have been accepted. The actual decision is in itself of no assistance to the respondent; but the Court observed in the course of its judgment:

(1) [1948] 2 All E.R. 503.

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"We think that, in a case where the voter is in no sense to blame, where he has intended to vote and has expressed his intention of voting in a particular way, and, so far as his part of the transaction is concerned, has done everything that he should, and the only defect raised as a matter of criticism of the ballot paper is some defect on the part of the official machinery by which the election is conducted, special consideration should (and, no doubt, would) be given, in order that the voter should not be disfranchised". These observations are no authority for the proposition that if there was no mark at all on the ballot paper it could still be accepted on the ground of intention. On the other hand, the whole of the discussion is intelligible only on the hypothesis that if there was no mark at all on the ballot paper, it must be rejected.

In the result, we must hold that in maintaining the election of the first respondent on the basis of the 301 votes which were liable to be rejected under Rule 47(1) (c) the Tribunal was plainly in error. Mr. Chatterjee would have it that this error is one of jurisdiction. We are unable to take this view, because the Tribunal had jurisdiction to decide whether on a construction of section 100 (2) (c) it could go into the fact of breach of Rule 23, and if it committed an error, it was an error in the exercise if its jurisdiction and not in the assumption thereof. But the error is manifest on the face of the record, and calls for interference in *certiorari*.

We have held that the election of the first respondent should be set aside. We have further held that if the Returning Officer had, after rejecting the 301 ballot papers which did not bear the correct marks, declared the appellant elected, his election also would have to be declared void. The combined effect of section 97 and section 100(2) (c) is that there is no valid election. Under the circumstances, the proper order to pass is to quash the decision of the Tribunal and remove it out of the way by *certiorari* under article 226, and to set aside the election of the first respondent in exercise of the powers conferred by article

227. As a result of our decision, the Election Commission will now proceed to hold a fresh election.

This appeal must accordingly be allowed, the decisions of the High Court and the Tribunal quashed and the whole election set aside. The parties will bear their own costs throughout.

Appeal allowed.

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December 10.

[MEHR CHAND MAHAJAN C.J., MUKHERJEA, S. R. DAS, VIVIAN BOSE, BHAGWATI, JAGANNADHADAS and VENKATARAMA AYYAR JJ.]

Hindu Law—Adoption—Widow's power to adopt—When such power terminates.

It is well-settled according to Hindu Law that a widow's power to adopt comes to an end by the interposition of a grandson or the son's widow competent to continue the line by adoption.

The mother's authority to adopt is not extinguished by the mere fact that her son had attained ceremonial competence.

The power to adopt does not depend upon any question of vesting or divesting of property.

The decision of the Judicial Committee of the Privy Council in *Anant Bhikappa Patil* v. *Shankar Ramchandra Patil* (L.R. 70 I.A. 232) is not sound in so far as it relates to the properties inherited from collaterals prior to adoption. In respect of such properties the adopted son can lay no claim on the ground of relation back.

Shrinivas Krishnarao Kango v. *Narayan Devji Kango* ([1955] 1 S.C.R. 1), followed.

Amarendra Mansing v. *Sanatan* ([1933] L. R. 60 I.A. 242), explained.

Anant Bhikappa Patil v. *Shankar Ramchandra Patil* ([1943] L.R. 70 I.A. 232), not relied on in part.

Bhoobun Moyee v. *Ram Kishore* ([1865] 10 M.I.A. 279); *Pudma Coomari* v. *Court of Wards* ([1881] L.R. 8 I.A. 229); *Thayammal and Kuttisami Aiyan* v. *Venkatarama Aiyan* ([1887] L.R. 14 I.A. 67); *Tarachurn* v. *Suresh Chunder* ([1889] L.R. 16 I.A. 166); *Ramkrishna*