(2008) 08 AHC CK 0335

Allahabad High Court

Case No: None

North Central Railway Mens Union		APPELLANT
	Vs	
North Central Railway Emloyees Sangh throug its General Secretary and Others		RESPONDENT

Date of Decision: Aug. 22, 2008

Acts Referred:

- Constitution of India, 1950 - Article 226

Hon'ble Judges: Ashok Bhushan, J; Arun Tandon, J

Bench: Division Bench

Judgement

Ashok Bhushan, J.

These two appeals having been filed against the same judgment dated 23.5.2008, passed by learned Single Judge of this Court in writ petition No. 5872 of 2008, North Central Railway Employees Sangh and Anr. v. Union of India and Ors., have been heard together and are being disposed of by this common judgment.

2. Sri Navin Sinha, learned Senior Advocate, assisted by Sri Siddharth Singh has appeared for the appellant in appeal No. 754 of 2008. Sri Govind Saran has appeared for appellant in Special Appeal No. 761 of 2008, Sri K.N. Tripathi, learned Senior Advocate, assisted by Sri N.K. Pandey and Sri Chandan Kumar have appeared for the contesting respondent, North Central Railway Employees Sangh, the petitioner in the writ petition.

3. It is sufficient to refer the facts and pleadings in special appeal No. 745 of 2008 for deciding both the appeals. Brief facts of the case for deciding the issues raised in the appeals are; the appellant, respondent No. 1 and respondent No. 7 are registered trade unions under Trade Union Act, 1926 of the railway employees of the Zone, North Central Railway. Both claimed recognition as registered unions to

interact with Railway authorities qua discharge of various functions and obligations in respect of service conditions and welfare of the employees. Modalities and methodology for electing the trade union, to be recognised by the railways have been finalised by the Government of India namely; ''Modalities For Conducting Secret Ballot For The Purpose Of Granting Recognition To Registered Railway Trade Unions Representing All Categories of Group ''C And Group ''D'' Employees Of Indian Railways''. The election process in accordance with the modalities was initiated by the Railways by publishing the election programme in the newspaper ''Amar Ujala'' on 10.12.2007. Date for nomination was fixed as 25.10.2007. Date of scrutiny of nominations and publication of the final list of unions found eligible to participate were notified as 26th and 27th November respectively while 29th November, 2007 was fixed as date for polling. The appellant and respondent unions participated by filing their nominations. Nomination of respondents No. 1 and 7 were provisionally accepted and their names were shown in the final list of the unions permitted to participate in the elections. After poll, votes received by different unions, the number of valid votes and number of invalid votes were counted and recorded. The details of votes received by the appellant and the respondent unions and one other union namely; Railway Mazdoor Union mentioned in the judgment of the learned Single Judge to which there is no dispute, is to the following effect:

SN	Names of Union (With regn. no.)	Total Electorate	Total valid votes cast	Votes obtained by the union	Votes obtained as %age of Electorate
1	NCRES 9168)			20593 7998	29.21 11.34
2	NCRKS (9275)	70499	59568	29583	41.96
3	NCRMU (9160)				
4	RMU (By-II-7867)			1394	01.97

4. The respondent No. 1 filed writ petition No. 56530 of 2007, challenging the decision of acceptance of the nomination of respondent No. 7, which writ petition was dismissed on 16.11.2007 by this court holding that election process has begun,

it was left open for the petitioner to raise such legal and factual issues after the elections are over. Another writ petition No. 61261 of 2007 was filed by the petitioner questioning the result of elections. A Division Bench of this Court vide its order dated 12.12.2007 disposed of the writ petition requesting the General Manager North Central Railway, Allahabad to examine as to whether objection, if any filed by the writ petitioner are referable to Clause 27 of the modalities and in case such objections are found to be legally entertainable, the same may be decided on merits. In pursuance of the order of this Court dated 12.12.2007, the General Manager by his order dated 24.12.2007 rejected the objection and upheld the result of the election declared on 3.12.2007. Against the order dated 24.12.2007, issued by the General Manager, the writ petition was filed giving rise to this appeal.

5. In the writ petition, the petitioner had prayed for quashing the order dated 12.12.2007 and 24.12.2007. A further prayer was made to direct the respondent authorities to ascertain the result of the election for recognition after excluding the votes of respondent No. 5 (North Central Railway Karmchari Sangh) and declare the petitioner as a duly recognised trade union. The writ petition filed by the respondent No. 1 has been allowed vide judgment and order dated 23.5.2008 of learned Single Judge. Learned Single Judge has held that the votes polled by the writ petitioner be rounded of to 35% on the basis of which, the writ petitioner shall be entitled to be treated as recognised trade union. The appellant had secured the maximum vote in the election and was declared to be the only recognised trade union as per the result declared by the Railways. The appellant moved an application in the writ petition and was impleaded as one of the respondents. The judgment of the learned Single Judge has been challenged by the appellant as well as Union of India through General Manager, North Central Railway.

6. Sri Navin Sinha, learned Senior Advocate appearing for the appellant contended that the respondent No. 1 could not secure 35% votes of the total valid votes polled hence, was not entitled to be declared elected. The votes polled by the respondent No. 1 were only 34.57% which have been rounded off by learned Single Judge as 35% for declaring the respondent No. 1 as elected. Submission is that the principles of rounding off is not applicable in the facts of the present case, where difference between 34.57% and 35% as per the valid votes polled is 256 votes. He submits that paragraph 5 (ii) of the modalities contains a requirement of at least 35% of the valid votes polled which is thus, the minimum requirement for declaring an union to be recognised. Reliance has been placed by Sri Navin Sinha on a Division Bench judgment of this Court in the case of Vani Pati Tripathi v. Director General, Medical Education and Training, Jawahar Bhawan, Ashok Marg, Lucknow and Ors. reported in (2003) 1 UPLBEC 427 , Pranjal Bishnoi Vs. U.P. Technical University and Others, and a Division Bench judgment of this Court in the case of Noor Ali Ansari v. State of U.P. and Ors. reported in 2008 (4) ADJ 552, for the proposition that rounding off principle is not applicable in the facts of the present case. Sri Sinha further submitted that requirement of 35% of the valid votes polled for declaring an union

to be recognised, was approved by the Apex Court vide its order dated 8.3.2004 passed in Special Leave to Appeal No. 3716 of 2004 Railway Board and Anr. v. Southern Railway Mazdoor Union and Anr. He further submits that the object of the modalities cannot be read as recognising as many unions as possible rather for recognition, there has to be strict adherence to the modalities. He further submits that validity of the modalities, which requires 35% of the valid votes polled, was not even challenged in the writ petition.

7. Sri Govind Saran, learned Counsel appearing for the Union of India through General Manager, North Eastern Railway challenging the judgment of the learned Single Judge, contended that the modalities having been finalised, which were not under challenge, no union can be recognised which does not fulfil the requirements of the modalities. The respondent union had given a declaration that they will follow the modalities hence, they should adhere to modalities. The principles of rounding off is not applicable, since the respondent No. 1 was short of 256 votes in achieving the 35% of valid votes. Sri Govind Saran adopted the arguments raised by learned Counsel for the appellant in appeal No. 745 of 2008.

8. Sri K.N. Tripathi, learned Senior Advocate, appearing for the respondent No. 1 writ petitioner refuting the submissions of learned Counsel for the appellant has supported the judgment of the learned Single Judge. Sri Tripathi elaborating his submissions, contended that modalities are not statutory Rules. The interpretation put by learned Single Judge on the modalities is in consonance with the object of recognising an union. The interpretation of the modalities has to be in a manner which may advance the cause of railway employees. The principle of rounding off has rightly been applied by learned Single Judge. Sri Tripathi has also placed reliance on observations of Division Bench Judgment of this Court in Vani Pati Tripathi (supra) paragraph 7 of the judgment as well as upon the judgment of the apex court in State of U.P. and Anr. v. Pawan Kumar Tiwari and Ors. reported in (2005) 2 SCC 10 and State of Punjab v. Asha Mehta, (1997) 11 SCC 410 in support of the proposition that rounding off principle is fully applicable.

9. Sri Tripathi, reiterated his submissions which were pressed in the writ petition, but were not accepted by the learned Single Judge, namely; (i) The respondent No. 5 had not correctly filled its nomination, as it mentioned its addressed as 464-B, Nawab Yusuf Road, Allahabad which is the address of respondent No. 1. The nomination of respondent No. 7 had wrongly been accepted. He contends that much before, a notice was issued to the respondent No. 7 by Registrar Trade Union, to show cause as to why its registration be not cancelled, it having obtained the same by giving wrong address as 464-B Nawab Yusuf Road, Allahabad. The letter dated 29.10.2007 of Deputy Registrar has also been referred to by Sri Tripathi by which Deputy Registrar informed that the proposal of respondent No. 7 for change of address vide amended resolution dated 26.2.2006 has been forwarded to the Registrar, Trade Union. The respondent No. 1 further wrote to the Railway officials

on 29.10.2007 to reject the nomination of respondent No. 7. He submits that nomination of respondent No. 7 was provisionally accepted subject to furnishing proof of certificate of allotment of 464-B Nawab Yusuf Road, as the office of the Union, which certificate was never submitted by the respondent No. 7. Learned Counsel submits that nomination of respondent No. 7 ought to have been rejected; (ii) Sri Tripathi further contended that the nomination of respondent No. 7 having been wrongly accepted, the votes polled in favour of respondent No. 7 either should be added to the votes of respondent No. 1 or they be treated as thrown away votes and excluded for computing 35% of valid votes polled. He further submits that the said votes which were polled in favour of a candidate, whose nomination was wrongly accepted were void votes and cannot be counted.

10. Apart from the above submission, Sri Tripathi also contended that appellant cannot be said to be aggrieved person qua the judgment of the learned Single Judge (wherein the petitioner has been directed to be treated as recognised trade union), since by the order the appellant''s recognition has not been affected. He submits that the appellant has no right to maintain this appeal.

11. Sri Tripathi in support of his above submission relied on various decisions which will be referred to while considering the submissions in detail.

12. Before proceeding to consider the submissions on merits, it is necessary to first consider the submission of Mr. Tripathi that appellant North Central Railway Mens Union Allahabad are not aggrieved person qua the impugned judgment and have no right to maintain this appeal. The appellant were not initially made party in the writ petition, it filed an application for impleadment. The impleadment application of the appellant was allowed by learned Single Judge and they were also heard in the writ petition. A party which was respondent in the writ petition has a right to challenge the decision. The submission of learned Counsel for the appellant is that as per the modalities of conducting secret ballot, the respondent No. 1 has not secured the required minimum vote for recognition hence, they are not entitled to be recognised. In the facts of the present case, one union i.e. appellant succeeded as recognised as per modalities and it alone has the right to represent the railway employees. No other union recognised as per the modalities and any union which has not been validly elected or had not been recognised cannot as such be directed to be so recognised by the order of learned Single Judge. In an election for finding out the union which is to be recognised by the railways an union which has been elected and asserts that it is the only union elected as per the modalities can always complain against illegal recognition of the other Union. The right of any participant in an election to dispute the election has been recognised in paragraph 27 of the modalities itself which is as follows:

27. Counting & Declaration of final result:

All sealed covers received from Presiding Officers containing election report & Postal Ballots received will be opened by Returning Officer in the presence of Union representatives to prepare & compile final election result (Proforma at Annexure VI). The result will be declared by the General Manager of the Zonal Railway.

Any dispute regarding elections/counting of votes shall be raised on the day following the last day of the election/declaration of result. After expiry of this period, the result declared by the General Manager of the Zonal Railway will be treated as final.

13. This can be further explained as follows. In the present case, the respondent No. 1 had not secured the requisite votes therefore not held elected by railway administration. Assuming for this case if respondent No. 1 had been declared elected and recognised by Railway, can it be said that appellant, who were admittedly declared elected can dispute the election and recognition of respondent No. 1. The answer is obviously ''No''. The paragraph 27 is wide enough to cover the challenge by another candidate participant. If a participant has right to dispute an election, it has every right to carry the dispute to its logical end. In the writ petition, when appellant was impleaded as a party, it has every right to file the appeal. There is one more reason due to which this objection has no substance. An appeal has also been filed by the Union of India through General Manager, North Eastern Railway, challenging the judgment which is also being decided by this Common order. It is not even contended that General Manager, North Eastern Railway has no right to challenge the judgment.

14. Now we may consider the main submission of learned Counsel for the appellant regarding applicability of principle of rounding off.

15. The principle of rounding off a fraction of a number to a whole number has been applied by the Courts and in some cases have also been provided in statutory Rules under certain circumstances. There are certain factors which cannot be expressed in fraction hence, the Rule of rounding off has been applied as a Rule of necessity. The most common example is with regard to number of seats or posts when are required to be filled by different categories whose percentage is fixed like Rule of reservation for filling posts by candidates of Scheduled Castes, Schedule Tribes , Other Backward Class and other categories. Certain percentage of seats are required to be filled up by Scheduled Castes candidates for example in the State of U.P. by U.P. Public Services (Reservation for Scheduled Castes, Schedule Tribes and Other Backward Class) Act, 1994 provides that 21% posts are to be reserved at the stage of direct recruitment for the Scheduled Castes 2%, for Schedule Tribes 27% for Other Backward Class. The percentage of reservation qua the number of posts is often expressed in fraction. For example, if the posts are ten, 21% will be 2.1 and 27% will be 2.7, applying the principle of rounding off 2.1 shall be treated as 2 and 2.7 shall be treated as 3. This is because the number of posts cannot be expressed in fraction and as a necessity, it has to be expressed in whole number. Contrary to

above is the case with admission to a course or for calculation of percentage of the minimum marks in an examination required under rule or advertisement. Percentage of marks can be expressed in fraction hence, the rule of rounding off has not been held to be applicable with regard to percentage of marks. The judgment of this Court in the case of Vani Pati Tripathi v. Director General, Medical Education and Training, Jawahar Bhawan and Ors. reported 2003 (1) UPLBEC 427 of which one of us (Justice Ashok Bhushan) was a member, had considered the principles and laid down following in paragraph 6 and 7:

6. The second instance where the fraction is rounded up are the cases where seats have to be determined according to percentage of reservation for appointment or for admission in an educational institution. When number of seats come into fraction, the said fraction is rounded up according to the prescription of Rule or Statute. In those cases Rule or Statute always provides that fraction to be rounded up to whole or a fraction upto some extent be ignored. The above principle has been applied since a seat or a post can not be expressed in a fraction because seats and posts are always in whole number. For a competitive examination eligibility and the selection on the basis of merit sometimes depend on one mark. One mark when expressed in percentage may generally come in fraction but the said fraction cannot be ignored nor it can be said that the said fraction is insignificant.

7. Learned Counsel for the appellant placed reliance on a Single Judge judgment of this Court in Rajan Seth v. State of U.P. and Ors. (1992) 1 UPLBEC 636. The aforesaid case arose out of admission in MBBS in Medical College, Jhansi. The writ petitioner made an application to the Principal, Medical College, Kanpur seeking his transfer to Medical College, Kanpur. From the facts of the case it appears that 5% vacancies were to be filled up by transfer. Since 5% of 191 seats come to 9.55, for working out the number of seats, the fraction less than .5 has to be ignored and the figure has to be rounded up to make 10 seats. In the facts and circumstances of the aforesaid case this Court held that 9.55 should be rounded up to 10 seats. The aforesaid decision does not help the appellant in the present case. As observed above rounding up principle has been applied while determining the quota of seats or while determining the majority of votes. The said case relates to seats. Seats and posts cannot be expressed in fraction, hence, in this case fraction is rounded up but marks obtained by candidate in an examination can be expressed in fraction and when a particular merit is required as eligibility the principle of rounding up of less marks to the next higher percentage cannot be accepted. There is no principle that percentage of marks can only be expressed in round figure. Counsel for the appellant could notable to show any authority or Rule in support of his submission.

To the similar effect is another judgment in the case of Pranjal Bishnoi (Minor) v. U.P. Technical University and Ors. (supra) and judgment of the Division Bench in the case of Noor Ali (supra).

The relevant paragraph of the modalities which is subject matter of issue is paragraph 5, which is quoted herein below:

5. Norms for recognition:

i) All unions getting 30% or more of the single vote of the total electorate shall be considered recognized.

ii) If only one union gets 30% or more of the single vote of the total electorate and some other union polling next maximum number of votes, gets at least 35% of the valid votes polled, then both these unions will get recognition. (This assumes that 35% of votes polled will be less than 30% of the total electorate).

iii) If situations as stipulated in (i) and (ii) above don''t arise, then the two unions getting maximum number of votes will be recognized provided each one individually gets more than 35% of the valid votes polled.

iv) In case there is no union fulfilling the conditions laid down in (i), (ii) and (iii) above, then union which gets maximum number of valid votes polled will be recognized provided it gets at least 20% of the valid votes polled. In this case only one union will get recognized.

v) If no union gets even 20% of valid votes polled, then no union will stand recognized.

16. In the present case, the respondent No. 1 could not succeed in getting 30% hence, is claiming to have secured 35% of valid votes under paragraph 5 (ii) of the modalities. As noticed above the relevant word used in paragraph 5 (ii) is ''at least 35% of the valid votes''. The use of the word ''at least'' is to give emphasis on the minimum percentage of votes required. The idea is that at least 35% of the employees who have cast valid votes in election to support an union, only then it is entitled to be recognised. The percentage has relevance with number of employees. The word ''at least'' has been defined in Words and Phrases Permanent Edition Vol. 4A in following manner:

Words "at least" are emphatic and expressive of a minimum to be equated as no less than. Lasro Corporation v. Kree Institute of Electrolysis, Inc. 215 N.Y.S.2d 123, 128, 20 Misc. 2d 700.

In general- Cont''d

"At least" means a minimum of and must at least be equal; something substantially equal is not enough. Halt v. Dawson Ky. 420 S.W. 2d 366, 368.

The meaning of the words ''at least'' is in the smallest or lowest degree; at the lowest estimate or at the smallest concession or claim; at the smallest number. In re Gregg''s Estate 62 A. 856, 857, 213 Prescribed Authority. 260.

The word "at least" has been defined in The New International Webster"s Comprehensive Dictionary Of The English Language as follows:

at least (lest) adj. Smallest in size, value, etc.;-minimal. -n. That which is least.-adv. in the lowest or smallest degree. [OE liest, lasest, superl. of lassa less]

The word "at least" has also been defined in The New Oxford Dictionary of English as follows:

Phrases at least 1 not less than; at the minimum: clean the windows at least once a week. 2 if nothing else (used to add a positive comment about a generally negative situation): the options aren"t complete but at least they"re a start. 3 anyway (used to modify something just stated): they seldom complained-officially at least.

The word "at least" used before 35% implies that minimum number of employees who should vote for union should be 35% of the valid votes . As noticed in the present case, the difference between 34.7% and 35% is 256 votes, if the principle of rounding off is applied. 256 votes have to be added to the votes of respondent No. 1 which were neither polled nor received by the respondent No. 1. 35% of the valid votes of the railway employees thus were not polled by the respondent No. 1 and it was less by 256 votes. Learned Counsel for the respondent No. 1 has relied on paragraph 7 of the judgment of the Division Bench in the case of Vani Pati Tripathi (supra) where the Division Bench observed as follows "As observed above rounding up principle has been applied while determining the quota of seats or while determining the majority of votes". The words "majority of votes" used in paragraph 7 was in context of a case Wahid Ullah Khan Vs. District Magistrate, Nainital and others, where votes cannot be expressed in fraction. In the case which was referred in paragraph 5 of the judgment more than half was required for consideration in a case where membership of the votes was 15. Half of the members comes to 7 1/2 which could not have been expressed by way of votes hence, it was to be rounded off as 8 and the majority was thus 8 out of 15 members. That was a case in context of interpretation of Section 87-A of the UP. Municipalities Act, 1916. The present is not a case where there is a dispute of fraction of one vote so as to apply the principle of rounding off. A plain reading of Clause 5 of the modalities thus clearly suggests that 35% of total votes polled of the employees is the minimum required to get recognition as an union.

17. The submission of Sri Tripathi that a liberal interpretation has to be given to the modalities also does not appeal to us. The modalities contained in paragraph 5 are clear and plain which does not admit any dispute or doubt. Learned Single Judge has held that the object of implementing the modalities provide representation to as many unions as possible otherwise large numbers of employees will remain unrepresented, during interacting with the railways, in our opinion is not the true and only object of the modalities. With respect to the Hon"ble Judge, we are of the view that the necessary preconditions for recognition of an union have to be fulfilled

by the trade union as have been laid down in the modalities when the election is held for ascertaining the recognition of the union, the same has to be in accordance with the modalities such unions may be 1, 2 or 3. The modalities suggests that restrictions have been introduced to limit the number of unions to be recognised. We may notice that earlier the union which had 15% membership of railway employees was entitled to be recognised. It is useful to refer the judgment of Madras High Court in the case of Southern Railway Mazdoor Union v. The Railway Board and Ors. reported in 2004 2 LW 407, paragraph 48 of which is quoted herein below:

48. The letter of 28.10.1985 which sets out the acceptance by the Railway Board of the recommendations of the Railway Reforms Committee to double the minimum percentage of the non gazetted workmen required to be members of the unions which seek recognition, from 15% to 30%, did not prescribe the mode now prescribed by the Board in it''s letter of 26.06.2002 for ascertaining the membership of the unions. By recommending the increase of the minimum percentage from 15 to 30, m the Railway Reforms Committee obviously did not intend to pave the way for recognition of unlimited number of unions. What was obviously intended was to reduce the number of unions that could be recognised at any given point of time from six which was the maximum if each recognised union was to have at least 15% of the work force as it''s members, to three, which is the maximum number of unions that can be recognised on the basis of that each such union has as it''s members at least thirty per cent of the non gazetted work force.

The judgment of Southern Railway Mazdoor Union was approved by the apex court vide its judgment and order dated 8.3.2004 in Railway Board and Ors. v. Southern Railway Mazdoor Union.

The modalities have been finalised by the Union of India which have to be uniformally adhered to by all. There is no scope of putting any particular purposive interpretation to the modalities as suggested by learned Single Judge. In view of the foregoing discussions the principle of rounding off is not applicable in the facts of the present case and learned Single Judge erred in allowing the writ petition by applying the principle of rounding off.

18. Sri Tripathi has also placed reliance on two judgments of the apex Court in the case of State of U.P. and Anr. v. Pawan Kumar reported in (2005) 2 SCC 10 and State of Punjab v. Asha Mehta, (1997) 11 SCC 410 , in support of the rounding off principle. The judgment of the apex Court in State of U.P. v. Pawan Kumar (supra) was a case, where the percentage of reservation was being worked out with regard to posts of Civil Judge (Senior Division). The percentage qua the number of posts of different categories were 46.50 (General) 19.53 (Scheduled Castes), 25.11 (Other Backward Class) 1.86 (Schedule Tribes). In that case, since number of posts could not have been expressed in fraction and they have to be rounded off. The Apex Court applied the principle of rounding off. Following was laid down in paragraphs 6 and 7:

6. The High Court has found mainly two faults with the process adopted by the State Government. First, the figure of 46.50 should have been rounded off to 47 and not to 46; and secondly, in the category of freedom fighters and ex-servicemen, total 3 posts have been earmarked as horizontally reserved by inserting such reservation into general quota of 46 posts which had the effect of pushing out of selection zone three candidates from the merit list of general category.

7. We do not find fault with any of the two reasonings adopted by the High Court. The rule of rounding off based on logic and common sense is: if part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. 46.50 should have been rounded off to 47 and not to 46 as has been done. If 47 candidates would have been considered for selection in General category, the respondent was sure to find a place in the list of selected meritorious candidates and hence entitled to appointment.

19. There cannot be any dispute to the proposition as laid down by the apex court when number of posts are incapable of being expressed in fraction hence, has to be rounded off for the purpose of recruitment. In the case of State of Punjab v. Asha Mehta (supra) Public Service Commission had adopted an uniform procedure of rounding of 32.5% as 33%. The Commission had applied uniform practice in the recruitment process regarding percentage of marks with which the apex court refused to interfere. The said judgment only noticed the practice followed by Commission and refused to interfere in the matter. The said judgment does not lay down any such ratio which may help the respondent No. 1 in the present case.

20. Sri K.N. Tripathi in his usual persuasive manner repeated his other submissions, which were pressed in the writ petition but had not found favour with learned Single Judge. The first submission is that the nomination of respondent No. 7 was wrongly accepted as there is no concept of provisional acceptance of nomination. The ground of attack of Sri Tripathi is that the respondent No. 7 Union got itself registered mentioning its address as 464-B, Nawab Yusuf Road, Allahabad which is the address of the respondent No. 1 Union. As noted above, a letter was also written by the Deputy Registrar, Trade Union to the respondent No. 7 to show cause as to why its registration be not cancelled. It has come on record that respondent No. 7 by subsequent resolution proposed change of address and the letter sent by the Union in respect thereto was forwarded to the Registrar Trade Union. The General Manager, while deciding the representation has held that union respondent No. 7 contested the election by its name and by the symbol allotted to it and not by its address. It has come on the record that address was also not mentioned in the ballot paper. The nomination was submitted by all the unions, which was accepted by the Returning Officer. In the facts of the present case, it cannot be said that the decision of the Returning Officer to accept the nomination of respondent No. 7 was an incorrect decision. The registered office of the respondent No. 7 Union also also being 464-B, Nawab Yusuf Road, Allahabad and same having not yet been permitted

to be changed by the Registrar, the mention of said address in its nomination form could not be said to be such defect, which required, rejection of nomination. Learned Single Judge has approved the order of the competent authority by which it was held that the elections were contested in the name of the union and the election symbol allotted to it, and not on the office address which was not mentioned on the ballot papers. Learned Single Judge has further observed that, the election propaganda misled the voters, is a matter of fact to be proved by evidence which issue cannot be considered and decided in the proceedings under Article 226 of the Constitution of India. We fully approve the view taken by the learned Single Judge in that regard. The above submission of learned Counsel for the respondent No. 1 cannot be accepted.

21. The next submission of Sri Tripathi, learned Counsel for the respondent is that the votes cast in favour of respondent No. 7 have to be treated as void and invalid votes since its nomination was wrongly accepted. Even, if it is assumed for the arguments sake that nomination of respondent No. 7 was wrongly accepted still no benefit shall accrue to the respondent No. 1 due to following reasons.

22. The votes cast in favour of respondent No. 7 were votes cast by valid voters whose competence to participate in the election process and cast vote is not disputed. The nomination of respondent No. 7 was also accepted provisionally by Returning Officer and the name of the respondent No. 7 was shown in the ballot papers. The votes cast in favour of respondent No. 7 cannot be treated to be invalid votes. Clause 24 of the modalities specifically provide for "invalid votes", which is quoted herein below:

24. Invalid votes:

The Ballot Paper will be considered invalid when:

i) Mark is put against more than one union/symbol;

ii) Mark is put on the divider line; and

iii) The Ballot Paper contains any doubtful indication like name of the voters, signature, any form of written message etc.

In case of any dispute, decision of Presiding Officer will be final.

Thus, the votes cast in a secret ballot process shall be invalid only on the grounds as provided in Clause 24. The votes cast in favour of respondent No. ,7 cannot be said to be invalid as they do not answer any of the category of votes which could be declared invalid as specified in Clause 24. The whole conduct of election proceedings by secret ballot has been provided for in modalities and the challenge to election has also to be as per the modalities and the scheme of election provided. It is useful to refer to the observations of the Supreme Court in the case of Jyoti Basu and Others Vs. Debi Ghosal and Others,

8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.

23. Thus, the submission of learned Counsel for the respondent No. 1 that votes cast in favour of respondent No. 7 has to be treated as invalid votes and should not be computed, while finding out 35% of the valid votes cannot be accepted. The votes cast in favour of respondent No. 7 were valid votes and have to be computed, while computing the percentage of valid votes. Sri Tripathi also placed reliance on the judgment in the case of Bharat Bhushan Vs. Ved Prakash, . In the said judgment certain voters belonging to certain colonies voted in the election of Metropolitan Council for Delhi although such colonies were deleted from the electoral roll of the constituency No. 33. Due to error in preparation of the voters list, their names continued and they voted. The said votes were excluded. Delhi High Court held that certain areas of Jagjivan Nagar, Gali No. 1 to 9 were not part of constituency No. 33 and no person who was not for the time being entered in the electoral roll of that constituency is entitled to vote in that constituency . Following was laid down in paragraph 35 of the judgment:

35. Another part of the issue is that 392 voters belonging to Jyoti Nagar Colony on Loni Road (Jyoti Colony) in polling station No. 26 were illegally excluded. While discussing the disputed votes of Jagjivan Nagar, I have also discussed the situation of Jyoti Nagar Colony which is outside constituency No. 33 and in fact falls in constituency No. 34. Factually the voters of Jyoti Nagar Colony are not electors of constituency No. 33 and by virtue of Section 62 of the Act have no right to vote in that constituency. In Ext. P.W.-1/2, serial Nos. 359 to 735 (total votes 377) are printed in the list of constituency No. 33, but they have been deleted in the list itself. It is clear that there was error in printing the voters serial Nos. 359 to 735 of Jyoti Nagar Colony in the lit of constituency No. 33 and deletion must have been made before the lists were supplied to the petitioner or issued. These serial numbers of voters have not been assigned to any of the polling stations of constituency No. 33, Polling Station No. 26 mentioned in Ext. PW-8/2-A (or Ex. PW-1/9) does not include in it the serial numbers of voters from 359 to 735. They were, however, included in the tentative list Ext. PW8-/1 in polling station No. 24, but that tentative list is not final. The final list is Ext. PW-8/2. Thus I hold factually the voters of polling station No. 15, Jagjivan Nagar, Gali No. 1 to 9, voters Nos. 347/485-970,971-1604 (A), 347/2306-2471-A as well as voters No. 359 to 735 of Jyoti Colony earlier included in polling station No. 24 (later on renumbered as 26) were not electors of constituency No. 33 and had no right to vote in constituency No. 33.

The judgment of the Delhi High Court is clearly distinguishable. The voters who voted were not included in the constituency in the final delimitation and had wrongly exercised the voting rights, their votes were therefore excluded. In the case in hand, it is not the case of any of the parties that the voters who voted in favour of respondent No. 7 are not class III and class IV employees of the North Central Railway Zone and their names were not entered in the voters list thus, the Delhi High Court''s decision in no manner supports the contentions of the learned Counsel for the respondent No. 1.

24. Sri K.N. Tripathi elaborating his submissions, further submitted that votes cast in favour of respondent No. 7 whose nomination has wrongly been accepted have to be treated as wasted or thrown away votes and on that principle have to be excluded for computing the total valid votes polled. The concept of wasted or thrown away votes is a principle borrowed from English common law. It is useful to refer to paragraph 835 of the Halsbury Law of England IV Edition (Re-issue) which is to the following effect:

835. Votes given to a disqualified candidate. Votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away, and to decide this a scrutiny is not necessary. The disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person. Examples of the sort of disqualification that will cause votes to be thrown away are being a peer, alien or minor. For the votes given for a candidate to be thrown away, the voters must, before voting, either have had or be deemed to have had notice of the facts creating the candidate''s disqualification, and it is not necessary to show that the elector was aware of the legal result that such a fact entailed disqualification.

25. From the above proposition, it is clear that the votes given to a candidate, who is disqualified can be treated to be thrown away votes. It is further to be proved that voters before voting had or deemed to have knowledge of disqualification of the candidate. The respondent No. 7 in the present case was not disqualified to participate in the election nor voters can be imputed any such knowledge that respondent No. 7 was disqualified so as to treat the votes given to the respondent No. 7 as wasted votes or thrown away votes. Sri Tripathi also placed reliance on the judgment in the case of Chhedi Ram Vs. Jhilmit Ram and Others, . In the said case, the principle laid down is that the burden to establish that result of the election has been materially affected by the improper acceptance of the nomination, is upon the person impeaching the election. The apex Court further held in the said case that the burden is wholly incapable of being discharged if the candidate whose nomination has been improperly accepted obtained less number of votes than the difference between the number of votes secured by the successful candidate and the number of votes secured by the candidate who got the next highest number of

votes. In the said case, the votes which were obtained by the candidate whose nomination was improperly accepted was more than 20 times of the votes secured by next higher candidates. The judgment of the apex Court in Chhedi Ram (supra) does not help the respondent No. 1. In the present case, since firstly it has been held as above that acceptance of nomination of respondent No. 7 cannot be said to be illegal, further the burden is on the respondent No. 1 to prove that the votes polled by the respondent No. 7, would have been received by the respondent No. 1, which is question of fact which could only be decided by leading evidence which cannot be done in the proceedings under Article 226 of the Constitution of India and could only be done by way of suit in a competent court. Thus, the submission of the respondent No. 1 that the votes cast in favour of the respondent No. 7 should be added in the votes of respondent No. 1 or the votes cast in favour of respondent No. 7 should be excluded for computing the valid number of votes cast in the election, cannot be accepted.

26. In view of the foregoing discussions, we are of the view that learned Single Judge committed error in declaring the respondent No. 1 elected by applying the principle of rounding off. No interference was called for in the facts of the present case with the result declared by Railway Administration regarding the recognition of the Union. The writ petition filed by the respondent No. 1 deserves to be dismissed. In the result both the appeals are allowed. The judgment and order of the learned Single Judge dated 23.5.2008 is set aside and the writ petition filed by respondent No. 1 is dismissed.