



LL.B. VI Term

LB-6033 – Election Laws

Cases Selected and Edited by
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DELHI-110007
January, 2021**

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LL.B. VI Term

Paper : LB-6033-Election Laws

Prescribed Legislations:

- i. The Constitution of India, 1950
- ii. The Representation of the People Act, 1950
- iii. The Representation of the People Act, 1951
- iv. The Delimitation Act, 2002
- v. The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991
- vi. The Indian Penal Code, 1860 (Selected Relevant Provisions)
- vii. The Parliament (Prevention of Disqualification) Act, 1959
- viii. The Presidential and Vice-Presidential Elections Act, 1952

Prescribed Books:

1. V.S. Rama Devi and S.K. Mendiratta, *How India Votes – Election Laws, Practice and Procedure* (4th ed., 2017).
2. Kiran Gupta and P.C. Jain, *Chawla's Elections - Law & Practice* (10th ed., 2014).

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The Goswami Committee Report on Electoral Reforms, 1990

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Law Commission of India, 170th Report on Reform of the Electoral Laws (May, 1999)

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| 56. | <i>Union of India v. Association for Democratic Reforms</i> , (2002) 5 SCC 294 | |
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IMPORTANT NOTE:

1. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
2. The students are required to study the legislations as amended up-to-date and consult the latest editions of books.

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N.P. Ponnuswami v. Returning Officer, Namakkal Constituency

AIR 1952 SC 64

FAZL ALI, J. – 2. The appellant was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly from the Namakkal Constituency in Salem district. On 28th November, 1951, the Returning Officer for that constituency took up for scrutiny the nomination papers filed by the various candidates and on the same day he rejected the appellant's nomination paper on certain grounds which need not be set out as they are not material to the point raised in this appeal. The appellant thereupon moved the High Court under Article 226 of the Constitution praying for a writ of *certiorari* to quash the order of the Returning Officer rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329(b) of the Constitution. The appellant's contention in this appeal is that the view expressed by the High Court is not correct, that the jurisdiction of the High Court is not affected by Article 329(b) of the Constitution and that he was entitled to a writ of *certiorari* in the circumstances of the case.

3. Broadly speaking, the arguments on which the judgment of the High Court is assailed are two-fold:-

(1) that the conclusion arrived at by the High Court does not follow from the language of Article 329(b) of the Constitution, whether that Article is read by itself or along with the other Articles in Part XV of the Constitution; and

(2) that the anomalies which will arise if the construction put by the High Court on Article 329(b) is accepted, are so startling that the courts should lean in favour of the construction put forward on behalf of the appellant.

4. The first argument which turns on the construction of Article 329(b) requires serious consideration, but I think the second argument can be disposed of briefly at the outset. It should be stated that what the appellant chooses to call anomaly can be more appropriately described as hardship or prejudice and what their nature will be has been stated in forceful language by Wallace J. in *Sarvothama Rao v. Chairman, Municipal Council, Saidapet* [(1924) ILR 47 Mad 585, 600] in these words :

I am quite clear that any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored, and hence an injunction staying this election was absolutely necessary, unless the relief asked for was to be denied him altogether *in limine*. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time,

before the threatened wrong is committed; but when he has succeeded in so doing, the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit.

These observations however represent only one side of the picture and the same learned judge presented the other side of the picture in a subsequent case *Desi Chettiar v. Chinnasami Chettiar* [AIR 1928 Mad.1271, 1272] in the following passage:

The petitioner is not without his remedy. His remedy lies in an election petition which we understand he has already put in. It is argued for him that that remedy which merely allows him to have set aside an election once held is not as efficacious as the one which would enable him to stop the election altogether; and certain observations at p. 600 of *Sarvothama Rao v. Chairman, Municipal Council, Saidapet* are quoted. In the first place, we do not see how the mere fact that the petitioner cannot get the election stopped and has his remedy only after it is over by an election petition will in itself confer on him any right to obtain a writ. In the second place, these observations were directed to the consideration of the propriety of an injunction in a civil suit, a matter with which we are not here concerned. And finally it may be observed that these remarks were made some years ago when the practice of individuals coming forward to stop elections in order that their own individual interest may be safeguarded was not so common. It is clear that there is another side of the question to be considered, namely, the inconvenience to the public administration of having elections and the business of Local Boards held up while individuals prosecute their individual grievances. We understand the election for the elective seats in this Union has been held up since 31st May because of this petition, the result being that the electors have been unable since then to have any representation on the Board, and the Board is functioning, if indeed it is functioning, with a mere nominated fraction of its total strength; and this state of affairs the petitioner proposes to have continued until his own personal grievance is satisfied.

These observations which were made in regard to elections to Local Boards will apply with greater force to elections to legislatures, because it does not require much argument to show that in a country with a democratic constitution in which the legislatures have to play a very important role, it will lead to serious consequences, if the elections are unduly protracted or obstructed. To this aspect of the matter I shall have to advert later. But it is sufficient for the present purpose to state firstly that in England the hardship and inconvenience which may be suffered by an individual candidate has not been regarded as of sufficient weight to induce Parliament to make provision for immediate relief and the aggrieved candidate has to wait until after the election to challenge the validity of the rejection of his nomination paper, and secondly, that the question of hardship or inconvenience is after all only a secondary question, because if the construction put by the High Court on Article 329(b) of the Constitution is found to be correct, the fact that such construction will lead to hardship and inconvenience becomes irrelevant.

5. Article 329 is the last Article in Part XV of the Constitution, the heading of which is "Elections". In constructing this Article, reference was made by both parties in the course of their arguments to the other Articles in the same Part, namely, Articles 324, 325, 326, 327 and

328. Article 324 provides for the constitution and appointment of an Election Commissioner to superintend, direct and control elections to the legislatures; Article 325 prohibits discrimination against electors on the ground of religion, race, caste or sex; Article 326 provides for adult suffrage; Article 327 empowers Parliament to pass laws making provision with respect to all matters relating to, or in connection with, elections to the legislatures, subject to the provisions of the Constitution; and Article 328 is a complementary Article giving power to the State Legislature to make provision with respect to all matters relating to, or in connection with, elections to the State Legislature. A notable difference in the language used in Articles 327 and 328 on the one hand, and Article 329 on the other, is that while the first two Articles begin with the words “subject to the provisions of this Constitution” the last Article begins with the words “notwithstanding anything in this Constitution”. It was conceded at the bar that the effect of this difference in language is that whereas any law made by Parliament under Article 327, or by the State Legislatures under Article 328, cannot exclude the jurisdiction of the High Court under Article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Article 329.

6. Now, the main controversy in this appeal centres around the meaning of the words “no election shall be called in question except by an election petition” in Article 329(b), and the point to be decided is whether questioning the action of the Returning Officer in rejecting a nomination paper can be said to be comprehended within the words “no election shall be called in question”. The appellant's case is that questioning something which has happened before a candidate is declared elected is not the same thing as questioning an election, and the arguments advanced on his behalf in support of this construction were these:-

(1) That the word “election” as used in Article 329(b) means what it normally and etymologically means, namely, the result of polling or the final selection of a candidate;

(2) That the fact that an election petition can be filed only after polling is over or after a candidate is declared elected, and what is normally called in question by such petition is the final result, bears out the contention that the word “election” can have no other meaning in Article 329(b) than the result of polling or the final selection of a candidate;

(3) That the words “arising out of or in connection with” which are used in Article 324(1) and the words “with respect to all matters relating to, or in connection with” which are used in Articles 327 and 328, show that the framers of the Constitution knew that it was necessary to use different language when referring respectively to matters which happen prior to and after the result of polling, and if they had intended to include the rejection of a nomination paper within the ambit of the prohibition contained in Article 329(b) they would have used similar language in that Article and

(4) That the action of the Returning Officer in rejecting a nomination paper can be questioned before the High Court under Article 226 of the Constitution for the following reason:- Scrutiny of nomination papers and their rejection are provided for in Section 36 of the Representation of the People Act, 1951. Parliament has made this provision in exercise of the powers conferred on it by Article 327 of the Constitution which is “subject to the provisions of the Constitution”. Therefore, the action of the Returning Officer is subject to the extraordinary jurisdiction of the High Court under Article 226.

7. These arguments appear at first sight to be quite impressive, but in my opinion there are weightier and basically more important arguments in support of the view taken by the High Court. As we have seen, the most important question for determination is the meaning to be given to the word “election” in Article 329(b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. In *Srinivasalu v. Kuppuswami* [AIR 1928 Mad. 253, 255] the learned Judges of the Madras High Court after examining the question, expressed the opinion that the term “election” may be taken to embrace the whole procedure whereby an “elected member” is returned, whether or not it be found necessary to take a poll. With this view, my brother, Mahajan J. expressed his agreement in *Sat Narain v. Hanuman Prasad* [AIR 1945 Lah. 85] and I also find myself in agreement with it. It seems to me that the word “election” has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression “conduct of elections” in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329 (b). That the word “election” bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in *Halsbury's Laws of England* (See page 237 of *Halsbury's Laws of England*, 2nd ed., Vol. 12) in the following passage(s) under the heading “Commencement of the Election”:

Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is “reasonably imminent”. Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when “the conduct and management of” an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case.

The discussion in this passage makes it clear that the word “election” can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

8. The next important question to be considered is what is meant by the words “no election shall be called in question”. A reference to any treatise on elections in England will

show that an election proceeding in that country is liable to be assailed on very limited grounds, one of them being the improper rejection of a nomination paper. The law with which we are concerned is not materially different, and we find that in Section 100 of the Representation of the People Act, 1951, one of the grounds for declaring an election to be void is the improper rejection of a nomination paper.

9. The question now arises, whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

10. I think that a brief examination of the scheme of Part XV of the Constitution and the Representation of the People Act, 1951, will show that the construction I have suggested is the correct one. Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Article 324 with the second, and Article 329 with the third requisite. The other two Articles in Part XV, *viz.* Articles 325 and 326, deal with two matters of principle to which the Constitution-framers have attached much importance. They are:

- (1) prohibition against discrimination in the preparation of, or eligibility for inclusion in, the electoral rolls, on grounds of religion, race, caste, sex or any of them; and
- (2) adult suffrage.

Part XV of the Constitution is really a code in itself providing the entire ground-work for enacting appropriate laws and setting up suitable machinery for the conduct of elections.

11. The Representation of the People Act, 1951, which was passed by Parliament under Article 327 of the Constitution, makes detailed provisions in regard to all matters and all stages connected with elections to the various legislatures in this country. That Act is divided into II parts, and it is interesting to see the wide variety of subjects they deal with. Part II deals with the qualifications and disqualifications for membership, Part III deals with the notification of General Elections, Part IV provides for the administrative machinery for the conduct of elections, and Part V makes provisions for the actual conduct of elections and deals with such matters as presentation of nomination papers, requirements of a valid nomination, scrutiny of nominations, etc., and procedure for polling and counting of votes. Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made there under. The provisions of the Act which are material to the present discussion are Sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs, which may be sought in them. Section 80, which is drafted in almost the same language as Article 329(b), provides that “no election shall be called in question except by an election petition presented in accordance with the provisions of this Part”. Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that “every order of the Tribunal made under this Act shall be final and conclusive”. Section 170 provides that “no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election.” These are the main provisions regarding election matters being judicially dealt with, and it should be noted that there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage.

12. It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in *Wolver Hampton New Water Works Co. v. Hawkesford* [(1859) 6 C.B. (N.S.) 336, 356] in the following passage:

There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that, or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at

common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

13. It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under Article 226 of the Constitution. This argument however is completely shut out by reading the Act along with Article 329(b). It will be noticed that the language used in that Article and in Section 80 of the Act is almost identical, with this difference only that the Article is preceded by the words "notwithstanding anything in this Constitution". I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress.

14. It may be stated that Section 107(1) of the Representation of the People Act, 1949 in England is drafted almost in the same language as Article 329(b). That Section runs thus:-

No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as a parliamentary election petition) presented in accordance with this Part of this Act.

It appears that similar language was used in the earlier statutes, and it is noteworthy that it has never been held in England that the improper rejection of a nomination paper can be the subject of a writ of *certiorari* or *mandamus*. On the other hand, it was conceded at the bar that the question of improper rejection of a nomination paper has always been brought up in that country before the appropriate tribunal by means of an election petition after the conclusion of the election. It is true that there is no direct decision holding that the words used in the relevant provisions exclude the jurisdiction of the High Court to issue appropriate prerogative writs at an intermediate stage of the election, but the total absence of any such decision can be accounted for only on the view that the provisions in question have been generally understood to have that effect. Our attention was drawn to Rule 13 of the rules appended to the Ballot Act of 1872 and a similar rule in the Parliamentary Elections Rules of 1949, providing that the decision of the Returning Officer disallowing an objection to a nomination paper shall be final, but allowing the same shall be subject to reversal on a petition questioning the election or return. These rules however do not affect the main argument. I think it can be legitimately stated that if words similar to those used in Article 329(b) have been consistently treated in England as words apt to exclude the jurisdiction of the courts including the High Court, the same consequence must follow from the words used in Article 329(b) of the Constitution. The words "notwithstanding anything in this Constitution" give to that Article the same wide and binding effect as a statute passed by a sovereign legislature like the English Parliament.

15. It may be pointed out that Article 329(b) must be read as complimentary to clause (a) of that Article. Clause (a) bars the jurisdiction of the courts with regard to such law as may be made under Articles 327 and 328 relating to the delimitation of constituencies or the allotment of seats to such constituencies. It was conceded before us that Article 329(b) ousts the

jurisdiction of the courts with regard to matters arising between the commencement of the polling and the final selection. The question which has to be asked is what conceivable reason the legislature could have had to leave only matters connected with nominations subject to the jurisdiction of the High Court under Article 226 of the Constitution. If Part XV of the Constitution is a code by itself, i.e., it creates rights and provides for their enforcement by a special tribunal to the exclusion of all courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process to be made the subject-matter of contest before the High Courts and thereby upset the time-schedule of the elections. The more reasonable view seems to be that Article 329 covers all “electoral matters”.

16. The conclusions which I have arrived at may be summed up briefly as follows:--

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the “election” and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the “election” and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.

17. It will be useful at this stage to refer to the decision the Privy Council in **Berge v. Laudry** [(1876) 2 AC 102]. Petitioner in that case, having been declared duly elected a member to represent an electoral district in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and was himself declared guilty of corrupt practices both personally and by his agents. Thereupon, he applied for special leave to appeal to Her Majesty in Council, but it was refused on the ground that the fair construction of the Act of 1875 and the Act of 1872 which preceded it providing among other things that the judgment of the Superior Court “shall not be susceptible of appeal” was that it was the intention of the legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. In delivering the judgment of the Privy Council, Lord Cairns observed as follows:-

These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar

jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive; and enable the constitution of the Legislative Assembly to be distinctly and speedily known.

After dealing with certain other matters, the Lord Chancellor proceeded to make the following further observations:--

Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always, in every colony, following the example of the mother country, been zealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place.

18. The points which emerge from this decision may be stated as follows : (1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed it (2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

20. It is necessary to refer at this stage to an argument advanced before us on behalf of the appellant which was based on the language of Article 71(1) of the Constitution. That provision runs thus:-

All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

The argument was as follows. There is a marked contrast between the language used in Article 71(1) and that of Article 329(b). The difference in the phraseology employed in the two provisions suggests that they could not have been intended to have the same meaning and scope as regards matters to be brought up before the tribunals they respectively deal with. If the framers of the Constitution, who apparently knew how to express themselves, intended to

include within the ambit of Article 329(b) all possible disputes connected with elections to legislatures, including disputes as to nominations, they would have used similar words as are to be found in Article 71(1). It is true that it is not necessary to use identical language in every provision, but one can conceive of various alternative ways of expression which would convey more clearly and properly what Article 329(b) is said to convey.

21. It seems to me that once it is admitted that the same idea can be expressed in different ways and the same phraseology need not be employed in every provision, the argument loses much of its force. But, however that may be, I think there is a good explanation as to why Article 329(b) was drafted as it stands.

22. A reference to the election rules made under the Government of India Acts of 1919 and 1935 will show that the provisions in them on the subject were almost in the same language as Article 329(b). The corresponding rule made under the Government of India Act, 1919, was Rule 31 of the Electoral Rules, and it runs as follows :-

No election shall be called in question, except by an election petition presented in accordance with the provisions of this Part.

It should be noted that this rule occurs in Part VII, the heading of which is “the final decision of doubts and disputes as to the validity of an election”. These words throw some light on the function which the election tribunal was to perform, and they are the very words which the learned counsel for the appellant argued, ought to have been used to make the meaning clear.

23. The same scheme was followed in the Election Rules framed under the Government of India Act, 1935, which are contained in “The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936” dated the 3rd July, 1936. In that Order, the Rule corresponding to Rule 31 under the earlier Act, runs thus:-

No election shall be called in question except by an election petition presented in accordance with the provisions of this Part of the Order.

This rule is to be found in Part III of the Order, the heading of which is “Decision of doubts and disputes as to the validity of an election and disqualification for corrupt practices.”

24. The rules to which I have referred were apparently framed on the pattern of the corresponding provisions of the British Acts of 1868 and 1872, and they must have been intended to cover the same ground as the provisions in England have been understood to cover in that country for so many years. If the language used in Article 329(b) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been consistently used in certain earlier legislative provisions and which had stood the test of time.

25. And now a word as to why negative language was used in Article 329(b). It seems to me that there is an important difference between Article 71(1) and Article 329(b). Article 71(1) had to be in an affirmative form, because it confers special jurisdiction on the Supreme Court which that Court could not have exercised but for this Article. Article 329(b), on the other hand, was primarily intended to exclude or oust the jurisdiction of all courts in regard to electoral matters and to lay down the only mode in which an election could be challenged. The negative form was therefore more appropriate, and, that being so, it is not surprising that

it was decided to follow the pre-existing pattern in which also the negative language had been adopted.

26. Before concluding, I should refer to an argument which was strenuously pressed by the learned counsel for the appellant and which has been reproduced by one of the learned Judges of the High Court in these words:

It was next contended that if nomination is part of election, a dispute as to the validity of nomination is a dispute relating to election and that can be called in question only in accordance with the provisions of Article 329(b) by the presentation of an election petition to the appropriate Tribunal and that the Returning Officer would have no jurisdiction to decide that matter and it was further argued that Section 36 of Act XLIII of 1951 would be *ultra vires* in as much as it confers on the Returning Officer a jurisdiction which Article 329(b) confers on a Tribunal to be appointed in accordance with the Article.

This argument displays great dialectical ingenuity, but it has no bearing on the result of this appeal and I think it can be very shortly answered. Under Section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act and decide all objections which be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the Returning Officer does not call in question any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election. The decision of this appeal however turns not on the construction of the single word “election” but on the construction of the compendious expression – “no election shall be called in question” in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method.

27. We are informed that besides the Madras High Court, seven other State High Courts have held that they have no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection of nomination papers. This view is, in my opinion, correct and must be affirmed. The appeal must therefore fail and is dismissed.

* * * * *

Election Commission of India through Secretary v. Ashok Kumar

AIR 2000 SC 2979

R.C. LAHOTI, J. – 2. The 12th Lok Sabha having been dissolved by the President of India on 26.4.1999, the Election Commission of India announced the programme for the General Election to constitute the 13th Lok Sabha. Pursuant thereof, the polling in the State of Kerala took place on 11.9.1999. The counting of votes was scheduled to take place on 6.10.1999.

3. In exercise of the powers conferred by Rule 59A of the Conduct of Election Rules, 1961, the Election Commission of India issued a notification published in Kerala Gazette Extra-ordinary dated 1st October, 1999 which reads as under:-

NOTIFICATION NO. 470/99/JUD-II (H.P.)

1. WHEREAS, Rule 59A of the Conduct of Elections Rules, 1961 provides that where the Election Commission apprehends intimidation and victimisation of electors in any constituency and it is of the opinion that it is absolutely necessary that ballot papers taken out of all ballot boxes used in that constituency should be mixed before counting, instead of being counted polling station wise, it may, by notification in the Official Gazette, specify such constituency;

2. AND WHEREAS, on such specification under the said Rule 59A of the Conduct of Election Rules, 1961, the ballot papers of the specified constituency shall be counted by being mixed instead of being counted polling station wise.

3. AND WHEREAS, the Election Commission has carefully considered the matter and has decided that in the light of the prevailing situation in the State of Kerala, and in the interest of free and fair election and also for the safety and security of electors and with a view to preventing intimidation and victimisation of electors in that State, each of the Parliamentary Constituencies in the State except Ernakulam and Trivandrum Parliamentary Constituencies, may be specified under the said Rule 59A for the purposes of counting votes at the general election to the House of the People, 1999 now in progress.

4. NOW, THEREFORE, the Election Commission hereby specifies that each of the said Parliamentary Constituencies, except Ernakulam and Trivandrum Parliamentary Constituencies, in the State of Kerala as the constituencies to which the provisions of Rule 59A of the Conduct of Elections Rules, 1961 shall apply for the purpose of counting of votes at the current General Election to the House of the People.

BY ORDER

Sd/-

(K.J. RAO)

Secretary, Election Commission of India

4. In Ernakulam and Trivandrum constituencies electronic voting machines were employed for polling. In all other constituencies of Kerala voting was through ballot papers.

5. On 4.10.1999, two writ petitions were filed respectively by the respondents no.1 & 2 herein, laying challenge to the validity of the above notification. In O.P. No. 24444/1999 filed

by respondent no. 2, who was a candidate in the election and has been a member of the dissolved Lok Sabha having also held the office of a Minister in the Cabinet, it was alleged that large scale booth capturing had taken place in the Lok Sabha election at Kannur, Allappuzha and Kasaragod constituencies. Similar allegations of both capturing were made as to polling stations throughout the State. At such polling stations, the polling agents of the Congress party and their allies were not allowed to sit in the polling booths. In 70 booths polling was above 90%, in 25 booths the percentage of polling was more than 92% and in 5 booths it was 95% and above. The presiding officers and the electoral officers did not take any action on the complaints made to them and they were siding with the ruling party (Left Democratic Front or the LDF). At some places the representatives of the Congress party were ordered to be given police protection by the Court but no effective police protection was given. There are other polling booths where the percentage of polling has been very low, as less as 7.8% in booth no. 21 at Manivara Government School. No polling was recorded in booth no. 182. In 27 booths polling was 26%. Complaints were also made to the Chief Election Commissioner. Under Section 135A of the Representation of the People Act, 1951, booth capturing is an offence.

6. O.P. no. 24516/1999 was filed by respondent no.1, who contested from the Allapuzha constituency as an independent candidate, alleging more or less similar facts as were alleged in O.P. no.24444/1999.

7. In both the writ petitions it is alleged that in the matter of counting the Election Commission of India issued guidelines on 22nd September, 1999 which directed that all the ballot boxes of one Polling Station will be distributed to one table for counting the ballot papers. There was no change in the circumstances ever since the date of the above-said guidelines and yet on 28.9.1999 the Election Commission of India issued the impugned notification. According to both the writ petitioners, if counting took place in accordance with the directions issued on 28.9.1999, valuable piece of evidence would be lost as the allegations as to booth capturing could best be substantiated if the counting of votes took place polling station-wise and not by mixing of votes from the various booths. An interim relief was sought by both the writ petitioners seeking suspension of the notification dated 28.9.1999.

8. Notice of the writ petition and applications seeking interim relief was served on the standing counsel for the State Government and the Government Pleader who represented the Chief Electoral Officer. Paucity of time and the urgency required for hearing the matter did not allow time enough for service of notice on the parties individually.

9. The prayer for the grant of interim relief was opposed by the learned counsel appearing for the respondents before the High Court by placing reliance on Article 329(b) of the Constitution. According to the writ petitioners before the High Court, the normal rule was to count votes booth-wise unless exceptional circumstances were shown to exist whereupon Rule 59A could be invoked. According to the learned counsel for the respondents before the High Court, in Ernakulam and Trivandrum parliamentary constituencies, polling was done with the aid of voting machines and hence, excepting these two constituencies, the Election Commission of India formed an opinion for invoking Rule 59A which the Election Commission of India was justified, and well within its power to do. In the opinion of the High Court, in view of large number of allegations of booth capturing (without saying that such

allegations were correct) it was necessary to have the votes counted booth-wise so that the correctness of the allegations could be found out in an election petition which would be filed later, on declaration of the results. The High Court also believed the averment made in the affidavits filed in support of the stay petitions wherein it was stated that training was given to the officers for counting the votes booth-wise, i.e. with mixing or without mixing. Mixing of votes of all booths will take more time in counting and require engagement of more officers. The learned Government pleader was not able to demonstrate before the High Court if the notification dated 28.9.1999 was published in the official gazette. On a cumulative effect of the availability of such circumstances, the High Court by its impugned order dated 4th October, 1999 directed the Election Commission and Chief Electoral Officer to make directions in such a way that counting was conducted booth-wise consistently with the guidelines dated 22.9.1999.

10. On 5.10.1999 the Election Commission of India filed the special leave petitions before this court which were taken up for hearing upon motion made on behalf of the petitioner-appellant. A copy of the official gazette dated 1st October, 1999 wherein the notification dated 28.9.1999 was published, was also produced for the perusal of this court on the affidavit of Shri K.J. Rao, Secretary, Election Commission of India. This court directed notices to be issued and in the meanwhile operation of the order of the Kerala High Court was also directed to be stayed.

11. When the matter came up for hearing after notice, leave was granted for filing the appeals and interim direction dated 5.10.1999 was confirmed to remain in operation till the disposal of appeals. At the final hearing it was admitted at the Bar that in view of the impugned order of the High Court having been stayed by this court, the counting had taken place in accordance with the Notification dated 28.9.1999 made by the Election Commission of India. In view of these subsequent events, the appeals could be said to have been rendered infructuous. However, the learned counsel for the appellant submitted that the issue arising for decision in these appeals is of wide significance in as much as several writ petitions are filed before the High Courts seeking interim directions interfering with the election proceedings and therefore it would be in public interest if this court may pronounce upon the merits of the issue arising for decision in these appeals. We have found substance in the submission so made and, therefore, the appeals have been heard on merits.

12. The issue arising for decision in these appeals is the jurisdiction of the High Court to entertain petitions under Article 226 of the Constitution of India and to issue interim directions after commencement of the electoral process.

13. Article 324 of the Constitution contemplates constitution of the Election Commission in which shall vest the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under the Constitution. The words superintendence, direction and control have a wide connotation so as to include therein such powers which though not specifically provided but are necessary to be exercised for effectively accomplishing the task of holding the elections to their completion.

14. The term election as occurring in Article 329 has been held to mean and include the entire process from the issue of the Notification under Section 14 of the Representation of the People Act, 1951 to the declaration of the result under Section 66 of the Act.

15. The constitutional status of the High Courts and the nature of the jurisdiction exercised by them came up for the consideration of this court in **Harwan Investment and Trading Pvt.Ltd., Goa** [1993 Supp (2) SCC 433]. It was held that the High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and supplementary powers. Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction including the jurisdiction to determine their own powers. The following statement of law from **Halsbury's Laws of England** [4th Edn., Vol.10, para 713] was quoted with approval:

Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court.

16. This Court observed that the jurisdiction of courts is carved out of sovereign power of the State. People of free India are the sovereign and the exercise of judicial power is articulated in the provisions of the Constitution to be exercised by the courts under the Constitution and the laws there under. It cannot be confined to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the court to render justice according to law. Where statute is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.

17. That the power of judicial review is a basic structure of the Constitution - is a concept which is no longer an issue.

18. Is there any conflict between the jurisdiction conferred on the High Courts by Article 226 of the Constitution and the embargoes created by Article 329 and if so how would they co-exist came up for the consideration of this court in **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency** [AIR 1952 SC 64]. The law enunciated in **Ponnuswami's case** was extensively dealt with, and also amplified, by another Constitution Bench in **Mohinder Singh Gill v. Chief Election Commissioner, New Delhi** [AIR 1978 SC 851]. The plenary power of Article 329 has been stated by the Constitution Bench to be founded on two principles :

- (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion;
- (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution.

On these principles, the conclusions arrived at in **Ponnuswami** case were so stated in **Mohinder Singh Gill** case:

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the election; and if any irregularities are committed while it is in progress and they belong to the category or class which under the law by which elections are governed, would have the effect of vitiating the election and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.

19. However, the Constitution Bench in *Mohinder Singh Gill* case could not resist commenting on *Ponnuswami* case observing that the non-obstante clause in Article 329 pushes out Article 226 where the dispute takes the form of calling in question an election, except in special situations pointed out at, but left unexplored in *Ponnuswami*.

20. *Vide* para 29 in *Mohinder Singh Gill* case, the Constitution Bench noticed two types of decisions and two types of challenges: The first relating to proceedings which interfere with the progress of the election and the second which accelerate the completion of the election and acts in furtherance of an election. A reading of *Mohinder Singh Gill* case points out that there may be a few controversies which may not attract the wrath of Article 329(b). To wit:

(i) power vested in a functionary like the Election Commission is a trust and in view of the same having been vested in high functionary can be expected to be discharged reasonably, with objectivity and independence and in accordance with law. The possibility however cannot be ruled out where the repository of power may act in breach of law or arbitrarily or *malafide*.

(ii) A dispute raised may not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. The Election Commission may pass an order which far from accomplishing and completing the process of election may thwart the course of the election and such a step may be wholly unwarranted by the Constitution and wholly unsustainable under the law.

In *Mohinder Singh Gill* case, this Court gives an example. Say after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30 if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, which order would have the effect of preventing an election and not promoting it, the Court's intervention in such a case will facilitate the flow and not stop the election stream.

21. A third category is not far to visualise. Under Section 81 of the Representation of the People Act, 1951 an election petition cannot be filed before the date of election, i.e., the date on which the returned candidate is declared elected. During the process of election something may have happened which would provide a good ground for the election being set aside. Purity of election process has to be preserved. One of the means for achieving this end is to deprive a returned candidate of the success secured by him by resorting to means and methods falling foul of the law of elections. But by the time the election petition may be filed and judicial assistance secured, material evidence may be lost. Before the result of the election is declared assistance of Court may be urgently and immediately needed to preserve the evidence, without in any manner intermeddling with or thwarting the progress of election. So also, there may be cases where the relief sought for may not interfere or intermeddle with the process of the election but the jurisdiction of the Court is sought to be invoked for correcting the process of election, taking care of such aberrations as can be taken care of only at that moment failing which the flowing stream of election process may either stop or break its bounds and spill over. The relief sought for is to let the election process proceed in conformity with law and the facts and circumstances be such that the wrong done shall not be undone after the result of the election has been announced subject to overriding consideration that the Court's intervention shall not interrupt, delay or postpone the ongoing election proceedings. The facts of the case at hand provide one such illustration with which we shall deal with a little later. We proceed to refer a few other decided cases of this court cited at the Bar.

22. In *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman* [AIR 1985 SC 1233] writ petitions under Article 226 of the Constitution were filed before the High Court asking for the writs of *mandamus* and *certiorari*, directing that the instructions issued by the Election Commission should not be implemented by the Chief Electoral Officer and others; that the revision of electoral rolls be undertaken *de novo*; that claims, objections and appeals in regard to the electoral rolls be heard and disposed of in accordance with the rules; and that, no notification be issued under section 15(2) of the Representation of the People Act, 1951 calling for election to the West Bengal Legislative Assembly, until the rolls were duly revised. The High Court entertained the petitions and gave interim orders. The writ petitioners had also laid challenge to the validity of several provisions of the Acts and Rules, which challenge was given up before the Supreme Court. The Constitution Bench held, though the High Court was justified in entertaining the writ petition and issuing a rule therein, since the writ petition apparently contained a challenge to several provisions of election laws, it was not justified in passing any order which would have the effect of postponing the elections which were then imminent. Even assuming, therefore, that the preparation and publication of electoral rolls are not a part of the process of election within the meaning of Article 329(b), we must reiterate our view that the High Court ought not to have passed the impugned interim orders, whereby it not only assumed control over the election process but, as a result of which, the election to the Legislative Assembly stood the risk of being postponed indefinitely.

23. In *Election Commission of India v. State of Haryana* [AIR 1984 SC 1406] the Election Commission fixed the date of election and proposed to issue the requisite notification. The Government of Haryana filed a writ petition in the High Court and secured

an *ex-parte* order staying the issuance and publication of the notification by the Election Commission of India under sections 30, 56 and 150 of the Representation of the People Act, 1951. This Court deprecated granting of such *ex-parte* orders. During the course of its judgment the majority speaking through the Chief Justice observed that it was not suggested that the Election Commission could exercise its discretion in an arbitrary or *malafide* manner; arbitrariness and *malafides* destroy the validity and efficacy of all orders passed by public authorities. The minority view was recorded by M.P.Thakkar, J. quoting the following extract from ***A.K.M Hassan Uzzaman v. Union of India*** [(1982) 2 SCC 218]:

The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution

and held that even according to ***Hassan*** case the Court has the power to issue an interim order which has the effect of postponing an election but it must be exercised sparingly (with reluctance) particularly when the result of the order would be to postpone the installation of a democratically elected popular Government.

24. In ***Digvijay Mote v. Union of India*** [(1993) 4 SCC 175] this Court has held that the powers conferred on the Election Commission are not unbridled; judicial review will be permissible over the statutory body, i.e., the Election Commission exercising its functions affecting public law rights though the review will depend upon the facts and circumstances of each case; the power conferred on the Election Commission by Article 324 has to be exercised not mindlessly nor *malafide*, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation.

25. ***Anugrah Narain Singh v. State of U.P.*** [(1996) 6 SCC 303] is a case relating to municipal elections in the State of Uttar Pradesh. Barely one week before the voting was scheduled to commence, in the writ petitions complaining of defects in the electoral rolls and de-limitation of constituencies and arbitrary reservation of constituencies for scheduled castes, scheduled tribes and backward classes the High Court passed an interim order stopping the election process. This Court quashed such interim orders and observed that if the election is imminent or well under way, the Court should not intervene to stop the election process. If this is allowed to be done, no election will ever take place because someone or the other will always find some excuse to move the Court and stall the elections. The importance of holding elections at regular intervals cannot be over-emphasised. If holding of elections is allowed to stall on the complaint of a few individuals, then grave injustice will be done to crores of other voters who have a right to elect their representatives to the democratic bodies.

27. In ***Mohinder Singh Gill*** case, the Election Commission had cancelled a poll and directed a re-polling. The Constitution Bench held that a writ petition challenging the cancellation coupled with re-poll amounted to calling in question a step in election and is therefore barred by Article 329(b). However, *vide* para 32, it has been observed that had it

been a case of mere cancellation without an order for repoll, the course of election would have been thwarted (by the Election Commission itself) and different considerations would have come into play.

28. Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the *lis* terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen, nor assuming a role of an over-enthusiastic activist, would do. The two extremes have to be avoided in dealing with election disputes.

29. Section 100 of the Representation of the People Act, 1951 needs to be read with Article 329(b), the former being a product of the later. The sweep of Section 100 spelling out the legislative intent would assist us in determining the span of Article 329(b) though the fact remains that any legislative enactment cannot curtail or override the operation of a provision contained in the Constitution. Section 100 is the only provision within the scope of which an attack on the validity of the election must fall so as to be a ground available for avoiding an election and depriving the successful candidate of his victory at the polls. The Constitution Bench in ***Mohinder Singh Gill*** case asks us to read Section 100 widely as covering the whole basket of grievances of the candidates. Sub-clause (iv) of clause (d) of sub-section (1) of Section 100 is a residual catch-all clause. Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any rules or orders made there under if not specifically covered by any other preceding clause or sub-clause of the Section it shall be covered by sub-clause (iv). The result of the election insofar as it concerns a returned candidate shall be set aside for any such non-compliance as above said subject to such non-compliance also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned. The conclusions which inevitably follow are: in the field of election jurisprudence, ignore such things as do not materially affect the result of the election, unless the requirement of satisfying the test of material effect has been dispensed with by the law; even if the law has been breached and such breach satisfies the test of material effect on the result of the election of the returned candidate yet postpone the adjudication of such dispute till the election proceedings are over so as to achieve, in larger public interest, the goal of constituting a democratic body without interruption or delay on account of any controversy confined to an individual or group of individuals or a single constituency having arisen and demanding judicial determination.

30. To what extent Article 329(b) has an overriding effect on Article 226 of the Constitution? The two Constitution Benches have held that the Representation of the People Act, 1951 provides for only one remedy; that remedy being by an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. The non-obstante clause with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election. The provisions of the Constitution and the Act read together do not totally exclude the right of a citizen to approach the Court so

as to have the wrong done remedied by invoking the judicial forum; nevertheless the lesson is that the election rights and remedies are statutory, ignore the trifles even if there are irregularities or illegalities, and knock the doors of the courts when the election proceedings in question are over. Two-pronged attack on anything done during the election proceedings is to be avoided -one during the course of the proceedings and the other at its termination, for such two-pronged attack, if allowed, would unduly protract or obstruct the functioning of democracy.

31. The founding fathers of the Constitution have consciously employed use of the words “no election shall be called in question” in the body of Section 329(b) and these words provide the determinative test for attracting applicability of Article 329(b). If the petition presented to the Court calls in question an election, the bar of Article 329(b) is attracted. Else it is not.

32. For convenience sake, we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-

1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

2) Any decision sought and rendered will not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing, or in furtherance of the election proceedings cannot be described as questioning the election.

3) Subject to the above, the action taken or orders issued by the Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of *mala fide* or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and the stage is set for invoking the jurisdiction of the Court.

5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the courts indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

33. These conclusions, however, should not be construed as a summary of our judgment. These have to be read along with the earlier part of our judgment wherein the conclusions have been elaborately stated with reasons.

34. Coming back to the case at hand it is not disputed that the Election Commission does have power to supervise and direct the manner of counting of votes. Till 22nd September, 1999 the Election Commission was of the opinion that all the ballot boxes of one polling station will be distributed to one table for counting the ballot papers and that would be the manner of counting of votes. On 28.9.1999 a notification under Rule 59A came to be issued. It is not disputed that the Commission does have power to issue such notification. What is alleged is that the exercise of power was *mala fide* as the ruling party was responsible for large scale booth capturing and it was likely to lose the success of its candidates secured by committing an election offence if material piece of evidence was collected and preserved by holding polling station wise counting and such date being then made available to the Election Tribunal. Such a dispute could have been raised before and decided by the High Court if the dual test was satisfied: (i) the order sought from the Court did not have the effect of retarding, interrupting, protracting or stalling the counting of votes and the declaration of the results as only that much part of the election proceedings had remained to be completed at that stage, (ii) a clear case of *malafides* on the part of Election Commission inviting intervention of the Court was made out, that being the only ground taken in the petition. A perusal of the order of the High Court shows that one of the main factors which prevailed with the High Court for passing the impugned order was that the learned Government Advocate who appeared before the High Court on a short notice, and without notice to the parties individually, was unable to tell the High Court if the notification was published in the Government Gazette. The power vested in the Election Commission under Rule 59A can be exercised only by means of issuing notification in the official gazette. However, the factum of such notification having been published was brought to the notice of this Court by producing a copy of the notification. Main pillar of the foundation of the High Courts order thus collapsed. In the petitions filed before the High Court there is a bald assertion of *malafides*. The averments made in the petition do not travel beyond a mere *ipsi dixit* of the two petitioners that the Election Commission was motivated to oblige the ruling party in the State. From such bald assertion an inference as to *malafides* could not have been drawn even prima facie. On the pleadings and material made available to the High Court at the hearing held on a short notice we have no reason to doubt the statement made by the Election Commission and contained in its impugned notification that the Election Commission had carefully considered the matter and then decided that in the light of the prevailing situation in the State and in the interests of free and fair election and also for safety and security of electors and with a view to preventing intimidation and victimisation of electors in the State, a case for direction attracting applicability of Rule 59A for counting of votes in the constituencies of the State, excepting the two constituencies where electronic voting machines were employed, was made out. Thus, we find that the two petitioners before the High Court had failed to make out a case for intervention by the High Court amidst the progress of election proceedings and hence the High Court ought not to have made the interim order under appeal though the impugned order did not have the effect of retarding, protracting, delaying or stalling the counting of votes or the progress of the election proceedings. The High Court was perhaps inclined to intervene so

as to take care of an alleged aberration and maintain the flow of election stream within its permissible bounds.

35. The learned counsel for the Election Commission submitted that in spite of the ballot papers having been mixed and counting of votes having taken place in accordance with Rule 59A it would not be difficult for the learned Designated Election Judge to order a re-count of polls and find out polling-wise break-up of the ballots if the election- petitioner may make out a case for directing a re-count by the Court. In his submission the grievance raised before the High Court was fully capable of being taken care of at the trial of the election petition to be filed after the declaration of the results and so the bar of Article 329(b) was attracted. In this connection he invited our attention to Chapter XIV-B: “Counting of Votes” of ***Handbook for Returning Officers*** (1998) issued by Election Commission of India. This is an aspect of the case on which we would not like to express any opinion as the requisite pleadings and material are not available before us.

36. For the foregoing reasons, the appeals are allowed. The impugned orders of the High Court are set aside.

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G.V. Sreerama Reddy v. Returning Officer
(2009) 9 SCC 736

P. SATHASIVAM, J. - 1. This appeal, under Section 116A of the Representation of the People Act, 1951, is directed against the order dated 19.09.2008 of the High Court of Karnataka at Bangalore in Election Petition No. 4 of 2008 in and by which the High Court upheld the objection of the Registry that there was no proper presentation of the election petition in terms of Section 81(1) of the Representation of the People Act, 1951, (the Act), consequently dismissed the election petition.

2. Election to Constituency No. 140, Bagepalli, Karnataka Legislative Assembly was held in the General Elections conducted in the State in 2008. Appellant No.1 was the candidate of the CPM party. Appellant No.2 was his election agent. Respondent No.1 is the Returning Officer of Bagepalli Legislative Assembly Constituency. Respondent No.2 is the Congress candidate who has been declared elected in the election held on 10.05.2008. Respondent No.3 is the Observer appointed by the Election Commission of India.

3. According to the appellants, election was held on 10.05.2008 and counting took place on 25.05.2008. Initially, the Media Officer appointed by the Election Commission announced appellant No.1 as the successful candidate and declared him elected. When the election agents and counting agents of appellant No.1 had left the place of counting, an application for re-counting was submitted by the second respondent and thereafter, second respondent was declared elected. The appellants filed an election petition under Section 81 of the Act on various grounds pointing out large-scale irregularities and illegalities committed by respondent-authorities in the voting and the illegalities of allowing the recounting after announcing the declaration of appellant No.1 as elected.

4. On 06.07.2008, the first appellant, through his advocate, Shri Shiva Reddy presented the election petition before the Registrar (Judicial), High Court of Karnataka. The Registry of the High Court put up an office objection that as the appellants were not present at the time of filing of the election petition, the presentation of the papers were not in accordance with Section 81 of the Act and as such there was no proper filing of the election petition. Based on the office objection, the matter was placed before the learned Single Judge of the High Court dealing with the election petition and arguments were heard. By the impugned order, the learned Single Judge based on the recorded statement of Registrar (Judicial) dated 07.07.2008 that “petitioners were not present while presenting this petition” and finding that it was not a proper presentation in terms of Section 81, dismissed the election petition. Aggrieved by the said order, the appellants have filed this appeal before this Court.

6 Since the election petition was dismissed at the threshold on the alleged ground of improper filing, there is no need to traverse various averments made therein. The only question to be considered by this Court is whether the election petition as presented was in accordance with Section 81 (1) of the Act and whether the High Court was right in dismissing the same as it was not presented by the candidate or elector?

7. Part VI of the Act relates to disputes regarding elections. Chapter II therein speaks about presentation of election petitions to the High Court. Section 80 mandates that no

election shall be called in question except by an election petition presented in accordance with the provisions of Part VI. Section 81 relates to presentation of election petitions.

8. Sub-section (1) also makes it clear that the election can be challenged not only by any candidate of such election but also even an elector who was entitled to vote at the election to which the election petition relates irrespective of the fact that whether he has voted at such election or not. Sub-section (3) mandates that depending on the number of respondents mentioned in the petition, such required copies duly attested by the election petitioner under his own signature to be a true copy of the petition shall be furnished.

9. Learned counsel appearing for the appellants submitted that in the light of the language used in sub-section (1) there is no compulsion/obligation to present the election petition by the candidate himself. In other words, according to him, in view of the fact that the election petitioner had duly executed a vakalatnama, in favour of his advocate, he is empowered to present it to the authorized officer of the Registry. It is further contended that presentation of the election petition by a candidate or elector is not mandatory and if it is presented by his advocate duly authorized, the same is a proper presentation in terms of sub-section (1) of Section 81 of the Act. It is also contended that in cases of substantial compliance and where it is shown that absence was not to harm the respondent's case and certain exigencies existed which made the presence difficult, the court should not dismiss the petition merely for non-compliance with Section 81(1) of the Act. On the other hand, learned counsel appearing for the contesting second respondent-successful candidate submitted that in view of the language used in sub-section (1), it is mandatory that the candidate or elector is to personally present it before the High Court. In view of the endorsement by the Registrar (Judicial) stating that the petitioners (appellants herein) were not present while presenting the election petition, the impugned order of the High Court dismissing the same cannot be faulted with.

10. A close look of Section 81 reveals that the two remaining Sub-sections after the amendment introduced by Act 47 of 1966, i.e. (1) and (3) deal with two distinct, but inter-related issues. Sub-section (1) deals with the necessary requirements of any petition challenging an election, and Sub-section (3) deals with additional requirements as to the petition presented.

11. Sub-section (1) has five components, (i) the qualification of the petitioner, i.e. he/she must be either “a candidate at such election” or an “elector”; (ii) the petition must be presented ‘by’ the petitioner; (iii) the petition must be based on one or more of the grounds specified in sub-section (1) of section 100 and section 101; (iv) it must be presented in the High Court; and (v) it must be presented within 45 days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

12. Therefore, all these five requirements are extremely specific and clear. This inference is further strengthened by Section 86(1) which provides that the “High Court shall dismiss an election petition which does not comply with the provisions of Section 81”.

13. This Court, on previous occasions, had the chance to interpret Section 81(1). It must be noted that the Representation of the People Act is a special statute, and a self-contained regime. In *K. Venkateswara Rao v. Bekkam Narasimha Reddi* [(1969) 1 SCR 679], a

question arose whether 45 days period provided under Section 81(1) could be condoned through the application of the Limitation Act? After examining the relevant provisions of the Act, this Court held: "...the Limitation Act cannot apply to proceedings like an election petition inasmuch as the Representation of the People Act is a complete and self-contained code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act."

15. While interpreting a special statute, which is a self-contained code, the Court must consider the intention of the Legislature. The reason for this fidelity towards the Legislative intent is that the statute has been enacted with a specific purpose which must be measured from the wording of the statute strictly construed. The preamble of the Representation of the People Act makes it clear that for the conduct of elections of the Houses of Parliament or the Legislature of each State, the qualification and dis-qualification for membership of those Houses, the corrupt practice and other offences in connection with such allegations the Act was enacted by the Parliament. In spite of existence of adequate provisions in the Code of Civil Procedure relating to institution of a suit, the present Act contains elaborate provisions as to disputes regarding elections. It not only prescribes how election petitions are to be presented but it also mandates what are the materials to be accompanied with the election petition, details regarding parties, contents of the same, relief that may be claimed in the petition. How trial of election petitions are to be conducted has been specifically provided in Chapter III of Part VI. In such circumstances, we are of the view that the provisions have to be interpreted as mentioned by the Legislature.

16. One can discern the reason why the petition is required to be presented by the petitioner personally. An election petition is a serious matter with a variety of consequences. Since such a petition may lead to the vitiation of a democratic process, any procedure provided by an election statute must be read strictly. Therefore, the Legislature has provided that the petition must be presented "by" the petitioner himself, so that at the time of presentation, the High Court may make preliminary verification which ensure that the petition is neither frivolous nor vexatious.

17. In this context, earlier decisions of this Court regarding the interpretation of Section 81(1) must be understood. In *Sheo Sadan Singh v. Mohan Lal Gautam* [1969 (1) SCC 408], in paragraph 4, this court held that:

"The High Court has found as a fact that the election petition was presented to the registry by an advocate's clerk in the immediate presence of the petitioner. Therefore, in substance though not in form, it was presented by the petitioner himself. Hence the requirement of the law was fully satisfied."

Learned counsel for the appellant submitted that even though the "form" of the provision was not followed, i.e. the petition was not presented "by" the petitioner "personally", in "substance", it was followed. It is to be noted that in *Sadan Singh* case, it is not in dispute that the petition was presented to the Registry in the immediate presence of the petitioner. In other words, the officer authorized by the High Court had an opportunity to verify him but in the case on hand, admittedly, it was presented only by the advocate and the petitioners were not present before the Registrar (Judicial). In view of the same, the said decision is not helpful

to the appellant's case. This is because the petitioner therein had, in substance, complied with the provision as strictly construed.

18. Learned counsel appearing for the appellants relied on a decision of the High Court of Rajasthan (Jaipur Bench) in *Bhanwar Singh v. Navrang Singh* [AIR 1987 Raj 63]. In the case before the learned Single Judge, the election petition had been presented by one Rajendra Prasad, Advocate and not by the petitioner himself. It was argued by learned counsel for the petitioner therein that election petition had been validly presented under Section 81(1) of the Act because Section 81 (1) of the Act only makes a provision as to who can file an election petition and does not deal with as to who should actually present it before the Registry. It is further submitted that Section 81 of the Act nowhere provides that the petitioner should be physically present at the time of presentation of the election petition. The learned Single Judge, after adverting to the words – “by”, “presented” concluded that these words used in Section 81(1) of the Act have to be given wide meaning and found that election petition filed through an advocate without the presence of candidate or elector is valid. We are unable to accept the said conclusion.

19. We have already pointed out that in spite of provisions in CPC and Evidence Act relating to institution of suit and recording of evidence etc. this Act provides all the details starting from the presentation of the election petition ending with the decision of the High Court. In such circumstances, it is but proper to interpret the language used by the Legislature and implement the same accordingly. The challenge to an election is a serious matter. The object of presenting an election petition by a candidate or elector is to ensure genuineness and to curtail vexatious litigations. If we consider sub-section (1) along with the other provisions in Chapter II and III, the object and intent of the Legislature is that this provision i.e. Section 81(1) is to be strictly adhered to and complied with.

20. In view of the endorsement by the Registrar (Judicial) on 07.07.2008 that the election petition was presented only by an advocate and not by the election petitioners, we accept the reasoning of the High Court in dismissing the election petition. We further hold that as per sub-section (1) of Section 81, election petition is to be presented by any candidate or elector relating to the election personally to the authorized officer of the High Court and failure to adhere such course would be contrary to the said provision and in that event the election petition is liable to be dismissed on the ground of improper presentation. Since, the High Court has correctly dismissed the election petition, the civil appeal fails and the same is dismissed with no order as to costs.

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Manohar Joshi v. Nitin Bhaurao Patil

AIR 1996 SC 796

J.S. VERMA, J. - This is an appeal under Section 116A of the Representation of the People Act, 1951 ("the R.P. Act") against the judgment dated 26.4.1993 by S.N. Variava, J. of the Bombay High Court in Election Petition No. 24 of 1990 whereby the election of the appellant Manohar Joshi to the Maharashtra Legislative Assembly from 32, Dadar Constituency of Greater Bombay held on 27.2.1990 has been declared to be void on the ground under Section 100(1)(b) of the R.P. Act.

2. Manohar Joshi was the candidate of the BJP-Shiv Sena alliance at that election while the original election petitioner Bhaurao Patil (now dead), was the candidate of the Congress (I) Party. Manohar Joshi secured the highest number of votes i.e. 47,737, while Bhaurao Patil secured 24,354 votes. Accordingly, Manohar Joshi was declared duly elected on 1.3.1990.

3. Admittedly, the last date for filing the election petition according to the limitation prescribed in sub-section (1) of Section 81 of the R.P. Act was 14.4.1990 but the election petition was actually presented in the Bombay High Court on 16.4.1990. It is also admitted that 14.4.1990 was a Saturday on which date the High Court as well as its office was closed on account of a public holiday and 15.4.1990 was a Sunday on which date also the High Court as well as its office was closed and, therefore, the election petition could not have been presented on either of these two dates. The first question which arises, relates to compliance of which renders the election petition liable for dismissal under Section 86 of the R.P. Act.

4. The election petition alleged the commission of corrupt practices under sub-sections (3) and (3A) of Section 123 of the R.P. Act and sought declaration of the election of Manohar Joshi to be void on the ground under Section 100(1)(b) of the R.P. Act. The corrupt practices alleged were, in substance, speeches on 24.2.1990 at Shivaji Park by the returned candidate Manohar Joshi and leaders of the BJP- Shiv Sena alliance, namely, Bal Thackeray, Chhagan Bhujbal and Pramod Nawalkar; and some audio and video cassettes played during the election campaign alleged to contain material constituting these corrupt practices. Any further reference to the audio cassettes is unnecessary since none was either produced or relied on at the trial. The petition was supported only on the ground of the said speeches and video cassettes. Further details of the same would be given later at the appropriate stage.

5. The High Court rejected the contention that the election petition was time barred and, therefore, liable to be dismissed under Section 86 of the R.P. Act. The High Court has held that the corrupt practices alleged have been proved. Consequently, the election petition has been allowed and the election of the returned candidate Manohar Joshi has been declared to be void on the ground under Section 100(1)(b) of the R.P. Act. Hence, this appeal.

6. It would be appropriate to first deal with the contention of Shri Ram Jethmalani relating to non-compliance of Section 81 of the R.P. Act which, if correct, renders the election petition liable to be dismissed under Section 86 thereof. The arguments of Shri Jethmalani in this respect have to be considered with reference to Sections 81, 83 and 86(1).

7. Shri Jethmalani contended that the election petition should have been dismissed by the High Court in accordance with Section 86(1) of the R.P. Act for non-compliance of sub-

section (1) of Section 81 because it was not presented within the prescribed limitation; and it ought to have been dismissed thereunder, also for non-compliance of sub-section (3) of Section 81. For the second part of the submission, Shri Jethmalani contended that sub-section (3) of Section 81 must be read along with Section 83 and, therefore, the copy of the election petition must be the copy of a petition satisfying the requirement of Section 83(1) of the R.P. Act. These are the two parts of the argument for invoking Section 86 for dismissal of the election petition at the threshold. The question, therefore, is: Whether there has been non-compliance of any part of Section 81 to attract Section 86 of the R.P. Act ? We will consider this argument at the outset.

NON COMPLIANCE OF SUB-SECTION (1) AND/OR SUB-SECTION (3) OF SECTION 81 OF THE R.P. Act

Re: sub-section (1) of section 81

8. In substance, the point for decision is whether the election petition filed on 16.4.1990 was presented within 45 days from the date of election of the returned candidate as required by sub-section (1) of Section 81, since the last day of limitation, so reckoned, fell on 14.4.1990. Admittedly, the High Court and its office was closed on 14.4.1990 as well as 15.4.1990 on account of which the election petition could not have been presented in the High Court on any of these two days. Incidentally, even 13.4.1990 was a holiday when the High Court and its office was closed, but that is not of any significance since the last day of limitation was 14.4.1990. There is no controversy that the provisions of the Limitation Act, 1963 are not applicable to the election petitions required to be presented under the R.P. Act and, therefore, Section 4 of the Limitation Act is of no avail. The only question is whether Section 10 of the General Clauses Act, 1897 applies to an election petition to permit filing of the election petition on the date when the High Court opened after the holidays. If Section 10 of the General Clauses Act is applicable then the election petition presented on 16.4.1990 was within the time prescribed by sub-section (1) of Section 81 and there would be no non-compliance of that provision to attract Section 86(1) of the R.P. Act requiring dismissal of the election petition as time barred.

9. The submission of Shri Jethmalani is that the R.P. Act is a self-contained Code and, therefore, no provision outside the Act can be imported for the purpose of computing the limitation for presentation of an election petition. On this basis, he submitted that Section 10 of the General Clauses Act has no application. In reply, Shri Ashok Desai, learned counsel for the respondents submitted that the scheme of the R.P. Act and the legislative history of the limitation prescribed by the Act for presentation of an election petition clearly show that Section 10 of the General Clauses Act applies for computing limitation for presentation of an election petition. Shri Desai also relied on the legal maxim - *lex non kojit ad impossibillia* - which means 'the law does not compel a man to do that which he cannot possibly perform.' Shri Desai submitted that the election petitioner was entitled as of right to present the election petition on the last day of limitation which fell on 14.4.1990, but that day and the next day being holidays when the High Court and its office was closed, the election petition presented on 16.4.1990, the first day on which the Court and its office opened after the holidays, was presented within the prescribed period of limitation. On this basis, Shri Desai submitted, there was no non-compliance of sub-section (1) of Section 81 of the R.P. Act.

10. Section 10 of the General Clauses Act, 1897 is as under:-

10. Computation of time- (1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this Section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

(2) This Section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.

11. A brief reference to the legislative history of the limitation prescribed by sub-section (1) of Section 81 is relevant. The limitation of 45 days from the date of election of the returned candidate for the presentation of an election petition, has been prescribed in sub-section (1) of Section 81 itself by an amendment by substitution of certain words by Act 27 of 1956. Prior to it, the period of limitation was required to be prescribed by the Rules framed under the R.P. Act according to the words then used in sub-section (1) of Section 81. Rule 119 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 (“1951 Rules”), prescribed that period. The 1951 Rules also contained Rule 2(6) which expressly provided for the application of the General Clauses Act to the provisions in the Rules.

12. A similar question relating to applicability of Section 10 of the General Clauses Act arose when the limitation was prescribed by the Rules as required by the then existing sub-section (1) of Section 81 in, *H.H. Raja Harinder Singh v. S. Karnail Singh* [1957 SCR 208]. It was held by this Court that Section 10 of the General Clauses Act is applicable to the presentation of election petitions. Thereafter, the same view has been taken in *Hukumdev Narain Yadav v. Lalit Narain Mishra* [1974 (3) SCR 31]; *Hari Shankar Tripathi v. ShivHarsh* [1976 (3) SCR 308]; *Simhadri Satya Narayana Rao v. M. Budda Prasad* [1994 Suppl.(1) SCC 449]. The later decisions were in relation to election petitions filed after amendment of Section 81(1) by Act 27 of 1956 prescribing the limitation in this Section itself. Shri Jethmalani tried to distinguish those decisions on the ground that the earlier decision in *H.H. Raja Harinder Singh v. S. Karnail Singh* [1957 SCR 208] was followed without noticing the legislative change by amendment of sub-section (1) of Section 81. In view of the fact that this point was not raised in the manner it has been done by Shri Jethmalani before us, it is appropriate that we consider the merit of this submission.

13. It is settled by the decision of this Court in *Ramlal, Motilal and Chhotelal v. Rewa Coalfields Ltd.* [1962 (2) SCR 762, 767] that the litigant has a right to avail limitation upto the last day and his only obligation is to explain his inability to present the suit/petition on the last day of limitation and each day thereafter till it is actually presented. This being the basic premise, it cannot be doubted that the election petitioner in the present case was entitled to avail the entire limitation of 45 days upto the last day, i.e. 14.4.1990 and he was required to explain the inability of not filing it only on 14.4.1990 and 15.4.1990 since the petition was

actually presented in the High Court on 16.4.1990. If Section 10 of the General Clauses Act applies, the explanation is obvious and the election petition must be treated to have been presented within time.

14. The question now is: Whether the applicability of Section 10 of the General Clauses Act to the presentation of election petitions under the R.P. Act is excluded ? No doubt the R.P. Act is a self-contained Code even for the purpose of the limitation prescribed therein. This, however, does not answer the question. It has to be seen whether the context excludes the applicability of Section 10 of the General Clauses Act which is in the part therein relating to the General Rules of Construction of all Central Acts. The legislative history of prescribing limitation for presentation of election petitions in accordance with sub-section (1) or Section 81 is also significant for a proper appreciation of the context. Admittedly, Section 10 of the General Clauses Act applied when by virtue of the requirement in the then existing sub-section (1) of Section 81, the period of limitation was prescribed by Rules framed under the R.P. Act, in Rule 119 of the 1951 Rules. This was expressly provided by Rule 2(6) of the 1951 Rules. There is nothing to indicate that providing the period of limitation in sub-section (1) of Section 81 itself by substitution of certain words by Act 27 of 1956 instead of prescribing the limitation by Rules, was with a view to exclude the applicability of Section 10 of the General Clauses Act. The change appears to have been made to provide for a fixed period in the Act itself instead of leaving that exercise to be performed by the rule making authority. An express provision in Rule 2(6) of the 1951 Rules was required since the General Clauses Act *ipso facto* would not apply to Rules framed under the Central Act, even though it would to the Act itself. The context supports the applicability of Section 10 of the General Clauses Act instead of indicating its exclusion for the purpose of computing the limitation prescribed in sub-section (1) of Section 81 for presentation of election petition.

15. In view of the basic premise that the election petitioner is entitled to avail the entire limitation of 45 days for presentation of the election petition as indicated by **Ramlal** if the contrary view is taken, it would require the election petitioner to perform an impossible task in a case like the present, to present the election petition on the last day of limitation on which date the High Court as well as its office is closed. It is the underlying principle of this legal maxim which suggests the informed decision on this point, leading to the only conclusion that Section 10 of the General Clauses Act applies in the computation of the limitation prescribed by sub-section (1) of Section 81 of the R.P. Act for presentation of an election petition. So computed, there is no dispute that the election petition presented in the present case on 16.4.1990 was within limitation and there was no non-compliance of sub-section (1) of Section 81 of the R.P. Act.

16. We have reached the above conclusion independent of the above decisions of this Court rendered on petitions presented subsequent to the amendment of sub-section (1) of Section 81. It may straightaway be said that in all these cases applicability of Section 10 of the General Clauses Act was either not doubted or was taken for granted. This is how the position has been understood for all these years and no case taking the contrary view has been cited at the Bar. This settled position is in conformity with the view we have taken on this point. There is no basis in law to take a different view.

Re: sub-section (3) of section 81

17. Sub-section (3) of Section 81 requires ‘every election petition to be accompanied by as many copy thereof’ as there are respondents, obviously for the purpose of a copy of the election petition being served upon each respondent along with the notice of the election petition. The submission of Shri Jethmalani is that the election petition and, therefore, its accompanying copy in accordance with Section 81(3) should satisfy the requirement of sub-section (1) of Section 83 as to the contents of the petition. He argues that if the contents of the election petition which has been filed and the copy accompanying it do not satisfy the requirement of Section 83(1), there is non-compliance of Section 81(3) attracting Section 86 for dismissal of the election petition. The argument is that the defect in such a case is in the accompanying copy of the election petition which is deficient in its contents as required by Section 83(1). For this reason, he submits, it results in non-compliance of Section 81(3) which attracts Section 86 of the R.P. Act.

18. In the present case, there is reference in paras 32 and 33 of the election petition to certain video cassettes, the contents of which are deemed to be incorporated by reference in the election petition, and since the video cassettes or a transcript of its contents was not filed along with the election petition and was not supplied with the copy of the election petition to the respondent (returned candidate), it is argued, that it has resulted in non-compliance of Section 81(3) which attracts Section 86. No further reference to the audio cassettes is necessary since the audio cassettes were not produced even at the trial and were not relied on by the election petitioner for proof of the corrupt practice. These video cassettes were later produced at the trial but the subsequent production of the video cassettes at the trial, it is urged, does not cure the defect of non-compliance of Section 81(3). In reply, Shri Ashok Desai submitted that the video cassettes did not form part of the election petition as the contents thereof are not incorporated by reference in the election petition and, therefore, non-production of the video cassettes or their transcript with the election petition and failure to annex the same to the copy of the election petition served on the returned candidate did not amount to non-compliance of Section 81(3). Shri Desai submitted that Section 81(3) merely requires the copy to conform with the election petition as presented in the court and not an election petition as required to be drafted according to Section 83(1) of the R.P. Act. He further submitted that any defect or deficiency in the contents of the election petition found with reference to Section 83(1) of the R.P. Act may have any other consequence requiring the court to act under Order 7 Rule 11 C.P.C. or order 6 Rule 16 C.P.C., but there is no non-compliance of Section 81(3) if the copy accompanying the election petition which is served on the respondent is identical with the election petition as it is actually presented in the court. In short, Shri Desai submitted that non-compliance of Section 83(1) of the R.P. Act is not visited with the consequence of dismissal of the election petition at the threshold under Section 86 and, therefore, the non-compliance of Section 81 which attracts Section 86 has to be seen without reference to Section 83 of the R.P. Act. Both sides have placed reliance on the same set of decisions to support the rival contentions.

19. There is no dispute that the election petition as presented in the court, was accompanied by as many copies thereof as there were respondents in the election petition; and the copy of the election petition served on the returned candidate with the notice of the

election petition was identical with the election petition as it was presented in the court. The requirement of the plain language of Section 81(3) was, therefore, fully met. The object of the provision is clearly to ensure that each respondent to the election petition gets an identical copy of the election petition as presented in the court to acquaint the respondent with the actual and full contents of the election petition as it is presented in the court. On the basis of the identical copy the respondent can prepare his defence and also take the plea of deficiency, if any, in the contents of the election petition with reference to Section 83 of the R.P. Act, in order to apply in the court for action being taken under Order 7 Rule 11, or Order 6 Rule 16, C.P.C., as the case may be. These provisions are attracted only after the election petition survives the liability for dismissal at the threshold under Section 86 of the R.P. Act.

20. Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of Section 81 requires the checking of limitation with reference to the admitted facts and sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with rules of the High Court. Thus, the compliance of Section 81, 82 and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R.P. Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86.

21. Acceptance of the argument of Shri Jethmalani would amount to reading into Section 86 an additional ground for dismissal of the election petition under Section 86 for non-compliance of Section 83. There is no occasion to do so, particularly when Section 86 being in the nature of a penal provision, has to be construed strictly confined to its plain language.

22. We may now refer to the decisions of this Court on which reliance is placed by both sides to support the rival contention on this point. In *Sahodrabai Rai v. Ram Singh Aharwar* [1968 (3) SCR 13] a translation in English of the pamphlet annexed to the election petition was incorporated in the body of the election petition and it was stated in the petition that it formed part of the petition. Along with the copy of the election petition which contained the entire transcript in English of the pamphlet, a copy of the pamphlet had not been annexed. The respondent raised the objection that the copy of the election petition served on him was not a copy of the election petition presented in the High Court and, therefore, the election petition was liable to be dismissed under Section 86 of the R.P. Act. It was held by this Court that the pamphlet which was filed as an annexure to the election petition must be treated as a document filed with the election petition and not a part of the election petition in so far as the averments are concerned. Obviously, this view was taken because the contents of the pamphlet were incorporated in the body of the election petition of which a copy was duly served on the respondent. Accordingly, it was held that there was no non-compliance of

Section 81(3) and the petition was not liable to be dismissed under Section 86 of the R.P. Act. In *A. Madan Mohan v. Kalavakunta Chandrasekhara* [1984 (2) SCC 288] the earlier decision in *Sahodrabai Rai* was followed. It was held that failure to furnish copy of schedules and documents which did not form an integral part of the election petition was not fatal to the petition and it was not liable to be dismissed under Section 86 of the R.P. Act. An earlier decision in *M. Karunanidhi v. Dr. H.V. Hande* [(1983) 2 SCC 473] was distinguished and it was pointed out that *M. Karunanidhi* did not depart from the ratio laid down in *Sahodrabai Rai*. Para 15 of the decision in *A. Madan Mohan* is as under:-

This decision in no way departs from the ratio laid down in *Sahodrabai* case. The aforesaid case, however, rested on the ground that the document (pamphlet) was expressly referred to in the election petition and thus became an integral part of the same and ought to have been served on the respondent. It is, therefore, manifest that the facts of the case cited above are clearly distinguishable from the facts of the present case. Furthermore, the decision in *M. Karunanidhi* case has noticed the previous decision and has fully endorsed the same.

This decision by a 3-Judge Bench also indicated that this stringent provision must be construed literally and strictly. Para 13 of the decision is as under:

It is a well settled principle of interpretation of statute that wherever a statute contains stringent provisions they must be literally and strictly construed so as to promote the object of the Act. As extracted above, this Court clearly held that if the arguments of the appellant (in that case) were to be accepted, it would be stretching and straining the language of Section 81 and 82 and we are in complete agreement with the view taken by this Court which has decided the issue once for all. (at page 291 of SCC)

Another decision referred is *U.S. Sasidharan v. K. Karunakaran* [(1989) 4 SCC 482]. That was a case in which a document was incorporated in the election petition by reference and was filed with the election petition in a sealed over but a copy was not supplied to the returned candidate along with a copy of the election petition. In such a situation, it was held to be non-compliance of Section 81(3) rendering the election petition liable for dismissal under Section 86(1) of the R.P. Act. This conclusion was reached on the view that non-supply of copy of the document with a copy of the election petition was a fatal defect because the document was filed in the High Court with the election petition and it formed an integral part of the election petition. This decision also indicates the distinction between a document forming an integral part of the election petition and being produced merely as evidence of an averment made in the election petition.

23. The distinction brought out in the above decisions is, that in a case where the document is incorporated by reference in the election petition without reproducing its contents in the body of the election petition, it forms an integral part of the petition and if a copy of that document is not furnished to the respondent with a copy of the election petition, the defect is fatal attracting dismissal of the election petition under Section 86(1) of the R.P. Act. On the other hand, when the contents of the document are fully incorporated in the body of the election petition and the document also is filed with the election petition, not

furnishing a copy of the document with a copy of the election petition in which the contents of the document are already incorporated, does not amount to non-compliance of Section 81(3) to attract Section 86(1) of the R.P. Act. In other words, in the former case the document filed with the election petition is an integral part of the election petition being incorporated by reference in the election petition and without a copy of the document, the copy is an incomplete copy of the election petition and, therefore, there is non-compliance of Section 81(3). In the other situation, the document annexed to the petition is mere evidence of the averment in the election petition which incorporates fully the contents of the document in the body of the election petition and, therefore, non-supply of a copy of the document is mere non-supply of a document which is evidence of the averments in the election petition and, therefore, there is no non-compliance of Section 81(3). In *U.S. Sasidharan*, this distinction is clearly brought out as under:-

The material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition. Section 81(3) provides for giving a true copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3) and, as such, the court has to dismiss the election petition under Section 86(1) for non-compliance with Section 81(3).

On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of Section 81(3). The document may be relied upon as an evidence in the proceedings. In other words, when the document does not form an integral part of the election petition, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the election petition. (paras 15 and 16 at page 489)

24. It may be mentioned that in all the above decisions cited at the Bar, the document in question had been filed in the court along with the election petition, but a copy of that document was not supplied to the respondent with the copy of the election petition. In those cases wherein the annexed document was treated to be incorporated by reference in the election petition forming an integral part of the election petition, non-supply of a copy of the document was held to be fatal warranting dismissal of the election petition under Section 86(1) for non-compliance of Section 81(3). In the other cases, the document was filed with the election petition, but the contents thereof were also incorporated in the body of the election petition, a copy of which had been supplied to the respondent even though copy of that

document was not furnished in addition. In those cases, non-supply of a copy of the document was held not to be non-compliance of Section 81(3) because the document annexed to the election petition was treated as evidence of the averments contained in the body of the election petition, a copy of which had been furnished to the respondent. This is the gist of these decisions which also indicates that the question has to be answered with reference to the kind of use made of the document annexed to the petition, whether as an integral part of the election petition or merely as evidence of the pleadings contained in the body of the election petition.

25. In the present case, the video cassettes, non-supply of a copy of transcript of which is urged by Shri Jethmalani to be a ground for non-compliance of Section 81(3), were not even filed in the High Court with the election petition in the High Court. This is, therefore, not a case of non-supply of a copy of a document which was filed along with the election petition. What was supplied to the returned candidate in the present case, was a true copy of the election petition as it was presented in the court without the video cassettes of which mere mention was made without incorporating its contents by reference of enumerating it in the election petition. It is not the case of the election petitioner that the full contents of the video cassettes or their transcripts are incorporated by reference in the election petition in order to make the video cassettes an integral part of the election petition, inasmuch as no video cassette was filed along with the election petition as it was presented in the High Court. Reliance is placed by the election petitioner on the video cassettes produced later during the trial as only evidence of the pleading in paras 32 and 33 of the election petition. It is, therefore, clear that the contents of the video cassettes except to the extent pleaded in paras 32 and 33 of the election petition, cannot be treated to be incorporated by reference in the election petition as a part of the pleadings and its use is sought to be made by the election petitioner only as evidence of the averments contained in paras 32 and 33 of the election petition. Admittedly, a true copy of the election petition as presented in the High Court was furnished to the returned candidate along with the notice of the election petition. There was thus no non-compliance of sub-section (3) of Section 81 of the R.P. Act. The election petition was, therefore, not liable to be dismissed under Section 86(1) even on the ground of non-compliance of Section 81(3) of the R.P. Act.

26. The contention of Shri Jethmalani that the entire election petition is liable to be dismissed under Section 86(1) of the R.P. Act for non-compliance of sub-section (1) and/or sub-section (3) of Section 81 is, therefore, rejected.

27. The next question now is: Whether the contents of the election petition are as required by Section 83 of the Act or there is any deficiency therein to attract Order 7 Rule 11 or Order 6 Rule 16, C.P.C.? This question arises from the alternative submission of Shri Jethmalani who contended that the pleading of corrupt practice with reference to the use of video cassettes is deficient and is, therefore, liable to be struck out under Order 6 Rule 16, C.P.C. He submitted that this would leave for consideration only the speeches of Manohar Joshi, Bal Thackeray, Pramod Nawalkar and Chhagan Bhujbal on 24.2.1990 as the only basis for the charge of the corrupt practice under sub-section (3) and (3A) of Section 123 for consideration in the election petition. He urged that there is no pleading of any part of the speech of Chhagan Bhujbal in the election petition and, therefore, reference to his speech is innocuous.

For the speeches of Manohar Joshi, Bal Thackeray and Pramod Nawalkar, he urged that the specific pleading contained in the body of the election petition alone requires consideration, excluding all other material brought on record during the trial which is an impermissible addition to the record on account of a serious mistrial resulting from the unusual procedure adopted by the learned trial Judge in the High Court. Shri Jethmalani referred copiously to the evidence to support his submission that the learned trial Judge himself directed a witness to search for certain documents and produce them in addition to extensively cross-examining that witness himself to bring on record a log of material which is wholly irrelevant and inadmissible. In sort, his submission is that on the basis of the only pleading contained in the body of the election petition and the admissible and relevant evidence alone, no corrupt practice under sub-section (3) or sub-section (3A) of Section 123 is made out.

28. Some other questions arising out of the remaining arguments of Shri Jethmalani and reply of Shri Ashok Desai which are referred later, have to be considered with reference to the pleadings of the parties. It is, therefore, appropriate at this stage to quote the relevant pleadings in the election petition and the written statement of the returned candidate.

29. We must observe that the pleadings of the parties are frivolous and prolix of which only certain portions were relied at the hearing of the appeal by the learned counsel for the parties and, therefore, reference only to the relevant portions of the pleadings is necessary. We may add that the failure to exclude from consideration the pleading which is prolix and irrelevant, has led to the reception of considerable evidence which too is irrelevant and inadmissible resulting in needless increase in the bulk of the record of the trial court and an excursion by the High Court into an irrelevant area. There has been a failure to invoke and apply the provisions in the Code of Civil Procedure at the pretrial stage which has led to an improper frame of the issues resulting in lack of focus on the real points in controversy alone confined to the actual pleadings.

30. According to Shri Ashok Desai, learned counsel for the respondents, the relevant pleadings relating to the allegation of corrupt practices pleaded in the election petition are in paras 2, 5(o), 7, 8, 16, 17, 18, 30, 31, 32, 33 and the first sentence of para 35 as well as paras 59 and 60 of the written statement. According to Shri Jethmalani, learned counsel for the appellant, the relevant pleadings are only in paras 30, 31, 32, and 33 of the election petition. At any rate, nothing more has to be seen in the election petition for this purpose in addition to the portions pointed out by Shri Desai. These portions of the election petition and the written statement are as under:

From Election Petition No.24/1990

(2) The petitioner says that the petitioner had contested the general election to the Maharashtra Legislative Assembly held on 27/2/1990 (hereinafter referred to as "the said election") as a candidate of Indian National Congress (Congress-I) with the election symbol of "Hand". The Respondent was the candidate of Shiv Sena Party with the election symbol of "Bow & Arrow" put by the alliance of two parties, viz. Shiv Sena and Bhartiya Janata Party (BJP). The other candidates were either independent candidates or belonging to other political parties like Janata Dal, etc.

5. The Petitioner states that before setting out the nature of corrupt practices committed by the first respondent, it is necessary to give certain facts which have transpired in India over the last one decade, which are as under:

(o) The petitioner states that all the aforesaid facts show that the said two parties, viz; BJP and Shiv Sena have systematically exploited various unfortunate disputes set out hereinabove so as to seek votes during the parliamentary election and the election in question in the name of '*Hindutva*' i.e. Hindu religion.

7. The petitioner states that accepting a candidature in the election of the said alliance meant that the said particular candidate had accepted the basic concept and plank on which the said two parties were jointly contesting the elections for the Assembly. It further meant that the candidate accepted Bal Thackeray, Pramod Mahajan, Kirti Somaiya as their leaders and consented to the said leaders making an appeal to vote for the candidates of the said alliance. It further meant that the philosophy and ideology of the leaders of the alliance, and particularly Bal Thackeray, such as (a) Hindus are and Hindu religion is in danger, (b) that only the alliance can protect Hindus and Hindu religion, (c) that the Congress-I and Janata Dal have failed to protect, and will not protect Hindus and Hindu religion and their candidates are unfit to be elected, (d) that Hindus have suffered and will continue to suffer indignity, discrimination and unequal treatment, (e) that the problems in states like Kashmir, Punjab, Assam etc. have arisen because of the pampering of the minorities, (f) that Hindus must come together and fight the attack on them and their religion and say with pride that they are Hindus, (g) that Hindus owed a duty to their religion and if necessary must give their life for it, (h) that minorities, and particularly the Muslims, were treated more favourably for their votes than Hindus.

8. The petitioner states that the respondent being a candidate of the said alliance, has accepted the ideology and philosophy of the said alliance, some of which is set out hereinabove. The respondent also consented to the leaders of the said alliance such as Bal Thackeray, Pramod Mahajan, Kirti Somaiya, Gopinath Munde and others making appeals to the voters to vote for her. In fact, as more particularly set out hereinbelow, the respondent herself has expressly made an appeal to vote for her to fight for Hinduism."

16. The petitioner states that similarly another joint public meeting was held in the said constituency i.e. at Shivaji Park, Dadar on 24/2/1990. At the said meeting most of the candidates of the BJP-Shiv Sena alliance, including the Respondent herein, were present. The said meeting was addressed by the leaders of the said alliance. At the said meeting Bal Thackeray reiterated that the said alliance was contesting the elections in the name of Hindu religion and to fight for Hindutva. The proceedings of the said meeting were widely reported in various dailies viz; '*Mumbai Sakal*', '*Nava Kal*', '*Navshakti*', '*Maharashtra Times*', '*Navbharat Times*', '*Loksatta*', '*Sunday Observer*', '*The Times of India*', '*Indian Express*' all dated 25/2/1990 and '*Samma*' dated 25/2/1990 and 26/2/1990. The petitioner craves leave to refer to and rely upon the said press reports as and when produced.

17. Some of the most offending statements made at the said meeting by the leaders of the said alliance are as under:-

(a) To handle the Congress-I hoodlums the Shiv Sainiks may take law in their hands and use firearms if necessary (Thackeray).

(b) To save '*Hindutva*' vote for BJP-Sena nominees (Pramod Mahajan, BJP- MP).

(c) Mr. Rajiv Gandhi does not know his own religion, and thus has no right to speak on Hinduism (Pramod Mahajan).

(d) The result of these elections will not only depend on the solution to the problem of food, cloth but the same will also decide whether in the state the flame of *Hindutva* will grow or will be extinguished. If in Maharashtra the flame of Hinduism is extinguished, then anti-national Muslims will be powerful and they will convert Hindustan into Pakistan. If the flame of *Hindutva* will grow then in that flame the anti- national Muslims will be reduced to ashes (Pramod Mahajan).

(e) We must protect '*Hindutva*' at all costs and for that we must not allow the saffron (Bhagwa) of Shri Chhakravarthi Shivaji Maharaj to fall from our shoulders (Pramod Mahajan).

(f) Rajiv Gandhi speaking on *Hindutva* is like a prostitute lecturing on fidelity. The country is again heading for partition. It is, therefore, necessary that in these circumstances and to keep the flame of *Hindutva* alive, the alliance of BJP-Shiv Sena should be elected (Mahajan).

(g) (Referring to Rajiv Gandhi), wife Christian, mother Hindu, father a Parsee and therefore himself without any (Hindu) culture/teaching (*vevarsi*). (Pramod Mahajan).

18. The petitioner states that the proceedings of the said meeting were tape-recorded and taken down in shorthand by the police authorities. The petitioner craves leave to refer to and rely upon the said tape-recorded speeches and the speeches taken down in shorthand by the police authorities.

30. The petitioner states that the respondent himself in his capacity as a candidate from the said constituency as well as a leader of the said alliance made appeals which offends the provisions of the said Act. For e.g. in the meeting held on 24.2.1990 at Shivaji Park, the respondent stated the first Hindu State will be established in Maharashtra. Similarly in various other public meetings, the respondent herein made objectionable appeals. Some of the meetings were reported in newspapers.

31. The petitioner states that such meetings were held at Khaddke Building, Dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990. At all the said meetings, as well as meetings at other places, the other speakers who were present for e.g. Pramod Mahajan (M.P.-BJP) Dada Kondke (Marathi Actor), Jayantiben Mehta, Chandrika Kenia (MPs) made objectionable appeals to vote for the respondent.

31. In fact the speakers went on to say that on the respondent being elected and on the said alliance establishing a Hindu Government, we will give jobs to all Hindus. The petitioner craves leave to refer to and rely upon the election diaries maintained by the local police stations, the speeches recorded by the Special Branch-I on audio cassettes, video cassettes and the speeches recorded in Marathi shorthand. The

petitioner also craves leave to refer to and rely upon the press reports of the said meetings.

32. The petitioner states that in addition to holding public meetings, the said alliance had also taken out video cassettes and audio cassettes. The video cassettes were titled "Challenge & Appeal" "Shiv Sena" and the other called "Ajinkya". The said video cassettes and audio cassettes disclose promises, appeals, exhortations and inducements to the voters to vote for the said alliance and their candidates. The said cassettes show that the said alliance has scant respect for the religious beliefs and practices of other religions like Muslims, Christians etc. Not only the other religions are ridiculed but the followers thereof are termed as "traitors" and "betrayers". Under the guise of protecting Hindu religion/*Hindutva* the said cassettes attack other religions and whip up lowered instincts and animosities. The concept of secular democracy is totally eliminated. It generates powerful emotions by appealing to the Hindu voters to vote for the candidates of the alliance on a false impression given to voters that only the alliance and its candidates can protect Hindu religion. The petitioner will rely upon the visuals which have the aforesaid effect on the voters. The petitioner also craves leave to refer to and rely upon the said video cassettes as and when produced.

33. The petitioner states that the said alliance had also issued audio cassettes wherein the speeches of the leaders of the said alliance like Bal Thackeray, at various places in Maharashtra are recorded, e.g. Parbhani, Sely Aurangabad, Panvel, Girgaon, Vashi (New Bombay) etc. The said audio cassettes as well as the video cassettes were played in the said constituency, particularly at the Shakha offices, street corners after 6.30 p.m. They were regularly exhibited at or near the places of residence of some of the active workers of the said alliance in the said constituency. The exhibition and playing of the cassettes was on a large scale in the said constituency. The petitioner craves leave to refer to and rely upon the said audio cassettes as and when produced.

35. The petitioner states that the aforesaid facts clearly prove that the respondent and his agents with his consent have indulged into corrupt practices listed under Section 123 of the said Act.

From Written Statement

59. With reference to para 32 of the Petition, it is true that the said alliance has taken two video cassettes known as "AJIMKYA" and "AVAHAN AND VAWHAN". However, it is totally false to the knowledge of the petitioner to allege that the said alliance and/or Shiv Sena party and/or I have and/or my election agent and/or any person has with my consent and/or election agent and/or any person has with my consent and/or knowledge has taken out any audio cassettes as alleged. This respondent denies that the said video cassettes disclose any promises and/or appeals and/or extortions and/or inducements which in any manner amount to corrupt practice and or any other offence under the Representation of People Act, 1951 as alleged or at all and puts the petitioner to the strict proof thereof. This respondent denies that the said cassettes or either of them show any religious beliefs and/or practices as alleged. This Respondent categorically denies that the said cassettes or either of them show

any scant respect for Muslims and/or Christian and/or any other religion as alleged or at all and puts the petitioner to the strict proof thereof. This Respondent categorically denies that any religion has been ridiculed and/or followers thereof are termed as "Traitors" and/or "Betrayers" as alleged or at all and puts the Petitioner to the strict proof thereof.

This Respondent denies that the said cassettes and/or either of them attach other religions and/or whips up lowered instincts and/or animosities as alleged or at all. This respondent denies that the said cassettes or either of them had appealed to the voters in the name of religion as alleged. This respondent submits that it has been held by the Supreme Court of India innumerable cases that whenever a reference is made in the election petition to a document, and the document includes an audio or video cassette, copy of such document must be supplied along with the Election Petition to the concerned Respondent inasmuch as by making a reference to the document and without pleading its contents in the Election Petition, the documents becomes incorporated in the Election Petition by reference. It becomes an integral part of the Election Petition under Section 81 and as required by Section 81 when document forms an integral part of the petition and the copy of the said document is not furnished to the Respondent alongwith the Election Petition, copy of the Election Petition will not be a true copy within the meaning of Section 81 and the same is liable to be dismissed under the provisions of Section 86. Paragraph 32 of the Petition does not give any material particulars about the allegations which are sought to be made. It is submitted that the test to be applied where the pleadings discloses material facts and cause of action is that in absence of answer from the Respondent, would the court be in a position to give a judgment in favour of the petitioner. It is submitted that in the instant case, the answer is emphatically no and hence the entire contents of para 32 are wholly irrelevant, vexatious and abuse of this Hon'ble Court. The said pleadings, therefore, are not a complete cause of action and in breach of provisions of Sections 81, 82 and 86 of the Representation of People act and the election petition is liable to be and should be dismissed.

60. With reference to para 33 of the Petition, this Respondent categorically denies that the said alliance and/or Shiv Sena Party and/or B.J.P. Party issued any audio cassette as alleged and this Respondent puts the petitioner to strict proof thereof. The said paragraph alleges that the said video and/or audio cassettes were played in the said constituency particularly at Shakhia Office, Street corners. The said paragraph does not state the place, date and time when the said cassettes are alleged to have been played. It further does not mention the names of the persons who are alleged to have played the said cassettes. This Respondent submits that it has been held by the Supreme Court of India that the allegations of corrupt practice are in the nature of criminal charges, and it is necessary that there should be no vagueness in the allegations so that the returned candidate may know how the case he has to meet. If the allegations are bogus and general and the particulars of corrupt practice are not stated in the petition then in such a case the petition does not disclose any cause of action and the Petition does not disclose any cause of action and the petition is liable

to be and should be dismissed. Furthermore, as mentioned in the above paragraph, it has been held by the Supreme Court of India that when a reference has been made in the Petition to any document including a video or audio cassette, a copy of the said document, must be supplied along with the Election Petition because by making a reference to such a document the same forms integral part of the petition and therefore, without a copy of the said document the petition is incomplete.

This Respondent, therefore, submits that for the reasons mentioned above, the Petition is liable to be and should be dismissed with costs.

31. It would also be appropriate to quote the issues framed on 9.1.1992 by the High Court on these pleadings, as under -

1. Whether the Respondent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of the People Act, 1951 as alleged in the petition?

2. Whether the Election Agent or any other agent of the Respondent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of the People Act, 1951 as alleged in the petition?

3. Whether any other person with the consent of the Respondent or his election agent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of the People Act, 1951 as alleged in the petition?

4. Whether the Respondent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of the People Act, 1951 as alleged in the petition?

5. Whether the election agent or any other agent of the Respondent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of the People Act, 1951 as alleged in the petition?

6. Whether any other person with the consent of the Respondent or his election agent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of the People Act, 1951 as alleged in the petition?

7. Whether the Petitioner proves that the Respondent has committed the corrupt practices as defined in Section 123(7) of the Representation of the People Act 1951 as alleged in the petition?

8. Whether the election of the Respondent is to be set aside?

9. Generally?

It may be mentioned that issue no. 6(A) was framed *suo motu* by the High Court almost at the fag end of the trial, as under:

6(A) Whether the *Hindutva* as used by the Shiv Sena Party during the Maharashtra Legislative Assembly Election 1990 is as alleged in the Petition or as alleged in the Written Statement ?

32. After both sides closed their respective cases, on the submission of Shri Jethmalani, the following issues were also permitted to be raised by an order dated 4th January, 1993:

1(A) Whether the Petition is filed beyond the period of 45 days fixed by Section 81 of the Representation of People Act, 1951 and requires to be peremptorily dismissed under Section 86 thereof ?

1(B) Whether the Petition must be dismissed for its failure to plead or disclose under what part of Section 100 of the Act relief is claimed?

33. It was strenuously argued by Shri Desai that there is admission of the returned candidate in his written statement about the existence and use of the video cassettes during the election campaign in the constituency and even of its contents, the only dispute being related to the meaning of the contents. On this basis, it was urged that there is no deficiency in the pleading of the corrupt practice in the election petition and the requirement of its proof is reduced to a great extent by admission in the written statement. The High Court has taken this view which is supported and relied on by Shri Desai in his submission. The High Court's judgment proceeds on this basis. It is, therefore, necessary to examine this aspect at this stage.

34. Assuming the contents of the video cassette amount to the kind of speech or act which is a corrupt practice under sub-section (3) or sub-section (3A) of Section 123, in order to constitute that corrupt practice it must further be shown that the act was done during the election campaign between 8.2.1990 when the returned candidate became a 'candidate' and 27.2.1990 the date of poll, and that it was the act of the candidate or his agent or any other person with his consent. Unless all these constituent parts of the corrupt practice are pleaded to constitute the cause of action raising a triable issue and are then proved by evidence, the corrupt practice cannot be held to be pleaded and proved. If the act attributed is by the display of a video cassette recorded some time earlier, the display being between the above dates in the constituency, a mere display of the video cassette does not prove all the constituent parts of the corrupt practice, inasmuch as it must also be pleaded and proved that such display was by the candidate or his agent or any other person with his consent. Where the display of the cassette is attributed to any other person with the consent of the candidate, the liability of the candidate for commission of the corrupt practice results vicariously from the act of the other person, done with the consent of the candidate. In such a case, the constituent part of the corrupt practice is the act done by any other person, not by the candidate himself or his agent for whose act the candidate's consent is assumed, with the authorisation for the act being done by any other person with the candidate's consent. This distinction between the act amounting to corrupt practice done by the candidate himself or his election agent and any other person with his consent has to be kept in view. This has relevance also for the purpose of Section 99 of the R.P. Act with reference to which one of the arguments has been addressed.

35. It was argued by Shri Ashok Desai that in case of the provocative and incendiary speeches given by acknowledged leaders of the political party the consent of the candidate set up by their party has to be assumed being implicit from the relationship of the candidate with the speaker through the medium of the party. On this basis, it was urged that a party candidate must be held to have consented to such speeches made by the leaders of that party and, therefore, if the speech of the leader satisfies the other requirements of the corrupt practice, the consent of the candidate which too is a constituent part of the corrupt practice, must be assumed to make out the ground under Section 100(1)(b) of the R.P. Act for declaring his election to be void. Shri Desai made a fervent emotive appeal that unless the law is so

construed, a candidate of the party will get the benefit of appeal for votes on the ground of his religion on the basis that his consent has not been pleaded and proved, thereby frustrating the object of the enactment and adversely affecting the purity of elections which is of essence in a democracy. It was argued that leaders of the party must be assumed to be agents of the candidates of that party for the purpose of the ground of corrupt practice.

36. In our opinion, the fallacy in the argument is that it overlooks certain other provisions of the R.P. Act –such as section 100.

37. The distinction between clause (b) of sub-section (1) and sub-clause (ii) of clause (d) therein is significant. The ground in clause (b) provides that the commission of any corrupt practice by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent by itself is sufficient to declare the election to be void. On the other hand, the commission of any corrupt practice in the interests of the returned candidate by an agent other than his election agent (without the further requirement of the ingredient of consent of a returned candidate or his election agent) is a ground for declaring the election to be void only when it is further pleaded and proved that the result of the election in so far as it concerns a returned candidate has been materially affected. This ground is further subject to sub-section (2) of Section 100 of which the onus is on the returned candidate.

38. It is, therefore, clear that if the corrupt practice is committed in the interests of the returned candidate by any other person, even if he be an agent other than his election agent, without the consent of the returned candidate or his election agent, the law provides for the election to be declared void under Section 100(1)(d)(ii) provided it is also pleaded and proved that the result of the election of the returned candidate has been materially affected thereby. The apprehension expressed by Shri Ashok Desai is, therefore, ill founded since the law clearly provides that the returned candidate would not get the benefit of a corrupt practice committed in his interests by anyone if the result of the election is shown to be materially affected thereby.

39. Apart from this aspect, it has also to be remembered that provision is made in the R.P. Act as well as in the general law to punish the makers of such incendiary speeches for the offences committed by them in the form of electoral offences e.g. under Section 125 of the R.P. Act and Sections 153A, 153B and 295A of the Indian Penal Code. Thus even if the acknowledged leaders of a party have committed any corrupt practice which results in benefit to the returned candidate then on proof of the benefit having materially affected the election result in favour of the candidate, his election would be set aside on the ground under Section 100(1)(d)(ii) of the R.P. Act. There is thus no occasion to read into the ground in Section 100(1)(b) or the definition of "corrupt practice" the implied consent of the candidate for any act done by a leader of that party to dispense with a clear pleading and proof of the candidate's or his election agent's consent as a constituent part of the corrupt practice for the ground under Section 100(1)(b) of the R.P. Act.

40. It may also be mentioned that the proposition suggested in the argument of Shri Desai does not appear to be correct. Whenever the requirement is of consent, it must be free consent given by the giver of the consent, of his own volition. Ordinarily, it also implies a subservient role of the person to whom consent is given and the authority of the giver of the consent to

control the actions of the agent. It is difficult to ascribe to an acknowledged leader of the party a role subservient to the candidate set up by that party inasmuch as the candidate is ordinarily in no position to control the actions of his leader. However, if even without giving his consent, the candidate has received benefit from the leader's act in a manner which materially affects his election favorably, on pleading and proof of such material effect on the election, the candidate's election is liable to be set aside on the ground under Section 100(1)(d)(ii) unless, as provided in sub-section (2) of Section 100 he further discharges the onus placed upon him that in spite of his opposition and taking due precautions that act had been committed for which he cannot be responsible.

41. Reliance in the election petition on the allegations of corrupt practices was for the ground under Section 100(1)(b) and not Section 100(1)(d)(ii); and it is under Section 100(1)(b) that the election has been declared to be void by the High Court. There was no attempt to plead and prove that the result of the election of the appellant was materially affected for these reasons to make out a ground under Section 100(1)(d)(ii) for declaring the election of the returned candidate to be void. It is in this manner the present case has to be viewed.

42. The pleading in paras 2, 5(o), 7 and 8 of the election petition is general relating to the party of which the appellant was a candidate, and the plank of Hindutva which in the election petition is equated with Hindu religion. We have already indicated in the connected matters - Civil Appeal No. 2835 of 1989 - **Bal Thackeray v. Prabhakar K. Kunte** decided today, that the word "*Hindutva*" by itself does not invariably mean Hindu religion and it is the context and the manner of its use which is material for deciding the meaning of the word "*Hindutva*" in a particular text. It cannot be held that in the abstract the mere word "*Hindutva*" by itself invariably must mean Hindu religion. The so-called plank of the political party may at best be relevant only for appreciation of the context in which a speech was made by a leader of the political party during the election campaign, but no more for the purpose of pleading corrupt practice in the election petition against a particular candidate.

43. In para 16 of the election petition apart from some general pleading, there is reference to a speech at Shivaji Park, Dadar on 24.2.1990 by Bal Thackeray and some other leaders who have not been named therein except for the appellant (respondent in the election petition). In para 17, the alleged offending portions of the speeches of those leaders of the BJP-Shiv Sena alliance have been enumerated. These portions are from speeches alleged to have been made by Bal Thackeray of the Shiv Sena and Pramod Mahajan of the B.J.P. Thus para 17 contains allegation of specific portions of speeches by Bal Thackeray and Pramod Mahajan for the purpose of pleading the corrupt practice. Further reference to it would be made later. Para 18 merely says that the proceedings of the meeting were tape-recorded and taken down in shorthand by police authorities on which the petitioner would rely. Obviously this relates only to evidence of what is pleaded and does not amount to incorporation by reference of the contents of the alleged tapes and there is no enumeration of its contents in the election petition. Para 30 refers to the speech by the appellant himself and names some other speakers at different meeting. Further reference to para 30 would be made later. Para 31 is a general statement referring to speakers in general without naming any one of them and mentions the existence of certain audio and video cassettes of the speeches. Paras 32 and 33

then refer to certain video cassettes and audio cassettes giving merely the title of the video cassettes and generally their purport and say that the video cassettes were displayed in the constituency, particularly at Shakha offices, street corners after 6.30 p.m. and were regularly exhibited at or near the places of residence of some of the active workers of the said alliance in the said constituency. It is significant that neither these video cassettes and audio cassettes nor the transcript of their texts was reproduced in the election petition or annexed to the election petition so that the contents thereof were not pleaded in either of the required modes. That apart, there is nothing in the pleading to indicate the names of the persons who are alleged to have displayed the same or the dates on which they were displayed or in other words any other fact which would make the allegation clear and specific. The further requirement of consent of the returned candidate for those acts is not pleaded as required for the ground under Section 100(1)(b) of the R.P. Act and in the definition of the corrupt practices under sub-sections (3) and (3A) of Section 123. Para 35 is the only other para in the election petition which is relied on by Shri Desai in this context and it merely says that the aforesaid facts clearly prove that the respondent (appellant in this appeal) and his agents with his consent have indulged into corrupt practice under Section 123 of the said Act. This is a mere repetition of the statutory provision and not a pleading of any material fact.

44. We have no doubt that the requisite consent of the returned candidate or his election agent which is a constituent part of the corrupt practices under sub-sections (3) and (3A) of Section 123, and an ingredient of the ground under Section 100(1)(b) has nowhere been pleaded in the election petition either in connection with the allegations based on the speeches by Bal Thackeray, Pramod Mahajan and any other leader or the display of video and audio cassettes in the constituency, when this is an essential requirement for raising a triable issue of corrupt practice to bind the appellant with the consequences of such a corrupt practice and to invalidate his election. In our opinion, this alone is sufficient to ignore the entire pleading in the election petition relating to speeches by Bal Thackeray, Pramod Mahajan and any other leader as well as the display of video and audio cassettes since none of those acts is attributed to the appellant or his election agent. For this reason, it is also not necessary to consider the specific portions alleged to form parts of speeches of Bal Thackeray and Pramod Mahajan mentioned in paras 16 and 17 of the election petition. Same is the result of pleadings in paras 32 and 33 relating to the video and audio cassettes. In para 31 there is a general averment that the speakers went on to say that on the respondent (appellant in this appeal) being elected and the said alliance establishing a Hindu Government, jobs would be given to all Hindus. No speaker is specifically named and what is alleged to have been said by the appellant in his speech in the meeting held on 24.2.1990 is contained only in para 30 of the election petition. Since the contents of para 31 cannot be related to the speech alleged to have been made by the appellant in that meeting, that too must be left out of consideration.

45. The only surviving allegation requiring consideration is in para 30 relating to the allegation made with reference to the speech made by the appellant himself. The portion in para 30 relating to the appellant (respondent in the election petition) which has to be considered is as under:

The petitioner states that the respondent himself in his capacity as a candidate from the said constituency as well as a leader of the said alliance made appeals which

offends the provisions of the said Act. For e.g. in the meeting held on 24.2.1990 at Shivaji Park, the respondent stated the first Hindu State will be established in Maharashtra. Similarly in various other public meetings, the respondent herein made objectionable appeals. Some of the meetings were reported in newspapers. The petitioner states that such meetings were held at Khaddke Building, dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990.

46. The High Court failed to appreciate that the only allegation of corrupt practice in this election petition which raised a triable issue is as indicated above and rest of the general averments deficient in requisite pleadings of all the constituent parts of the corrupt practice did not constitute a pleading of the full cause of action and, therefore, had to be ignored and struck out in accordance with Order 6, Rule 16, C.P.C. However, there being a specific allegation in para 30 of the election petition relating to the returned candidate himself based on his speech made on 24.2.1990, to that extent a triable issue had been raised and had to be decided.

47. It is this failure in the High Court which has led to an unnecessary protracted trial and reception of considerable irrelevant evidence which in turn has led to the errors found in the judgment. The reason for this error appears particularly from para 32 of the judgment in which the High Court has indicated its perception of the nature of trial of the election petition as under:-

It must be noted that this Election Petition is not based upon individual acts of Respondent or his Election Agent or any other person with his consent. This petition is based upon the above mentioned plank and/or policy decision of the Shiv Sena and B.J.P. and the campaigning by the party and the Respondent on the basis of that plank.

48. In our opinion, it is this erroneous impression of the High Court which has led to the serious errors committed during the trial for which the parties are equally to blame inasmuch as both sides contributed to the expansion of the legitimate scope of the trial by introducing matters which have no relevance for the pleading and proof of the corrupt practices under sub-sections (3) and (3A) of Section 123 for the purpose of the ground under Section 100(1)(b) to invalidate the election, which is the true scope of this election petition.

49. Before we take up for consideration the corrupt practice attributed to the appellant himself in para 30 of the election petition based on his own speech on 24.2.1990, it would be appropriate at this stage to refer to the argument based on Section 99 of the R.P. Act.

NON COMPLIANCE OF SECTION 99 OF THE R.P. ACT

50. Admittedly, no notice was given to Bal Thackeray, Pramod Mahajan or any other person against whom allegation was made of commission of corrupt practice in the election petition, even though the High Court has held those corrupt practices to be proved for the purpose of declaring the appellant's election to be void on the ground contained in Section 100(1)(b) of the R.P. Act. We would now indicate the effect of the combined reading of Sections 98 and 99 of the R.P. Act and the requirement of notice under Section 99 to all such

persons before decision of the election petition by making an order under Section 98 of the R.P. Act.

51. The combined effect of Sections 98 and 99 of the R.P. Act may now be seen.

52. The opening words in Section 98 are "At the conclusion of the trial of an election petition the High Court shall make an order". There can be no doubt that Section 98 contemplates the making of an order thereunder in the decision of the High Court rendered 'at the conclusion of the trial of an election petition'. Declaration of the election of any returned candidate to be void in accordance with clause (b) is clearly to be made in the decision of the High Court rendered at the conclusion of the trial of an election petition and not at an intermediate state. Clauses (a), (b) and (c) in Section 98 contemplate the different kinds of orders which can be made by the High Court in its decision at the conclusion of the trial which has the effect of disposing of the election petition in the High Court. There is nothing in Section 98 to permit the High Court to decide the election petition piecemeal and to declare the election of any returned candidate to be void at an intermediate stage of the trial when any part of the trial remains to be concluded.

53. Sub-Section (1) of Section 99 begins with the words "At the time of making an order under Section 98 the High Court shall also make an order" of the kind mentioned in clauses (a) and (b) therein. It is amply clear that the order which can be made under clauses (a) and (b) of sub-section (1) of Section 99 is required to be made at the time of making an order under Section 98'. As earlier indicated, an order under Section 98 can be made only at the conclusion of the trial. There can be no doubt that the order which can be made under sub-section (1) of Section 99 has, therefore, to be made only at the conclusion of the trial of an election petition in the decision of the High Court made by an order disposing of the election petition in one of the modes prescribed in clauses (a), (b) and (c) of Section 98. This alone is sufficient to indicate that the requirement of Section 99 is to be completed during the trial of the election petition and the final order under Section 99 has to be made in the decision of the High Court rendered under Section 98 at the conclusion of the trial of the election petition.

54. Clause (a) of sub-section (1) of Section 99 provides for the situation "where any charge is made in the petition of any corrupt practice having been committed at the election". In that case, it requires that at the time of making an order under Section 98, the High Court shall also make an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that corrupt practice. Clause (b) further requires the fixing of the total amount of costs payable and specifying the person by and to whom costs shall be paid. The net result is that where any charge is made in the petition of any corrupt practice having been committed at the election, the High Court shall at the time of making an order under Section 98' also make an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and where the charge of corrupt practice has been found proved, it must also record the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. Thus, the trial is only one at the end of which

the order made by the High Court must record the names of all persons, if any, who have been proved at the trial to have been guilty of the corrupt practice and the nature of that practice.

55. It follows that the High Court cannot make an order under Section 98 recording a finding of proof of corrupt practice against the returned candidate alone and on that basis declare the election of the returned candidate to be void and then proceed to comply with the requirement of Section 99 in the manner stated therein with a view to decide at a later stage whether any other person also is guilty of that corrupt practice for the purpose of naming him then under Section 99 of the R.P. Act. It is equally clear that the High Court has no option in the matter to decide whether it will proceed under Section 99 against the other persons alleged to be guilty of that corrupt practice along with the returned candidate inasmuch as the requirement of Section 99 is mandatory since the finding recorded by the High Court requires it to name all persons proved at the trial to have been guilty of the corrupt practice. The expression “the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice” in sub-clause (ii) of clause (a) of sub-section (1) of Section 99 clearly provides for such proof being required ‘at the trial’ which means ‘the trial of an election petition’ mentioned in Section 98, at the conclusion of which alone the order contemplated under Section 98 can be made. There is no room for taking the view that the trial of the election petition for declaring the election of the returned candidate to be void under Section 98 can be concluded first and then the proceedings under Section 99 commenced for the purpose of deciding whether any other person is also to be named as being guilty of the corrupt practice of which the returned candidate has earlier been held guilty leading to his election being declared void.

56. The rationale is obvious. Where the returned candidate is alleged to be guilty of a corrupt practice in the commission of which any other person has participated with him or the candidate is to be held vicariously liable for a corrupt practice committed by any other person with his consent, a final verdict on that question can be rendered only at the end of the trial, at one time, after the inquiry contemplated under Section 99 against the other person, after notice to him, has also been concluded. Particularly, in a case where liability is fastened on the candidate vicariously for the act of another person, unless that act is found proved against the doer of that act, the question of recording a finding on that basis against the returned candidate cannot arise. Viewed differently, if the final verdict has already been rendered against the returned candidate in such a case, the opportunity contemplated by Section 99 by an inquiry after notice to the other person is futile since the verdict has already been given. On the other hand, if the question is treated as open, a conflicting verdict after inquiry under Section 99 in favour of the notice would lead to an absurdity which could not be attributed to the legislature.

57. The plain language of Section 98 and 99 of the R.P. Act indicates the construction thereof made by us and this is also supported by the likely outcome of a different construction which is an absurd result and must, therefore, be rejected. The High Court has overlooked the obvious position in law in taking a different view. No notice under Section 99 was given by the High Court before making the final order under Section 98 of the R.P. Act declaring the election to be void. This is a fatal defect.

58. This alone is sufficient to indicate that apart from the reasons given earlier, the election of the appellant in the present case could not be declared void by making an order under Section 98 on the ground contained in Section 100(1)(b) of the R.P. Act without prior compliance of Section 99. Absence of notice under Section 99 of the R.P. Act vitiates the final order made under Section 98 by the High Court declaring the election to be void.

59. However, in the present case, the remaining pleadings being ignored for the reasons already given, no further question arises of the effect of non-compliance of Section 99 in respect of these other persons because the finding of corrupt practices against the appellant based on the speeches of these other persons and the video and audio cassettes has to be set aside for the reasons already given. This is yet another instance of a serious defect in the trial of this election petition by the High Court.

SPEECH OF APPELLANT

60. We would now consider the only surviving question based on the pleading in para 30 of the election petition. The specific allegation in para 30 against the appellant is that in the meeting held on 24.2.1990 at Shivaji Park, Dadar, he had stated that "the first Hindu State will be established in Maharashtra". It is further pleaded therein that such meetings were held at Khaddke Building, Dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990. These further facts are unnecessary in the context because the maximum impact thereof is to plead that the same statement was made by the appellant in the other meetings as well, even though such an inference does not arise by necessary implication. In our opinion, a mere statement that the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope. However, despicable be such a statement, it cannot be said to amount to an appeal for votes on the ground of his religion. Assuming that the making of such a statement in the speech of the appellant at that meeting is proved, we cannot hold that it constitutes the corrupt practice either under sub-section (3) or sub-section (3A) of Section 123, even though we would express our disdain at the entertaining of such a thought or such a stance in a political leader of any shade in the country. The question is whether the corrupt practice as defined in the Act to permit negation of the electoral verdict has been made out. To this our answer is clearly in the negative.

64. It is significant that the mere production of the official record including the literature of Jamaat-e-Islami Hind depicting its philosophy and aims and the intelligence reports without examining any witness who could depose from personal knowledge to the alleged unlawful activities of the Association was held to be inadequate to support the declaration that Jamaat-e-Islami Hind is an unlawful association as defined in the said Act. It need hardly be mentioned that the requirement of proof of a corrupt practice at the trial of an election petition is higher and confined to strict legal evidence, in comparison to the material on which the tribunal can rely for its decision under Section 4 of the Unlawful Activities (Prevention) Act, 1967 to confirm the declaration by the Central Government of an association as unlawful.

65. The High Court misdirected itself by starting on a wrong premise in trying an allegation not in the pleading and then in admitting and relying on material which is not legal evidence for the proof of a corrupt practice. The error was aggravated by an incorrect appreciation of the legal principles and overlooking the meaning of certain terms explained in

earlier decisions. The significance of the trial of a corrupt practice and the consequence of the finding thereon, appears to have been missed in the High Court.

66. As a result of the aforesaid discussion, the finding recorded by the High Court against the appellant that charge of corrupt practices under sub-section (3) and (3A) of Section 123 of the R.P. Act has been proved to declare his election to be void on the ground contained in Section 100(1)(b) of the R.P. Act, is contrary to law and is, therefore, set aside. The result is that no ground is made out for declaring the appellant's election to be void. Accordingly, this appeal is allowed with costs resulting in dismissal of the election petition.

* * * * *

Raj Kumar Yadav v. Samir Kumar Mahaseth

(2005) 3 SCC 601

R.C. LAHOTI, C.J. -An election petition presented under Section 81 of the Representation of the People Act, 1951 (the Act) has been directed to be dismissed as barred by time. Feeling aggrieved, the election petitioner has filed this appeal under Section 116-A of the Act.

2. Shorn of all details, suffice it to state that the last date of limitation for presenting the election petition was 28.8.2003. What transpired in the High Court at the presentation may be described in the words of the learned designated Election Judge himself from the impugned judgment of the High Court. The relevant part is extracted and reproduced hereunder:

The admitted position is that the period of limitation of forty five days expired on 27.8.2003 on which date the designated Judge was sitting in court till 4.15 P.M. The court hours having expired, the designated election Judge retired into the chambers where at 4.25 p.m. Sri P.K. Verma, the learned counsel for the appellant came and wanted to file this election petition. Since under High Court Rules the election petitions could be filed only in the open court, I, as the designated election Judge refused to accept the petition beyond court hours. Learned counsel said that though petition was made ready that very day for presentation, because of some delay in finalizing it, he had gone to the court after court hours but by that time the Judge had retired to his chambers. Learned Counsel also requested in chambers that the Court Officer might be directed to accept that by making an initial over the petition noting the time of presentation so that the petition might be presented on the next working day. Since High Court Rules did not permit that, I refused that prayer also.

This was how the learned counsel presented the petition in the open court on 28.8.2003...

3. The question arising for decision is: whether an election petition presented at 4.25 p.m. on 27.8.2003, the last date of limitation, admittedly 10 minutes after the Judge had risen from the open court but was available in chambers within the court premises can be said to be a valid presentation so as to be within the period of limitation?

4. Article 329 of the Constitution provides *inter alia* that no election to either House of Parliament or to the House or either House of the 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. Under Section 80 of the Act, no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. Under Section 80-A, the High Court has been conferred with jurisdiction to try an election petition. Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court assigned for that purpose by the Chief Justice. Under Section 81 of the Act, an election petition may be presented within forty five days from the date of election. The rule making power for carrying out the purpose of the Act has been conferred on the Central Government under Section 169. The Act does not confer power on the High Court to make any rules. However, the rule making power vests in the High Court under Article 225 of the Constitution.

5. The present matter arises from the High Court of Patna. Chapter XXI-E of the High Court Rules framed by the Patna High Court incorporates the rules for the disposal of election petition filed under Section 81 of the Act. Rules 6 and 7, relevant for our purpose, are reproduced hereunder:

6. Subject always to the orders of the Judge, before a formal presentation of the election petition is made to the Judge in open Court, it shall be presented to the Stamp Reporter of the Court, who shall certify thereon if it is in time and in conformity with the requirements of the Act and the rules in this behalf, or is defective and shall thereafter return the petition to the petitioner for making the formal presentation after removing the defects, if any.

Provided that if on any Court day the Judge is not available on account of temporary absence or otherwise, the petition may be presented before the Bench hearing civil applications and motions.

7. (1) The date of presentation to the Judge or the Bench as mentioned in the proviso to Rule 6 shall be deemed to be the date of the filing of the election petition for the purposes of limitation.

(2) Immediately after it is presented, the petition shall be entered in a special register maintained for the registration of election petitions.

6. The limitation provided by Section 81 of the Act expires on 45th day from the date of election. The word 'day' is not defined in the Act. It shall have to be assigned its ordinary meaning as understood in law. The word 'day' as per English calendar begins at midnight and covers a period of 24 hours thereafter, in the absence of there being anything to the contrary in the context. Thus, the election petition could have been presented upto the midnight falling between 27th and 28th of August, 2003.

7. The statutory period of limitation as provided by the Act cannot be taken away by the Rules framed by the High Court governing its procedure. The rules framed in exercise of the power conferred by Article 225 relate to procedural matters and cannot make nor curtail any substantive law. In *S.A. Ganny v. I.M. Russell* (1930) ILR 8 Rangoon 380 (FB) Carr J.said:

I am very clearly of opinion, independently of the authorities to that effect, that a High Court has no power to alter by rule any period of limitation prescribed in the Limitation Act.

I am, however, also of opinion that when the High Court by rule gives a right of application for which no period of limitation is already prescribed the Court may also fix the period within that right must be exercised.

And, Suncliffe J. said (ILR pp. 395,396):

High Court Rules approximate very closely to Bye-laws. They can be altered at will. They can be canvassed. They are subordinate and domestic enactments. They must be *intra vires* of the power from which they derive and any other power in *pari materia*.

In our opinion, the length of any period of limitation provided by a statute cannot be curtailed by rules of procedure framed by High Court. When the statute prescribes

a particular day or date as the last day for any act being performed, it can be so done upto as late as the midnight immediately preceding the commencement of the next day.

8. We are also of the opinion that the High Court has not correctly interpreted Rules 6 and 7 of the High Court Rules. The rules are not meticulously well-drafted rules taking care of myriad situations which may arise. They appear to be more in the nature of directions aiming at convenient and smooth functioning of the High Court dealing with election petitions as also streamlining the procedure and practice of presentation. The designated Election Judge can always issue such orders as it may deem fit in the matter of presentation of the election petition. If the court is open, it is desirable that a formal presentation of the election petition is made to the Judge while sitting in open court. As the Judge himself is not expected to scrutinize the defects in the election petition presented to him, Rule 6 expects the election petition to be presented first to the Stamp Reporter of the court and then carried to the Judge for formal presentation. While presentation to the Stamp Reporter of the court is a presentation, the presentation before Judge in open court is a formal presentation. There would be nothing wrong if the election petitioner presents the election petition to the Stamp Reporter whereafter the election petition is carried to the Judge in open court either by the election petitioner or his counsel or by the Stamp Reporter or any official of the Registry under his directions. The Rule contemplates such presentation before the Stamp Reporter and the formal presentation to the Judge taking place on the same day and almost simultaneously as two steps of one transaction and in this background the date of presentation to the Judge or the Bench as described in Rule 6 is deemed to be the date of filing of the election petition. The process can also be reverse. If Stamp Reporter is not available, the election petition may be presented to the Judge who may then send it for scrutiny to the Stamp Reporter or any other official of the Registry. At the time of presentation, the Judge may not be sitting in open court, but that does not mean that the Judge cannot receive the election petition. He can receive it and then send it to the Stamp Reporter of the court.

9. In *Jamal Uddin Ahmad v. Abu Saleh Najmuddin* [(2003) 4 SCC 257] this Court has held that receiving an election petition presented under Section 81 of the Act is certainly not a judicial function which necessarily needs to be performed by a Judge alone; it is a ministerial function which may be performed by a Judge himself or be left to be performed by one of the administrative or ministerial staff of the High Court which is as much a part of the High Court.

10. As held by this Court in *State of Punjab v. Shamlal Murari* [(1976) 1 SCC 719]:

Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

The election petition, in the present case, could have been presented at any time upto the midnight falling between 27th and 28th August, 2003 and it would be treated as filed within the period of limitation.

11. Confining the filing time to the working hours of the court is not what is specifically spelt out by Rules 6 and 7 of the Patna High Court Rules. The High Court, in its impugned judgment, seems to have thought that the election petition could have been presented only to the Judge and that too in the open court. The Judge would ordinarily sit in open court upto 4.15 p.m. of the day as per the rules or practice of the High Court but that time is not the end of that day. The availability of time falling within the meaning of the word 'day', as provided by Section 81 of the Act, cannot be curtailed by making a provision in the rules contrary to the Act itself. Ordinarily, no litigant and lawyer would like to delay the presentation till the fag end of the day and then present it at an odd time to the inconvenience of the Judge wherever he may be. However, exceptional situations cannot be completely ruled out. It would be better if the ministerial act of receiving the election petition presented to the High Court is left to the administrative or ministerial staff of the High Court either by clarifying or by making a suitable amendment in the Rules of the Patna High Court.

12. In *Hukumdev Narain Yadav v. Lalit Narain Mishra* [(1974) 2 SCC 133] Election Petition Rules framed by Patna High Court came up for the consideration of the court and it was held that it may be that the presentation to the Judge will be the date of filing for the purpose of limitation, but that does not exclude a different procedure for filing in a case where limitation is about to expire and the conditions prescribed by Rule 6 in the matter of presentation cannot be complied with. Under the general rules governing the practice as to presentation of pleadings and documents in the High Court, an election petition can be presented on the last day of limitation, when the judges are not sitting to receive or entertain an election petition, to the Registrar or in his absence to some other officer in the Registry authorized to receive such presentation.

14. Reverting back to the facts of the present case, we find that the election petition was handed over to the designated Election Judge on the last day of limitation at 4.25 p.m. when the learned Judge was still available within the court premises, though he was not sitting in the open court, as the prescribed time of 4.15 p.m. ordinarily meant for transacting judicial work was over. The learned Judge did not himself receive the presentation nor did make any other order such as the one directing any official of the Registry to receive the same. The election petitioner had done all that was within his power to do for the purpose of presentation but he failed. He made the presentation on the next day when the Judge was available and sitting in the open court. The presentation would be deemed to be within limitation and valid.

15. The learned designated Election Judge of the High Court has erred in holding the presentation to be barred by limitation. The view so taken cannot be countenanced. The appeal is allowed. The impugned judgment of the High Court dated 10.9.2003 is set aside. The election petition is held to have been filed within prescribed period of limitation.

* * * * *

Udhav Singh v. Madhav Rao Scindia

AIR 1976 SC 744

SARKARIA, J. - This appeal is directed against a judgment, dated October 27, 1972, of the High Court of Madhya Pradesh dismissing the election petition filed by the appellant to question the election of the respondent to Lok Sabha.

2. Six candidates filed nomination papers for contesting the election to Lok Sabha from Guna Parliamentary Constituency in March 1971. Out of them, Sarvshri Shiv Pratap Singh and Gaya Prasad withdrew their candidature after their nomination papers were found to be in order after scrutiny, leaving four candidates in the field viz., Sarvshri Madhav Rao Scindia, Deorao Krishnarao Jadhav, Narayan Singh 'Albela' and Bundel Singh to contest the election. Shri Madhav Rao Scindia respondent herein who was sponsored by the Jan Sangh was declared elected by a margin of 1,41,090 votes over his nearest rival, Shri Deorao Krishnarao Jadhav, sponsored by the Indian National Congress.

3. Udhav Singh, an elector of the Constituency, filed an election petition on 26-4-1971, in the High Court challenging the election of the respondent on two main grounds viz.:

(i) that the respondent and/or his election agent had incurred or authorised expenditure in connection with the election in excess of the limit of Rs. 35,000 prescribed under Section 77(3) of the Act read with Rule 90 of the Conduct of Election Rules, 1961. It was alleged that the respondent made a tour in the Constituency by helicopters and showed Rs. 5,000 only as an expense towards the cost of the aviation fuel but did not show the hiring and other charges in respect thereof. It was further alleged that the respondent hired and used motor vehicles, not less than 18, but did not show the expenditure incurred in respect thereof in the statement of election expenses submitted by him to the Election Commission;

(ii) that the workers of the respondent, with his consent, had threatened the electors with bodily injuries and criminally intimidated them not to vote for Shri Deorao Krishnarao Jadhav, the Congress candidate. Five instances of such threats and intimidation interfering with the free exercise of electoral rights, were set out in clauses (i) to (v) of the original Paragraph 10(iii) of the petition, which, after amendment, was renumbered as Para 11(iv).

Clause (iv) of Paragraph 11 is as follows:

That, on or before 22-2-71, Shri Mohan Prasad Ojha, a Congress Worker of Village Umri (Tehsil Guna) was threatened at pistol point by the workers of the respondent with his consent. Shri Shiv Pratap Singh and others of Umri threatened not to vote and canvass in favour of the Congress candidate, Deorao Krishnarao Jadhav and threatening with dire consequences.

4. Process was issued to the lone respondent impleaded in the election petition. On 28-5-1971, an advocate put in an appearance on his behalf. In the written statement presented on 24-9-1971 the respondent traversed the allegations of corrupt practices made in the petition. In answer to clause (iv) of Paragraph 11 of the petition, the respondent stated:

The allegations of the petitioner that, on or before, 22-2-1971 Shri Mohan Prasad Ojha, a Congress Worker of the village Umri (Tehsil Guna) was threatened at pistol point by the workers of the respondent with his consent, is denied. It is also denied that with the consent of the respondent, Shri Shiv Pratap Singh and others of Umri threatened him not to vote and canvass in favour of the Congress candidate Shri Devrao Krishnarao Jadhav and threatened him with dire consequences. This para is also lacking in material particulars as to who were the alleged workers, what was their names; their addresses, castes etc. It cannot therefore, be enquired into. The allegation is incorrect, baseless and vague. It is also vague because particulars as to when, where and in whose presence the alleged consent of the respondent was given are not mentioned.

5. The main issues framed on 1-10-1971 were as under:

1. Has the respondent incurred or had authorised expenditure which was more than the prescribed limit laid down under the Representation of the People Act, 1951 or the Rules made thereunder, as detailed in Para 10(i) and 10(ii) of the petition?

2.(a) Did the worker of the respondent with his consent threaten the voters with injury, and criminally intimidated them in case they voted for D.K. Jadhav as detailed in Paragraph 11 of the petition, and if so, what is its effect ?

6. Thereafter, the petitioner examined twelve witnesses on various dates, fixed in the case, from 16-12-1971 to 24-7-1972.

7. On 3-8-1972, an application (No. 58/72) was submitted by the respondent alleging that the election-petitioner has in paragraph 11(iv) of the petition alleged the commission of a corrupt practice within the meaning of Section 123(2) of the Act, by, Shri Shiv Pratap Singh, one of the candidates, but has failed to join him as a respondent, and as such, his petition is liable to be dismissed under Section 86 on account of noncompliance with the mandate of Section 82(b). In this application, the respondent reproduced clause (iv) of para 11 of the petition as follows:

That on or before 22-2-71, Shri Mohan Prasad Ojha a Congress worker of village Umri (Tehsil Guna) was threatened at pistol point by the workers of the respondent with his consent, Shri Shiv Pratap Singh and others of Umri and threatened him not to vote and canvass in favour of the Congress candidate Deorao Krishnarao Jadav and, threatening him with dire consequences.

8. Notice of this application was given to the election petitioner, who after taking several adjournments, ultimately filed a reply on 28-8-1972. In his reply, the petitioner stated that Paragraph 11(iv) as reproduced in the respondent's application was not a correct reproduction. It was further stated:

It is denied that there has been any allegation of corrupt practice against Shri Shiv Pratap Singh who was a candidate at the aforesaid election. The respondent also understood the same thing, that is why he did not raise any objection for a long period of 11 months since the respondent filed his written statement.

However, though there is absolutely no doubt about the identity of the said Shri Shiv Pratap Singh, but the basic question giving rise to this application that an allegation of corrupt practice has been made against him in para 11(iv) of the petition is wholly incorrect and based on absolutely wrong interpretation of the statement of allegation made in the aforesaid paragraph.

The petitioner further stated that the objection as to non-joinder of necessary party not having been taken at the earliest, should be deemed to have been waived by the respondent.

9. In his rejoinder (I.A. 76/72, dated 7-9-1972), the respondent maintained that Para 11(iv) had been correctly extracted by him in his application dated 3-8-72, from the copy of the election-petition which was served upon him, certified to be true copy under the seal and signature of Shri R.K. Tankha, Advocate, the then Counsel for the petitioner. On 5-9-72, at about 4.30 p.m. the Counsel for the respondent on inspecting the original election petition discovered to their amazement that the three words (now underlined by us) had been erased and the erasures initialled. It was alleged that this tampering with the petition had been done to wriggle out of the fatal defect in the petition. The respondent prayed that the petitioner be recalled and allowed to be cross-examined on this point.

10. The learned trial judge postponed consideration of these applications and of the objection as to non-joinder of Shri Shiv Pratap Singh till the conclusion of the trial. Thereafter the respondent examined his witnesses. He also examined his Advocate Shri Baghel, who produced Ex. R-33, a copy of the petition, he had received from the office of the High Court. The respondent closed his evidence on 9-7-72.

12. Shri Baghel, Counsel for the respondent, while appearing in the witness-stand was unable to say definitely whether Ex. R-33, was a true copy of the copy he had received from the High Court office. In view of this the learned Judge held that it had not been proved that these erasures in para 11(iv) under initials were made subsequently to the filing of the petition. He therefore, considered clause (iv) of para 11 *sans* the words erased. There, as here, it was contended that the second part of clause (iv) of para 11 if properly construed would mean that Shri Shiv Pratap Singh and others of Umri were threatened- and not that they threatened-not to vote and canvass in favour of the Congress candidate. The learned judge repelled this contention with the observations that "in no circumstances of the case it is possible to read para 11(iv) in the manner suggested by the petitioner". According to him the allegations in this paragraph constituted a charge under Section 123(2) of the Act against Shri Shiv Pratap Singh and his non-joinder as a respondent was fatal to the petition which was liable to be dismissed on that score alone under Section 86.

13. On merits he found issues 1 and 2 against the petitioner. In the result, he dismissed the election petition with costs. Hence, this appeal by the petitioner.

15. It is common ground that Shri Shiv Pratap Singh was one of the candidates who had withdrawn his nomination papers for election from this Constituency, after the same had been found in order by the Returning Officer. There was thus no doubt that he was a "candidate" for the purpose of the relevant provisions of the Act. If therefore, the allegations made in cl

(iv) of para 11 of the petition relate to him and amount to a charge of corrupt practice against him, his non-joinder as a respondent would be fatal to the election petition.

16. Mr. Dixit, the learned Counsel for the appellant, contends that this objection as to non-joinder was not taken in the written statement, that it was raised for the first time about 14 months after the service of the notice of the election petition on the respondent-after the petitioner had examined all his witnesses in the case. It is submitted that this amounted to waiver. According to the learned Counsel, in view of the mandate of Order 8, Rule 2, Code of Civil Procedure, it was obligatory for the respondent to take all such pleas showing the petition to be non-maintainable, in his written statement. Since this was not done, the respondent should not have been allowed to raise this plea, namely, by an application when the case was in an advanced stage, and an amendment of the written statement was liable to be refused on the ground of laches.

17. On the other hand, Mr. Gupte, learned Counsel for the respondent, submits that it was not obligatory to take this objection in the written statement. It was a purely legal objection which for its determination did not require any facts to be pleaded and proved by the respondent. The fatal defect, it is submitted, is patent on the face of the election petition. Mr. Gupte submits that Order 8, Rule 2, is not attracted because that provision, as its marginal heading shows, enjoins the pleading of new facts, only as distinguished from bare points of law. In the alternative, it is submitted that the application, dated 3-8-72, whereby this objection was raised was in nature and substance additional pleading of the respondent which was accepted as such by the Court. The petitioner also submitted his reply thereto and he could not complain that he was taken by surprise. It is further urged that the provisions of Section 86 read with Section 82(b) are in the nature of a mandate to the Court which is bound to dismiss an election petition wherever it comes to its notice, whether on its own motion, or on the motion of the respondent, that there has been a non-compliance with the imperative of Section 82(b).

18. The material part of Section 82 reads thus:

Parties to the petition - A petitioner shall join as respondent to his petition -

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

19. Behind this provision is a fundamental principle of natural justice viz., that nobody should be condemned unheard. A charge of corrupt practice against a candidate, if established, entails serious penal consequences. It has the effect of debarring him from being a candidate at an election for a considerably long period. That is why, Section 82(b) in clear, peremptory terms, obligates an election- petitioner to join as respondent to his petition, a candidate against whom allegations of any corrupt practice are made in the petition. Disobedience of this mandate inexorably attracts Section 86 which commands the High Court, in equally imperative language, to- “dismiss an election petition which does not comply with the provisions of section 82”.

20. The respondent cannot by consent, express or tacit, waive these provisions or condone-a non-compliance with the imperative of Section 82(b). Even inaction, laches or delay on the part of the respondent in pointing out the lethal defect of non-joinder cannot

relieve the Court of the statutory obligation cast on it by Section 86. As soon as the non-compliance with Section 82(b) comes or is brought to the notice of the court, no matter in what manner and at what stage, during the pendency of the petition, it is bound to dismiss the petition in unstinted obedience to the command of Section 86.

21. Considered in the light of the above enunciation, the respondent was not precluded from raising the objection as to non-joinder merely because he had done so after the close of the petitioner's evidence, and not at the earliest opportunity. Nor was the respondent obligated to raise this objection only by his written statement, and in no other mode. Rule 2 of Order 8 of the Code of Civil Procedure is a rule of practice and convenience and justice. This procedural Rule is to subserve and not enslave the cause of justice. It lays down broad guidelines and not cast-iron traps for the defendant in the matter of drawing up his statement of defence. It says:

The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and *all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise* or would raise issues of fact not arising out of the plaint, as for instance fraud, limitation, release, payment, performance, or facts showing illegality.

22. The key-words are those that have been underlined. These words indicate the broad test for determining whether a particular defence plea or fact is required to be incorporated in the written statement. If the plea or ground of defence raises issues of fact not arising out of the plaint, such plea or ground is likely to take the plaintiff by surprise, and is therefore required to be pleaded. If the plea or ground of defence raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises. Nothing in the Rule compels the defendant to plead such a ground, nor debars him from setting it up at a later stage of the case, particularly when it does not depend on evidence but raises a pure question of law turning on a construction of the plaint. Thus, a plea of limitation that can be substantiated without any evidence and is apparent on the face of the plaint itself, may be allowed to be taken at any stage of the suit.

23. An objection on the ground of non-compliance with the requirement of Section 82(b) is a plea of this category. It arises out of allegations made in the petition itself. Such a plea raises a pure question of law depending on a construction of the allegations in the petition, and does not require evidence for its determination. Such a plea therefore, can be raised at any time even without formal amendment of the written statement.

24. In the instant case, it was raised by an application, dated 3.8.72, which was accepted by the court as a supplementary pleading of the respondent, and the petitioner had also pleaded in reply to the same. There are several decisions wherein an objection as to non-joinder of a necessary party in an election petition was allowed to be raised by means of a simple application submitted long after the presentation of the written statement by the respondent.

25. In **Rao Abhe Singh v. Rao Nihal Singh** [AIR 1964 Punj 209] a Division Bench allowed an objection as to non-joinder of a candidate, against whom a corrupt practice was

alleged, to be raised by way of an application which was filed after practically the whole evidence in the case had been recorded.

28. What should be the fair construction of the allegations in Para 11(iv) of the petition? Is it possible to read-as Shri Dixit wants us to read-this paragraph as containing a charge that Shri Shiv Pratap Singh and others of Umri were threatened by the workers of the respondent, not to canvass and vote for the Congress candidate ? Or, does it mean that Shri Mohan Prasad Ojha, an elector and a Congress worker was threatened by Shri Shiv Pratap Singh and others of Umri not to canvass and vote for the Congress candidate, Shri Deorao Krishnarao Jadhav?

29. Mr. Dixit submits that clause (iv) of Para 11 falls in two parts, separated by a comma, and the allegations in each part are distinct from the other. The first part comprising the allegations "That, on or before 22-2-71, Shri Mohan Prasad Ojha, a Congress Worker of Village Umri (Tehsil Guna) was threatened at pistol point by the workers" according to the Counsel, stands alone, and should not be read conjointly with the second part which speaks of Shri Shiv Pratap Singh and others of Umri. However, not very consistently with this argument, it is urged further that since the allegations in the first part are set out in passive voice, the contents of the second part should also be deemed to have been expressed in passive voice. If this methodology is adopted, the second part of Para 11(iv) according to Mr. Dixit, would read like this: "Shri Shiv Pratap Singh and others of Umri (were) threatened not to vote and canvass in favour of the Congress candidate, Deorao Krishnarao Jadhav"

30. We are afraid, this ingenious method of construction after compartmentalisation, dissection, segregation and inversion of the language of the paragraph, suggested by the Counsel, runs counter to the cardinal canon of interpretation, according to which, a pleading has to be read as a whole to ascertain its true import. It is not permissible to call out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole.

31. The construction of Para 11(iv) suggested by Mr. Dixit is not possible without a radical change in its sense and tense by unwarranted addition and excision of words. It would necessitate a material change in the tense by reading the verb "threatened" as "were threatened" so that what was clearly expressed by its author in active voice gets converted into a passive voice with consequent inversion and subversion of the original sense. Even the addition and attachment of the word "were" to the pre-existing verb "threatened" would not completely transform Shri Shiv Pratap Singh and others of Umri from "threateners" into the "threatened" unless the contra-indicative phrase "and threatening with dire consequences" was also amputated.

32. In our opinion, the correct way of construing Para 11(iv) is to take it as it stands, and read it not in parts but as a whole together with its preamble and the rest of the pleading. Thus read, the relevant allegation in clause (iv) of Para 11 would fairly and clearly admit of only this construction:

That on or before 22-2-71, Shri Mohan Prasad Ojha, a Congress Worker and elector of village Umri (Tehsil Guna) was threatened at pistol point with dire

consequences by Shri Shiv Partap Singh and others of Umri, the workers of the respondent with his consent, not to vote and canvass in favour of the Congress Candidate, Deorao Krishnarao Jadhav.

33. In our opinion, this is the only reasonable construction that the language of para 11(iv) without undue stretching, straining and twisting can bear. Indeed, from the relevant portions of the pleadings extracted earlier in this judgment, it is evident that both the parties, including the petitioner, had understood the allegations in para 11(iv) in the sense in which we have construed them. It was only after the presentation of the application, dated 3- 8-72, raising the objection, the petitioner in an attempt-as the High Court rightly put it-"to wriggle out from the unfortunate position he was placed in not making Shiv Pratap Singh a party", has started claiming the antic interpretation quite different from the one flowing from the plain language and tenor of para 11(iv).

We have therefore, no hesitation in repelling the second contention also, canvassed on behalf of the appellant.

34. The last contention of the learned Counsel for the appellant is that even if the second part of clause (iv) is construed as an allegation that Shri Shiv Pratap Singh and others of Umri threatened not to vote and canvass, then also, this allegation is so bereft of material facts and material particulars, that it does not constitute a complete charge of corrupt practice under Section 123(2). The material facts and material particulars, which according to the Counsel were, in view of the mandate of Section 83, required to be pleaded but have not been pleaded are: the place where the threat was given, the kind and nature of the injury threatened, or injury, if any, actually caused, the particulars of the parentage, address of Shiv Pratap Singh and others, the fact that this Shiv Pratap Singh of Umri was the same who was one of the candidates at the election and that the person threatened was an elector, and how the threat constituted an interference with the free exercise of his electoral right. It is urged that in ascertaining whether or not the allegations in para 11(iv) constitute a complete cause of action relating to a corrupt practice, the Court has to confine itself to this Para, and cannot take into consideration even an admission of the petitioner appearing in evidence or in any document extraneous to the election petition.

35. As against this, Mr. Gupte, has pointed out that all the material facts, as distinct from material particulars, necessary to constitute a complete charge of corrupt practice under Section 123(2) against Shri Shiv Pratap Singh, a candidate can be found in the petition if the same is read as a whole. In any case, the identity of this Shiv Pratap Singh as a candidate was admitted by the petitioner in the particulars supplied by him pursuant to an order of the Court on 8-8-1972. Those particulars, according to the Counsel are to be treated as a part of the Petitioner's pleading. It is further submitted that if there is any deficiency of particulars, as distinguishable from material facts, in Para 11(iv), then also they could be supplied, even after the expiry of limitation for the petition, pursuant to an order of the Court, made at the instance of the respondent. The petitioner cannot, it is stressed, take advantage of his own default, in not setting forth full particulars of basic facts set out in the petition.

36. Section 83 lays down:

(1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice....

37. Like the Code of Civil Procedure, this section also envisages a distinction between material facts and material particulars. Clause (a) of sub-section (1) corresponds to Order 6, Rule 2, while clause (b) is analogous to Order 6 Rules 4 and 6 of the Code. The distinction between “material facts” and “material particulars” is important because different consequences may flow from a deficiency of such facts or particulars in the pleading. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. If the petition is based solely on those allegations which suffer from lack of material facts, the petition is liable to be summarily rejected for want of a cause of action. In the case of a petition suffering from a deficiency of material particulars, the court has the discretion to allow the petitioner to supply the required particulars even after the expiry of limitation.

38. All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are “material facts”. In the context of a charge of corrupt practice, “material facts” would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner is bound to substantiate before he can succeed on that charge. Whether in an election-petition, a particular fact is material or not and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are “material facts” which must be pleaded and failure to plead even a single material fact amounts to disobedience of the mandate of section 83(1) (a).

39. “Particulars”, on the other hand, are “the details of the case set up by the party”. “Material particulars” within the contemplation of clause (b) of Section 83(i) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). ‘Particulars’ serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative.

40. The distinction between ‘material facts’ and ‘material particulars’ was pointed out by this Court in several cases, three of which have been cited at the bar. It is not necessary to refer to all of them. It will be sufficient to close the discussion by extracting what A. N. Ray J. (as he then was) said on this point in ***Hardwari Lal’s case***:

It is therefore vital that the corrupt practice charged against the respondent should be a full and complete statement of material facts to clothe the petitioner with a complete cause of action and to give an equal and full opportunity to the respondent to meet the case and to defend the charges. Merely, alleging that the respondent obtained or procured or attempted to obtain or procure assistance are extracting words from the statute which will have no meaning unless and until facts are stated to show what that assistance is and how the prospect of election is furthered by such assistance. In the present case, it was not even alleged that the assistance obtained or procured was other than the giving of vote. It was said by the counsel for the respondent that because the statute did not render the giving of vote a corrupt practice the words “any assistance” were full statement of material fact. The submission is fallacious for the simple reason that the manner of assistance, the measure of assistance are all various aspects of fact to clothe the petition with a cause of action which will call for an answer. Material facts are facts which if established would give the petitioner the relief asked for. If the respondent had not appeared, could the court have given a verdict in favour of the election petitioner. The answer is in the negative because the allegations in the petition did not disclose any cause of action.

41. Bearing in mind the criteria for distinguishing material facts from material particulars, let us now see whether the allegations in Para 11(iv) of the petition cover all the material facts constituting a complete charge of corrupt practice within the meaning of section 123(2) against Shri Shiv Pratap Singh who was a candidate at the election.

42. The gist of the corrupt practice of “undue influence” as defined in sub-section (i) of section 123 is “direct or indirect interference or attempt to interfere on part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right”.

43. By way of illustration sub-clause (1) of clause (a) of the proviso lays down that if a person who threatens any candidate or any elector or any person in whom a candidate or an elector is interested, with injury of any kind shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of sub-section (2).

44. In Para 11(iv) the particular corrupt practice alleged is of the kind indicated in the aforesaid sub-clause (i) of the Proviso. Reading Para 11 as a whole, it is clear that it is pleaded that Shri Shiv Pratap Singh and others of Umri had administered a threat to Shri Mohan Prasad Ojha who was a Congress Worker and an elector of Umri; that the threat was not to vote for the Congress candidate, Shri Jadhav, the threat was of causing bodily injury to the said elector, that the threatener Shri Shiv Pratap Singh, was an election worker of the respondent and had administered the threat to the said elector, with the consent of the respondent. Reading Para 11(iv) together with the contents of Para 10 of the petition, the import is clear that this threatener was none else but “Shri Shiv Pratap Singh MLA, s/o Shri Birjendra Singh r/o Umri House, Guna”, who “during the election of the respondent acted as his agent.”

45. It will thus be seen that all the “material facts” constituting a complete charge of corrupt practice under Section 123(2) against Shri Shiv Pratap Singh were stated in the petition. The approximate date of administering the threat which was only a material

particular as distinguished from a material fact-was also given. Only the place and the precise time of giving the threat were not stated. But these were, at best, only material particulars, and not “material facts”. The occasion for furnishing such particulars would have arisen only if the respondent had asked for them. Similarly, further and better particulars of the address etc. of Shri Shiv Pratap Singh would fall within the category of particulars. By an application dated 1-8-1972, the respondent, obviously as a matter of abundant caution, asked for fuller particulars of Shiv Pratap Singh referred to in para 11(iv). The petitioner submitted his reply, dated 8-8-72, through his Counsel in which he furnished these particulars of the said Shri Shiv Pratap Singh:

Shiv Pratap Singh s/o Brijendra Singh, aged about 35 years, occupation cultivation (at present M.L.A.Guna) resident of Umri House, Guna, Distt. Guna.

46. These particulars supplied by the election-petitioner were in the nature of his supplemental pleading. They could not be treated as something extraneous to his pleading. They could be legitimately looked into for construing Paragraph 11(iv) of the petition. These particulars supplied by the petitioner were substantially the same as given in Para 10 of the petition. These particulars doubly confirmed the identity of Shiv Pratap Singh mentioned in Para 11(iv) as the same person who was one of the candidates.

47. In sum, Para 11(iv) of the petition contained allegations of a complete charge of corrupt practice against a candidate, Shri Shiv Pratap Singh and consequently in view of section 82(b) it was obligatory for the petitioner to implead him also as a respondent. Failure to do so, would inexorably lead to the dismissal of his petition under section 86. Accordingly, on this short ground, and for all the reasons aforesaid, we uphold the dismissal of the election petition and disallow this appeal with costs.

* * * * *

Jyoti Basu v. Debi Ghosal

AIR 1982 SC 983

CHINNAPPA REDDY, J. - The first appellant, Jyoti Basu, is the Chief Minister and appellants two and three, Buddhadeb Bhattacharya and Hashim Abdul Halim, are two Ministers of the Government of West Bengal. They have been impleaded by the first respondent as parties to an election petition filed by him questioning the election of the second respondent to the House of the People from the Barrackpore Parliamentary Constituency in the mid-term Parliamentary election held in January, 1980. There were five candidates who sought election from the Constituency. Mohd. Ismail, the first respondent, whose candidature was sponsored by the Communist Party of India (Marxist) was, elected securing 2,66,698 votes as against Debi Ghosal, a candidate sponsored by the Indian National Congress led by Smt. Indira Gandhi who secured 1,62,770 votes. The other candidates Ramjit Ram, Robi Shankar Pandey and Bejoy Narayan Mishra secured 25,734, 12,271 and 2,763 votes respectively. The first respondent filed an election petition in the High Court of Calcutta questioning the election of the second respondent Mohd. Ismail on various grounds. He impleaded the returned candidate as the first respondent, and the other three unsuccessful candidates -respondents 2, 3 and 4 to the election petition. Besides the candidates at the election, he impleaded several others as respondents. The District Magistrate and Returning Officer was impleaded as the fifth respondent, Buddhadeb Bhattacharya, the Minister for Information and Publicity, Government of West Bengal as the sixth respondent, Jyoti Basu, the Chief Minister as the seventh respondent, Md. Amin, the Minister of the Transport Branch of the Home Department as the eighth respondent, Hashim Abdul Halim, the Minister of the Legislative and the Judicial Department as the ninth respondent and the Electoral Registration Officer as the tenth respondent. It was averred in the election petition that the Chief Minister and the other Ministers of the Government of West Bengal who were impleaded as parties to the election petition had colluded and conspired with the returned candidate to commit various alleged corrupt practices. Apart from denying the commission of the various alleged corrupt practices, the Chief Minister and the other Ministers claimed in their written statements that the election petitioner was not entitled to implead them as parties to the election petition. They claimed that as they were not candidates at the election they could not be impleaded as parties to the election petition. The Chief Minister and two of the other Ministers, Hashim Abdul Halim and Buddhadeb Bhattacharya filed an application before the High Court of Calcutta to strike out their names from the array of parties in the election petition. The application was dismissed by the Calcutta High Court on the ground that the applicants (appellants) were proper parties to the election petition and, therefore, their names should not be struck out of the array of parties. The appellants have preferred this appeal after obtaining special leave of this Court under Article 136 of the Constitution.

2. Shri Somnath Chatterjee, learned counsel for the appellant submitted that the concept of a proper party was not relevant in election law and that only those persons could be impleaded as parties who were expressly directed to be so impleaded by the Representation of the People Act, 1951. He claimed that in any case such persons were entitled to be struck out from the array of parties. On the other hand Shri Sidhartha Shankar Ray, and Shri R.K. Lala, learned

counsel for the first respondent submitted that the appellants were proper parties to the election petition and their presence was necessary for a complete, final and expeditious decision on the questions involved in the action.

3. To properly appreciate the rival contentions, it is necessary to refer to the relevant provisions of the Constitution of India and the two Representation of the People Acts of 1950 and 1951.

4. First, the Constitution. Part XV deals with elections. Article 324 vests in the Election Commission the superintendence, direction and control of the preparation of the Electoral rolls, and the conduct of all elections to Parliament and to the Legislatures of the States. Article 325 provides that there shall be one general electoral roll for every territorial constituency and that no person shall be ineligible for inclusion in such rolls on grounds only of religion, caste, sex or any of them. Article 326 provides that election to the House of the People and to the Legislative Assemblies of States shall be on the basis of adult franchise. Article 327 enables Parliament to make laws with respect to all matters relating to elections to either House of Parliament or to the Houses of the Legislature of a State. Article 328 enables the Legislature of a State, if Parliament has not made such legislation, to make laws with respect to all matters relating to elections to the Houses of the Legislature of the State. Article 329 bars interference by Courts in electoral matters and clause (b), in particular, provides that no election to either House of Parliament or to the House or either House of the 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.

5. Next, the Representation of the People Act, 1950. This Act provides for the delimitation of the Constituencies for the purpose of elections to the House of the people and the legislatures of States, the qualification of voters at such elections, the preparation of electoral rolls and other matters connected therewith.

6. Last, the Representation of the People Act of 1951, Part VI of the Act deals with "Disputes regarding Elections". Section 79 defines various terms and expressions used in the Parts VI and VII. Clause (b) defines a 'candidate' as meaning "a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate". Section 80 imposes a statutory ban on an election being called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. Section 80-A vests in the High Court the jurisdiction to try an election petition. Section 81 provides for the presentation of an election petition on one or more of the grounds specified in Section 100(1) and Section 101 by any candidate at such election or any elector who was entitled to vote at the election. Section 82 is titled "Parties to the petition". Section 83 prescribes the contents of the petition. Section 84 provides that a petitioner may, in addition to claiming a declaration that the election of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected. Section 86 deals with trial of election petitions. Sub-section (4) provides for an application by a candidate who is not already a respondent to be joined as a respondent. Section 87 is concerned with the procedure before the High Court. Section 90

enables the returned candidate or any other party to 'recriminate' in cases where, in the election petition, a declaration that a candidate other than the returned candidate has been elected is claimed. Section 98 prescribes the orders that may be made by the High Court at the conclusion of the trial of an election petition. It provides that the High Court shall make an order dismissing the election petition or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Section 99, enables the High Court to make, at the time of making order under Section 98, an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been guilty of corrupt practice and the nature of that practice. The proviso to Section 99 (1), however, prescribes that no person who is not a party to the petition shall be named in the order unless he had been given notice to appear before the High Court to show cause why he should not be so named and he had also been given an opportunity to cross examine any witness who had already been examined by the High Court and had given evidence against him and an opportunity of calling evidence in his defence and of being heard. Section 100 enumerates the grounds on which an election may be declared void. The High Court, it is said, among other grounds, shall declare the election of a returned candidate void in cases where corrupt practices are proved, where such corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent. Where the corrupt practice has been committed in the interests of the returned candidate by an agent other than his election agent, the result of the election in so far as it concerns the returned candidate must also be shown to have been materially affected. Section 101 prescribes the grounds for which a candidate, other than the returned candidate may be declared to have been elected. Section 110 provides for the procedure when an application for withdrawal of an election petition is made to the Court. Section 110(3)(c) says that a person who might himself have been a petitioner may apply to the Court to be substituted as a petitioner in place of the party withdrawing. Section 112(3) provides for the continuance of the election petition on the death of the sole petitioner in an election petition or of the survivor of several petitioners, by any person who might himself have been a petitioner and who applies for substitution within the stipulated period.

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. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a straight-jacket. Thus the entire election process commencing from the issuance of the

notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is, who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the scheme of the Act. We have noticed the necessity to rid ourselves of notions based on common law or equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else. Section 82 is headed "Parties to the petition" and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of Section 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86(4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while clause (b) of Section 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under Section 86(4), any other person cannot, under that provision seek to be joined as respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all? We think that the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86(4) and no others. However desirable and expedient it may appear to be, none else shall be joined as respondents.

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the Court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be' and subject to the provisions of the

Representation of the People Act, 1951 and the rules made thereunder. Section 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked. In *Mohan Raj v. Surendra Kumar Taparia* [AIR 1968 Raj. 287] this Court held that the undoubted power of the Court (i.e. the Election Court) to permit an amendment of the petition cannot be used to strike out allegations against a candidate not joined as a respondent so as to save the election petition from dismissal for non-joinder of necessary parties. It was said:

The Court can order an amendment and even strike out a party who is not necessary. But where the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder. When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as a curative means to save the petition.

Again, in *K. Venkateswara Rao v. Bekkam Narasimha Reddi* [AIR 1969 SC 872], it was observed:

With regard to the addition of parties which is possible in the case of a suit under the provisions of Order I Rule 10 subject to the added party right to contend that the suit as against him was barred by limitation when he was added, no addition of parties is possible in the case of an election petition except under the provisions of sub-section (4) of Section 86.

11. The matter may be looked at from another angle. The Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause against being 'named' as one guilty of a corrupt practice. Parliament however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election-petitioner or at the instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being 'named' and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be 'named'. The right does not extend to participation at all stages and in all matters, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to a prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitions, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations. To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prime facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his

public duties. It would be against the public interest to do so. The ultimate award of costs would be no panacea in such cases, since the public mischief cannot be repaired. That is why public policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Section 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another view-point. When in an election petition, in addition to the declaration that the election of the returned candidate is void, a further declaration is sought that any candidate other than the returned candidate has been duly elected, Section 97 enables the returned candidate or any other party to 'recriminate' i.e. to give evidence to prove that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to 'recriminate' under Section 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86(6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present defined by Section 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Sections 82 and 86(4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the seventh respondent in the appeal are directed to be struck out from the array of parties in the election petition

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Jabar Singh v. Genda Lal

AIR 1964 SC 1200

GAJENDRAGADKAR, J. - The question of law which this appeal has raised for our decision is in relation to the nature and scope of the enquiry contemplated by Sections 97, 100 and 101 of the Representation of the People Act, 1951 (the Act). The appellant Jabar Singh and the respondent Genda Lal, besides five others, had contested the election to the Madhya Pradesh Assembly on behalf of Morena Constituency No. 5. This election took place on the 21st February, 1962. In due course, the scrutiny of recorded votes took place and counting followed on the 27th February, 1962. As a result of the counting, the appellant was shown to have secured 5,671 votes, whereas the respondent 5,703 votes. It is not necessary to refer to the votes secured by the other candidates. After the result of the counting was thus ascertained, the appellant applied for recounting of the votes and thereupon, recounting followed as a result of which the appellant was declared elected having defeated the respondent by 2 votes. The recounting showed that the appellant secured 5,656 votes and the respondent 5,654. Thereafter, the respondent filed an election petition from which the present appeal arises. By his petition the respondent challenged the validity of the appellant's election on the ground of improper reception of votes in favour of the appellant and improper rejection of votes in regard to himself. The respondent urged before the Tribunal either for the restoration of the results in accordance with the calculations initially made before recounting, or a re-scrutiny of the votes by the Tribunal and declaration of the result according to the calculations which the Tribunal may make. His prayer was that the appellant's election should be declared to be void and a declaration should be made that the respondent was duly elected.

2. The Election Tribunal found that 10 ballot papers in favour of the respondent had been improperly rejected and 4 had been improperly accepted in favour of the appellant. That led to a difference of 12 votes and the position of the votes was found to be the respondent 5,664 and the appellant 5,652 votes.

3. At this stage, the appellant urged before the Tribunal that there had been improper rejection of his votes and improper acceptance of the votes of the respondent, and his case was that, if recounting and re-scrutiny was made, it would be found that he had secured a majority of votes. The respondent objected to this course; his case was that since the appellant had not recriminated under Section 97 of the Act, it was not open to him to make the plea that a recounting and re-scrutiny should be made on the ground that improper votes had been accepted in favour of the respondent and valid votes had been improperly rejected when they were cast in favour of the appellant. The respondent's contention was that in order to justify the claim made by the appellant it was necessary that he should have complied with the provisions of the proviso to Section 97(1) of the Act and should have furnished security as required by it. The failure of the appellant in that behalf precluded him from raising such a contention.

4. The Tribunal rejected the respondent's contention and held that in order to consider the relief which the respondent had claimed in his election petition, it was necessary for it to decide whether the respondent had in fact received a majority of votes under section 101 of the Act, and so, he re-examined the ballot papers of the respondent as well as the appellant

and came to the conclusion that 22 ballot papers cast in favour of the respondent had been wrongly accepted. The result was that the respondent had, in fact, not secured a majority of votes. As a consequence of these findings, the Tribunal declared that the election of the appellant was void and refused to grant a declaration to the respondent that he had been duly elected.

5. This decision led to two cross-appeals before the High Court of Madhya Pradesh, No. 46 of 1952 and No. 1 of 1963 respectively. The appellant challenged the conclusion of the Tribunal that his election was void, whereas the respondent disputed the correctness of the decision of the Tribunal that no declaration could be granted in his favour that he had been duly elected. In these appeals the main question which was agitated before the High Court was about the nature and scope of the enquiry permissible under sections 100 and 101 of the Act. In dealing with this question, the High Court based itself upon its own earlier decision in *Inayatullah Khan v. Diwanchand Mahajan* [15 E.L.R. 219] as well as the decision of this Court in *Bhim Sen v. Gopali* [22 E.L.R. 288] and held that the grievance made by both the parties in their respective appeals was not well founded and that the decision of the Tribunal was right. In the result, both the appeals were dismissed and the decision of the Tribunal was confirmed. Against this decision, the appellant has come to this Court by special leave. Later on, the respondent filed an application for leave to appeal to this Court, but the said application was filed beyond time. When the said application came on for hearing before this Court, the delay made by the respondent in preferring his application for special leave was not condoned, and so, the decision of the High Court against the respondent has become final and is no longer open to challenge in this Court. When the application for leave filed by the appellant was argued, and admitted by this Court, it was urged by Mr. Kapoor on his behalf that the observations made by this Court in the case of *Bhim Sen* on which the High Court substantially relied required reconsideration. That is why the appeal has been placed before a Bench of five Judges for final hearing.

6. In dealing with the question raised by Mr. Kapoor before us, it is necessary to refer to the provisions of the Act in regard to the presentation of election petitions and the prayers that the petitioners can make therein. Section 81 provides that an election petition calling in question any election on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 may be presented to the Election Commission by any candidate or any elector within the time specified by the said section. It is thus clear that when a person presents an election petition, it is open to him to challenge the election of the returned candidate under Section 100 (1) and claim a declaration that the returned candidate's election is void. He can also claim a further declaration that he himself or any other candidate has been duly elected. In other words, if the election petition contents itself with claiming a simple declaration that the election of the returned candidate should be declared to be void, the petition falls under Section 100 and the Election Tribunal can either grant the said declaration in which case the petition is allowed, or refuse to grant it in which case the petition is dismissed. It is also possible that the election petition may claim two reliefs, one under Section 100 (1), and the other under Section 101. In this category of cases, the Tribunal first decides the question as to whether the election of the returned candidate is valid or not, and if it is found that the said election is void, it makes a declaration to that effect and then deals

with the further question whether the petitioner himself or some other person can be said to have been duly elected. The scope of the enquiry which the Tribunal has to hold in such cases would obviously depend upon the nature of the reliefs claimed by the petition.

7. There is another fact which it is necessary to bear in mind in dealing with the controversy before us in the present appeal. When elections are held, the declarations of the results are governed by the statutory rules framed under the Act. The counting of votes is dealt with in the relevant rules under Part V. Rule 55 deals with the scrutiny and opening of ballot boxes. Rule 56(1) requires that the ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinised. Rule 56 (2) provides when the returning officer has to reject a ballot paper, the grounds for rejection are specified in clauses (a) to (h). Rules 56(3), (4) and (5) prescribe the procedure for rejecting ballot papers. When the ballot papers have been taken out of the ballot boxes and have been scrutinised, counting follows and that is dealt with by Rule 57 and the following Rules. Rule 63 provides for recounting of votes; Rule 63(1) lays down that after the counting has been completed, the returning officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same. Rule 63(2) permits an application to be made for a recounting and if that application is allowed, a recounting follows. If a recounting is made, then the result is declared once again on the sheet in Form 20. In pursuance of the result of counting thus announced, the result of the election is declared under Rule 64 and a certificate of election is granted to the returned candidate. It is significant that Rule 57(1) provides that every ballot paper which is not rejected under Rule 56 shall be counted as one valid vote, which means that after the ballot papers have been scrutinised and invalid papers are rejected under Rule 56(2), all voting papers which have been taken into the counting by the returning officer shall be deemed to be valid under Rule 57(1). Similarly, when the scrutiny of the nomination papers is made by the returning officer under Section 36 of the Act and as a result, certain nomination papers are accepted, Section 36(8) provides that the said acceptance shall be presumed to be valid. In other words, when an election petition is filed before an Election Tribunal challenging the validity of the election of the returned candidate, *prima facie* the acceptance of nomination papers is presumed to be valid and the voting papers which have been counted are also presumed to be valid. The election petition may challenge the validity of the votes counted, or the validity of the acceptance or rejection of a nomination paper; that is a matter of proof. But the enquiry would commence in every case with *prima facie* presumption in favour of the validity of the acceptance or rejection of nomination paper and of the validity of the voting papers which have been counted. It is necessary to bear in mind this aspect of the matter in dealing with the question about the scope and nature of the enquiry under Sections 100 and 101 of the Act.

8. Mr. Kapoor contends that in dealing with the cases falling under Section 100(1)(d) (iii), Section 97 can have no application and so, the enquiry contemplated in regard to cases falling under that class is not restricted by the prohibition prescribed by Section 97(1). He suggests that when the Tribunal decides whether or not the election of the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote, or the reception of any vote which is void, it has to examine the validity of all votes which have been counted in declaring the returned candidate to be elected, and so, no limitation can be imposed upon

the right of the appellant to require the Tribunal to consider his contention that some votes which were rejected though cast in his favour, had been improperly rejected and some votes which were accepted in favour of the respondent had been improperly accepted. Basing himself on this position, Mr. Kapoor further contends that when Section 101 requires that the Tribunal has to come to the conclusion that in fact the petitioner or such other candidate received a majority of the valid votes, that can be done only when a recount is made after eliminating invalid votes, and so, no limitations can be placed upon the scope of the enquiry contemplated by Section 101(a). Since Section 100(1)(d)(iii) is outside the purview of Section 97, it would make no difference to the scope of the enquiry even if the appellant has not recriminated as required by Section 97(1).

9. On the other hand, Mr. Garg who has addressed to us a very able argument on behalf of the respondent, urged that the approach adopted by the appellant in dealing with the problem posed for our decision in the present appeal is inappropriate. He contends that in construing Sections 97, 100 and 101, we must bear in mind one important fact that the returned candidate whose election is challenged can face the challenge under Section 100 only by making pleas which can be described as pleas affording him a shield of defence, whereas if the election petition besides challenging the validity of the returned candidate claims that some other person has been duly elected, the returned candidate is given an opportunity to recriminate and by way of recrimination he can adopt pleas which can be described as weapons of attack against the validity of the election of the other person. His argument is that though Section 100(1)(d)(iii) is outside Section 97, it does not mean that in dealing with a claim made by an election petition challenging the validity of his election, a returned candidate can both defend the validity of his election and assail the validity of the votes cast in favour of the petitioner or some other person. It is in the light of these two rival contentions that we must now proceed to decide 'what the true legal position in the matter is.

10. It would be convenient if we take a simple case of an election petition where the petitioner makes only one claim and that is, that the election of the returned candidate is void. This claim can be made under Section 100. Section 100(1)(a),(b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under Section 100(1)(d), it would be noticed that what the election petition has to prove is not only the existence of one or the other of the grounds specified in clauses (i) to (iv) of Section 100(1)(d), but it has also to establish that as a result of the existence of the said ground, the result of the election in so far as it concerns a returned candidate has been materially affected. It is thus obvious that, what the Tribunal has to find is whether or not the election in so far as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is: has the election of the returned candidate been materially affected? And no other enquiry is legitimate or permissible in such a case. This requirement of Section 100(1)(d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of Section 100(1)(d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate or whether there has been a

reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case falling under Section 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate, or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in Section 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of enquiry. Therefore, it seems to us that in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of Section 100(1)(d) itself. The enquiry is limited not because the returned candidate has not recriminated under Section 97(1); in fact, Section 97(1) has no application to the case falling under Section 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that, what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition.

11. There are, however, cases in which the election petition makes a double claim; it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that Section 100 as well as Section 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected, that Section 97 comes into play. Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate. The result of Section 97(1) therefore, is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. That being the nature of the proceedings contemplated by Section 97(1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by Section 97 (1) proviso and Section 97 (2). If the returned candidate does not recriminate as required by Section 97, then he cannot make any attack against the alternative claim made by the petition. In such a case, an enquiry would be held under Section 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry a declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate.

12. It is true that Section 101(a) requires the Tribunal to find that the petitioner, or such other candidate for the declaration of whose election a prayer is made in the election petition, has in fact received a majority of the valid votes. It is urged by Mr. Kapoor that the Tribunal cannot make a finding that the alternative candidate has in fact received a majority of the valid votes unless all the votes cast at the election are scrutinised and counted. In our opinion, this contention is not well-founded. We have already noticed that as a result of Rule 57, the Election Tribunal will have to assume that every ballot paper which had not been rejected under Rule 56 constituted one valid vote and it is on that basis that the finding will have to be made under Section 101(a). Section 97(1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected; but if by his failure to make recrimination within time as required by Section 97 the returned candidate is precluded from raising any such plea at the hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under Section 101(a) on the basis that the other votes counted by the returning officer were valid votes and that votes in favour of the returned candidate, if any, which were rejected were invalid. What we have said about the presumed validity of the votes in dealing with a petition under Section 101 (a) is equally true in dealing with the matter under Section 100(1)(d)(iii). We are, therefore, satisfied that even in cases to which Section 97 applies, the enquiry necessary while dealing with the dispute under Section 101(a) will not be wider if the returned candidate has failed to recriminate.

13. If the returned candidate has recriminated and has raised pleas in regard to the votes cast in favour of the alternative candidate or his votes wrongly rejected, then those pleas may have to be tried after a declaration has been made under Section 100 and the matter proceeds to be tried under Section 101(a). In other words, the first part of the enquiry in regard to the validity of the election of the returned candidate must be tried within the narrow limits prescribed by Section 100(1)(d)(iii) and the latter part of the enquiry which is governed by Section 101(a) will have to be tried on a broader basis permitting the returned candidate to lead evidence in support of the pleas which he may have taken by way of recrimination under Section 97(1). If Mr. Kapoor's construction of Section 100(1)(d)(iii) is accepted, it would either make Section 97 otiose and ineffective or make the operation of Section 101 read with Section 97 inconsistent with the operation of Section 100(1)(d)(iii). We are therefore, satisfied that the High Court was right in coming to the conclusion that the Tribunal was in error in holding that "it was an authority charged with the duty of investigating the validity of votes for and against the petitioning and returned candidate or for that matter of any other contesting candidate."

14. It, however, appears that following its own earlier decision in *Inayatullah Khan* case [15 E.L.R. 219] the High Court was disposed to take the view that the enquiry under Section 101(a) was wider and that in making its finding under the said provision, it was open to the Tribunal to scrutinise the votes and determine whether in fact, the petitioner or some other person had received a majority of the valid votes. As we have already indicated, this would be the position only if the returned candidate had recriminated; in the absence of recrimination, it would not be open to the Election Tribunal to allow the returned candidate to challenge the

validity of votes cast in favour of the petitioner or any other candidate in whose favour a declaration is claimed by the election petition or to contend that any of his votes were improperly rejected. We ought to add that the view taken by the Madhya Pradesh High Court in the case of *Inayatullah Khan* in regard to the scope of the enquiry under Section 101 (a) does not correctly represent the true legal position in that behalf. Similarly, the view taken by the Allahabad Court in *Lakshmi Shankar Yadav v. Kunwar Sripal Singh* [22 E.L.R. 47] cannot be said to interpret correctly the scope of the enquiry either under Section 100 or Section 101. The conclusion which we have reached in the present appeal is substantially in accord with the observations made by this Court in the case of *Bhim Sen* though it appears that the points in question were not elaborately argued before the Court in that case.

15. There is another point to which reference must be made. Mr. Garg contended that even if the view taken by the Tribunal about the scope of the enquiry under Section 100 (1) (d) (iii) and Section 101 was right, the relief granted by it was not justified by the pleadings of the appellant in the present proceeding. In support of this argument, he referred us to paragraph 4 of the special pleas filed by the appellant, and relied on the fact that, at the initial stage of the hearing- the Tribunal had framed 18 issues including issue no. 16 which consisted of three parts, viz.,-

(a) Whether any votes cast in favour of respondent no. 1 were wrongly rejected especially pertaining to polling station mentioned in para 4 of the written statement under heading special pleas?

(b) Whether many votes were wrongly accepted in favour of the petitioner appertaining to the polling stations mentioned in para 4 of the special pleas in written statement?

(c) What is the effect of the above in the case?

Later on, when the respondent contended that in the absence of any recrimination by the appellant these issues did not arise on the pleadings, they were struck out, and yet in its judgment the Tribunal has virtually tried these issues and given relief on grounds which were not included even in his written statement. Since this appeal was admitted mainly on the ground that the appellant wanted this Court to reconsider the observations made by it in the case of *Bhim Sen*, we do not propose to rest our decision on this subsidiary point raised by Mr. Garg.

16. It now remains to refer to two decisions which were cited before us during the course of the arguments. In *Vashist Narain Sharma v. Dev Chandra* [(1955)1 SCR 509] this Court has held that Section 100(1)(c), as it then stood, places a burden on the objector to substantiate the objection that the result of the election has been materially affected by the improper acceptance or rejection of the nomination paper. In that connection, this Court observed that where the margin of votes is greater than the votes secured by the candidate whose nomination paper had been improperly accepted, the result is not only materially not affected but not affected at all; but where it is not possible to anticipate the result, the petitioner must discharge the burden of proving that fact and on his failure to do so, the election must be allowed to stand.

17. In *Hari Vishnu Kamath v. Syed Ahmed Ishaque* [AIR 1955 SC 233] advertent to the expression "the result of the election" in Section 100(1)(c), this Court stated that unless there is something in the context compelling a different interpretation, the said expression must be construed in the same sense as in Section 66, and there it clearly means the result on the basis of the valid votes. Basing himself on this observation, Mr. Kapoor has urged that while the Tribunal decides the question as to whether the election of the returned candidate has been materially affected or not, the validity of the votes falls to be considered, and that inevitably enlarges the scope of the enquiry. We do not think that the observation on which Mr. Kapoor relies was intended to lay down any such proposition. All that the reference to Section 66 denotes is that after considering the pleas raised, the Tribunal has to decide whether the election of the returned candidate has been materially affected or not, and that only means that if any votes are shown to have been improperly accepted, or any votes are shown to have been improperly refused or rejected, the Tribunal has to make calculations on the basis of its decisions on those points and nothing more. It is necessary to recall that the votes which have not been rejected by the returning officer under Rule 56 have to be treated as valid, unless the contrary is specifically pleaded and proved. Therefore, we do not think that Mr. Kapoor is justified in contending that the observations in *Hari Vishnu Kamath* case support his plea that the enquiry under Section 100(1)(d)(iii) is wide enough to take in the scrutiny of the validity of all voting papers.

18. In *Keshav Laxman Borkar v. Dr. Devrao Laxman Anande* [(1960)1 S.C.R. 902] this Court has pointed out that the expression " valid votes" has nowhere been defined in the Act, but in the light of the provision of Section 36 (8) of the Act read with Rule 58, two things are clear, first that the candidates are validly nominated candidates whose nomination papers are accepted by the returning officer after scrutiny, and second that the provision of Section 58 provides that the ballot papers which are not rejected under Rule 57 are deemed to be "valid ballot papers" and are to be counted as such.

19. It appears that the position under English Law in regard to the recounting of votes in proceedings under election petitions is substantially similar. As Halsbury points out (*Halsbury's Laws of England*, p. 306 paras 553 & 554):

Where a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, either party must, six days before that appointed for the trial, deliver to the master, and also at the address, if any, given by the other side, a list of the votes intended to be objected to and of the heads of the objection to each of those votes.

It further appears that no evidence may be given against the validity of any vote or under any head not specified in the list, unless by leave of the Court upon such terms as to amendment of the list, postponement of the enquiry, and payment of costs as may be ordered. Where no list of the votes, to which it is intended to take objection, has been delivered within the time specified, the Court has no power to extend the time or to allow evidence of the votes objected to or of the objections thereto to be given at the trial. Therefore, it seems clear that in holding an enquiry either under Section 100(1)(d)(iii) or under Section 101, where Section 97 has not been complied with, it is not competent to the Tribunal to order a general recount of the votes preceded by a scrutiny about their validity.

20. In the result, the appeal fails and is dismissed. We would like to add that though we have accepted the construction of Section 100(1)(d)(iii) and Section 101 for which Mr. Garg contended, no relief can be granted to the respondent, because his application for special leave to appeal against the decision of the High Court has been dismissed since he was unable to make out a sufficient cause for condoning the delay made by him in preferring the said application. In the circumstances of this case, we direct that the parties should bear their own costs. We ought to mention that when this appeal was argued before us on 4th December, 1963, we were told that the fresh election which had been ordered to be held in accordance with the decision of the High Court was fixed for 6th December, 1963; and so, after the case was argued, we announced our decision and intimated to the learned Advocates that our reasons will follow. The present judgment gives the reasons for our decision. Appeal dismissed.

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Charan Lal Sahu v. Giani Zail Singh

AIR 1984 SC 309

CHANDRACHUD, C.J.- These three election petitions are filed under section 14 of the Presidential and Vice-Presidential Elections Act, 1952 to challenge the election of Respondent 1, Giani Zail Singh, as the President of India. The election to the office of the President of India was held on July 12, 1982. In all, 36 candidates had filed nomination papers including Shri Charan Lal Sahu who is the petitioner in election petition no. 2 of 1982 and Shri Nem Chandra Jain who is the petitioner in election petition no.3 of 1982. The Returning Officer accepted the nomination papers of two candidates only: Giani Zail Singh and Shri H.R. Khanna, a retired Judge of this Court. The result of the election was published in the Extraordinary Gazette of India on July 15, 1982 declaring Giani Zail Singh as the successful candidate. He took oath of office on July 25, 1982.

2. We will first take up for consideration election petitions 2 and 3 of 1982 which are filed respectively by Shri Charan Lal Sahu and Shri Nem Chandra Jain both of whom, incidentally, are advocates.

Election Petitions Nos. 2 & 3 of 1982:

3. In Petition No.2 of 1982, the petitioner asks for the following reliefs:

(1) That the Constitutional Eleventh Amendment Act 1961 be declared ultra-vires of the Constitution.

(2) That the sections 5B(6) and 5C, 21(3) of the Presidential and Vice-Presidential Elections Act 1952 (Amended) with Election Rules 1974 be declared, illegal, void and unconstitutional under Article 58 of the Constitution.

(3) That the post of Prime Minister and other Ministers be declared that they are in office of profit hence they have played undue influence in the election of the returned candidate.

(4) That the election of the (Returned Candidate) Respondent No. 1 be declared void and nomination of respondent no. 2 be declared illegally accepted thus, the petitioner be declared as elected as President under the Constitution, as stated in the petition under section 18 of the Act.

(5) That the above system of election of President is bad and unconstitutional. Therefore, it should be held directly in future by all the electorals and Union of India be directed to amend Articles 54, 55 and 56 of the Constitution of India.

(6) That sections 4(1), (2), 5, 6, 7 & 11 of the Salaries and Allowances of Ministers Act 1952 (Act No. 58 of 1952) along with sections 3, 4, 5, 6, 7, 8, and 9 of the Salaries and Allowances of Members of Parliament Act, 1954 be declared void and unconstitutional.

4. In Petition no. 3 of 1982, the petitioner prays that the election of Respondent 1 be set aside on the various grounds mentioned in the petition.

5. Apart from making several vague, loose and offhand allegations, the petitioners allege that Respondent 1 exercised undue influence over the voters through his confidants. We do

not consider it necessary to reproduce those allegations since we are of the opinion that these petitions are not maintainable.

6. A preliminary objection is taken to the maintainability of these petitions by Shri Asoke Sen who appears on behalf of Respondent 1 and by the learned Attorney General. They contend that neither of the two petitioners was a 'candidate' within the meaning of section 13(1) of the Act and since, under section 14A, an election petition can be filed only by a person who was a candidate at the election, the petitioners have no standing to file the petitions and therefore, the petitions must be dismissed as not maintainable.

7. Since the petitioners contested their alleged lack of locus to file the petitions, the following issue was framed by us as a preliminary issue in each of the two election petitions:

Does the petitioner have no *locus standi* to maintain the petition on the ground that he was not a 'candidate' within the meaning of section 13(a) read with section 14A of the Presidential and Vice- Presidential Elections Act, 1952?

8. Section 14 of the Act provides in sub-section (1) that no election shall be called in question except by presenting an election petition to the authority specified in sub-section (2). According to sub-section (2), the authority having jurisdiction to try an election petition is the Supreme Court. By section 14A(1) of the Act, an election petition may be presented on the grounds specified in section 18(1) and 19 "by any candidate at such election" or, "in the case of Presidential election, by twenty or more electors joined together as petitioners". Section 13(a) of the Act provides that unless the context otherwise requires, 'candidate' means a person "who has been or claims to have been duly nominated as a candidate at an election".

9. These provisions show that there are three pre-conditions which govern an election petition by which a Presidential election is challenged. In the first place, such a petition has to be filed in the Supreme Court. Secondly, the petition must disclose a challenge to the election on one or more of the grounds specified in sub- section (1) of section 18 or section 19. Thirdly, and that is important for our purpose, an election petition can be presented only by a person who was a candidate at the Presidential election or by twenty or more electors joined together as petitioners. Since the two election petition which are at present under our consideration have not been filed by twenty or more electors, the question which arises for our consideration is whether the two petitioners in the respective election petitions were 'candidates' at the election held to the office of the President of India.

10. The definition of the word 'candidate' in section 13(a) of the Act consists of two parts. 'Candidate' means a person who has either been duly nominated as a candidate at a presidential election or a person who claims to have been duly nominated. Neither of the two petitioners was duly nominated. This is incontrovertible. Section 5B(1)(a) of the Act provides that on or before the date appointed for making nominations, each candidate shall deliver to the Returning Officer a nomination paper completed in the prescribed form, subscribed by the candidate as assenting to the nomination, and "in the case of Presidential election, also by at least ten electors as proposers and at least ten electors as seconders". It is common ground that the nomination papers filed by the two petitioners were not subscribed by ten electors as proposers and ten electors as seconders. In fact, it is precisely for that reason that the nomination papers filed by the two petitioners were rejected by the Returning Officer. Since

the nomination papers of the two petitioners were not subscribed as required by section 5B (1) (a) of the Act, it must follow that they were not duly nominated as candidate at the election.

11. The petitioners, however, contend that even if it is held that they were not duly nominated as candidates their petitions cannot be dismissed on that ground since they 'claim to have been duly nominated'. It is true that in the matter of claim to candidacy, a person who claims to have been duly nominated is on par with a person who, in fact, was duly nominated. But the claim to have been duly nominated cannot be made by a person whose nomination paper does not comply with the mandatory requirements of section 5B(1) (a) of the Act. That is to say a person whose nomination paper, admittedly, was not subscribed by the requisite number of electors as proposers and seconders cannot claim that he was duly nominated. Such a claim can only be made by a person who can show that his nomination paper conformed to the provisions of section 5B and yet it was rejected, that is, wrongly rejected by the Returning Officer. To illustrate, if the Returning Officer rejects a nomination paper on the ground that one of the ten subscribers who had proposed the nomination is not an elector, the petitioner can claim to have been duly nominated if he proves that the said proposer was in fact an 'elector'.

12. Thus, the occasion for a person to make a claim that he was duly nominated can arise only if his nomination paper complies with the statutory requirements which govern the filling of nomination papers and not otherwise. The claim that he was 'duly' nominated necessarily implies and involves the claim that his nomination paper conformed to the requirements of the statute. Therefore, a contestant whose nomination paper is not subscribed by at least ten electors as proposers and ten electors as seconders, as required by section 5B(1) (a) of the Act, cannot claim to have been duly nominated, any more than a contestant who had not subscribed his assent to his own nomination can. The claim of a contestant that he was duly nominated must arise out of his compliance with the provisions of the Act. It cannot arise out of the violation of the Act. Otherwise, a person who had not filed any nomination paper at all but who had only informed the Returning Officer orally that he desired to contest the election could also contend that he "claims to have been duly nominated as a candidate".

13. It is not the case of the petitioners that the Returning Officer had wrongly rejected their nomination papers even though they were subscribed by ten or more electors as proposers and ten or more electors as seconders. Not only were the nomination papers rightly rejected on the ground of non-compliance with the mandatory requirement of section 5B(1) (a) of the Act, but the very case of the petitioners is that their nomination papers could not have been rejected by the Returning Officer on the ground of non-compliance with the aforesaid provision. Thus, their claim that they have been duly nominated is not within the framework of the Act but is *de hors* the Act. It cannot be entertained.

14. In *Charan Lal Sahu v. Shri Fakruddin Ali Ahmed* [AIR 1975 SC 1288], the petitioner claimed to have been duly nominated as a candidate though his nomination paper was rightly rejected on the ground of non-compliance with the provisions of sections 5B and 5C of the Act. It was held by this Court that merely because a candidate is qualified under Article 58 of the Constitution, it does not follow that he is exempt from compliance with the requirements of law which the Parliament has enacted under Article 71(3) for regulating the mode and the manner in which nominations should be filed. Since the petitioner did not

comply with the provisions of the aforesaid two sections, it was held that he could not claim to have been duly nominated and was therefore not a "candidate". In the result, the election petition was dismissed by the Court on the ground that the petitioner did not have the *locus standi* to maintain it.

15. The challenge of the petitioners to the provision contained in section 5B(1)(a) of the Act on the ground of its alleged unreasonableness has no substance in it. The validity of that provision was upheld by this Court in **Charan Lal Sahu v. Neelam Sanjeeva Reddy** [(1978)3 SCR 1]. Besides, if the petitioners have no locus to file the election petitions, they cannot be heard on any of their contentions in these petitions.

16. Accordingly, our finding on the preliminary issue is against the petitioners. We hold that they have no *locus standi* to file the election petitions since they were neither duly nominated nor can they claim to have been duly nominated as candidates at the presidential election. In view of this finding, Election Petition Nos. 2 and 3 of 1982 are dismissed.

17. It is regrettable that election petitions challenging the election to the high office of the President of India should be filed in a fashion as cavalier as the one which characterises these two petitions. The petitions have an extempore appearance and not even a second look, leave alone a second thought, appears to have been given to the manner of drafting these petitions or to the contentions raised therein. In order to discourage the filing of such petitions, we would have been justified in passing a heavy order of costs against the two petitioners. But that is likely to create a needless misconception that this Court, which has been constituted by the Act as the exclusive forum for deciding election petitions whereby a Presidential or Vice-Presidential election is challenged, is loathe to entertain such petitions. It is of the essence of the functioning of a democracy that election to public offices must be open to the scrutiny of an independent tribunal. A heavy order of costs in these two petitions, howsoever justified on their own facts, should not result in nipping in the bud a well-founded claim on a future occasion. Therefore, we refrain from passing any order of costs and, instead, express our disapproval of the light-hearted and indifferent manner in which these two petitions are drafted and filed.

Election Petition No. 4 of 1982

18. This Election Petition is filed by 27 Members of Parliament to challenge the election of Giani Zail Singh as the President of India. The petitioners belong to four opposition parties: The Lok Dal, The Democratic Socialist Party of India, the Bharatiya Janata Party and the Janata Party. These parties had jointly sponsored the candidature of Shri H.R. Khanna, a former Judge of this Court. Giani Zail Singh was returned as the successful candidate by a large margin of votes.

19. The petitioners, being Members of Parliament, were electors at the Presidential election. Their standing to file this petition is unquestioned.

20. One of the principal challenges of the petitioners to the election of Giani Zail Singh is that he is not a "suitable person" for holding the high office of the President of India. The petitioners have given their own reasons in support of this contention in paragraphs 5 to 8 of the petition. No useful purpose will be served by repeating those reasons in this judgment since, we are of the opinion that the election to the office of the President of India cannot be

questioned on the ground that the returned candidate is not a suitable person for holding that office.

21. The following issue arises on the above contention raised by the petitioners:

Can the election of a candidate to the office of the President of India be challenged on the ground that he is not a suitable person for holding that office?

22. Section 18 of the Presidential and Vice-Presidential Elections Act, 1952, which specifies the "grounds for declaring the election of a returned candidate to be void", reads thus:

18. (1) If the Supreme Court is of the opinion,-

(a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the consent of the returned candidate; or

(b) that the result of the election has been materially affected-

(i) by the improper reception or refusal of a vote, or

(ii) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act; or

(iii) by reason of the fact that the nomination of any candidate (other than the successful candidate), who has not withdrawn his candidature, has been wrongly accepted; or

(c) that the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate has been wrongly accepted;

the Supreme Court shall declare the election of the returned candidate to be void.

(2) For the purposes of this section, the offences of bribery and undue influence at an election have the same meaning as in Chapter IXA of the Indian Penal Code.

23. Section 19 of the Act, which specifies the "grounds for which a candidate other than the returned candidate may be declared to have been elected", reads thus:

If any person who has lodged an election petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Supreme Court is of opinion that in fact the petitioner or such other candidate received a majority of the valid votes, the Supreme Court shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected.

Provided that the petitioner or such other candidate shall not be declared to be duly elected if it is proved that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.

24. These being the only provisions of the Act under which the election of a returned candidate can be declared void, the question as to whether the returned candidate is suitable for holding the office of the President is irrelevant for the purposes of this election petition.

While dealing with an election petition filed under section 14 of the Act, this Court cannot inquire into the question whether the returned candidate is suitable for the office to which he is elected. The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer or limit those rights. Therefore, for deciding the question whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing that particular election. They have to function within the framework of that law and cannot travel beyond it. Only those persons on whom the right of franchise is conferred by the statute can vote at the election. In the instant case, that right is conferred on every 'elector' as defined in section 2(d) of the Act, which provides:

'Elector' in relation to a presidential election, means a member of the electoral college referred to in Article 54, and in relation to a Vice-Presidential election, means a member of the electoral college referred to in Article 66.

Only those persons who are qualified to be elected to the particular office can contest the election. In the instant case, that right is regulated by section 5A of the Act which provides:

Any person may be nominated as a candidate for election to the office of President or Vice-President if he is qualified to be elected to that office under the Constitution.

The election can be called into question in the manner prescribed by the statute and not in any other manner. In the instant case, section 14(1) of the Act provides that no election shall be called in question except by presenting an election petition to the authority specified in sub-section (2). By sub-section (2) of section 14, the Supreme Court is constituted the sole authority for trying an election petition. Finally, an election can be called into question and set aside on those grounds only which are prescribed by the statute. In the instant case, the grounds for setting aside the election to the office of the President or the Vice President and the grounds on which a candidate other than the returned candidate may be declared to have been elected are laid down in sections 18 and 19 of the Act. The election can neither be questioned nor set aside on any other ground. Therefore, the challenge to the election of the returned candidate on the ground of his want of suitability to occupy the office of the President cannot be entertained and must be rejected out of hand.

25. Apart from the legal position that the rights flowing out of an election are statutory and not common law rights, it is impossible to conceive that any court of law can arrogate to itself the power to declare an election void on the ground that the returned candidate is not a suitable person to hold the office to which he is elected. Suitability of a candidate is for the electorate to judge and not for the court to decide. The Court cannot substitute its own assessment of the suitability of a candidate for the verdict returned by the electorate. The verdict of the electorate is a verdict on the suitability of the candidate. 'Suitability' is a fluid concept of uncertain import. The ballot-box is, or has to be assumed to be, its sole judge. Were the Court to exercise the power to set aside an election on the ground that, in its opinion, the returned candidate is not a suitable person for the office to which he is elected, the statute will stand radically amended so as to give to the Court a virtual right of veto on the question of suitability of the rival candidates. And then, an unsuccessful candidate will

challenge the election of the successful candidate on the ground that he is more suitable than the latter. That is an impossible task for the Courts to undertake and indeed, far beyond the limits of judicial review by the most liberal standard.

26. Accordingly, the challenge to the election of the returned candidate on the ground that he is not suitable for holding the office of the President of India fails and is rejected. Our finding on the issue is in the negative.

27. The other grounds on which the petitioners have challenged the election of Respondent 1 are these:

(1) That Shri M.H. Beg, former Chief Justice of the Supreme Court and now Chairman of the Minorities Commission, was engaged by Respondent 1 and by the Prime Minister Smt. Indira Gandhi "for influencing the votes of the minority communities";

(2) that Rao Birendra Singh, a cabinet Minister of the Government of India, who is a "supporter and a close associate" of Respondent 1, exercised undue influence over the voters by misusing the Government machinery in that, a statement issued by him asking the voters to vote for Respondent 1 was published by the Press Information Bureau, Government of India;

(3) that the Prime Minister participated in the election campaign of Respondent 1 and misused the Government machinery for that purpose;

(4) that the Prime Minister made a communal appeal to the Akali Dal that its members should vote for Respondent 1; and

(5) that Government helicopters and cars belonging to the Government were misused for the purpose of election of Respondent 1. It is alleged by the petitioners that these various acts were committed by the well-wishers and supporters of Respondent 1 with his connivance.

28. It was contended by Shri Asoke Sen that, even assuming that these allegations are true, they do not disclose any cause of action for setting aside the election of the Respondent. In view of these rival contentions, we framed the following issue for consideration:

Whether the averments in the Election Petition, assuming them to be true and correct, disclose any cause of action for setting aside the election of the returned candidate (Respondent 1) on the ground stated in section 18(1) (a) of the Presidential and Vice-Presidential Elections Act, 1952?

29. Section 18(1) (a) of the Act which we have already set out, provides that the Supreme Court shall declare the election of the returned candidate to be void if it is of opinion-

That the offence of bribery and undue influence at the election has been committed by the returned candidate or by any person with the consent of the returned candidate.(emphasis supplied)

We may keep aside the question of bribery since there is no allegation in that behalf. Nor is it alleged that the offence of undue influence was committed by the returned candidate himself. The allegation of the petitioners is that the offence of undue influence was committed by certain supporters and close associates of Respondent 1 with his connivance. It is patent that this allegation, even if it is true, is not enough to fulfil the requirements of section 18(1) (a).

What that section, to the extent relevant, requires is that the offence of undue influence must be committed by some other person with the "consent" of the returned candidate. There is no plea whatsoever in the petition that undue influence was exercised by those other persons with the consent of Respondent 1.

30. It is contended by Shri Shujatullah Khan who appears on behalf of the petitioners, that connivance and consent are one and the same thing and that there is no legal distinction between the two concepts. In support of this contention, learned counsel relies upon the meaning of the word 'connivance' as given in **Webster's Dictionary** (Third Edition, Volume 1, p. 481); **Random House Dictionary** (p.311); **Black's Law Dictionary** (p. 274); **Words and Phrases** (Permanent Edition, Volume 8A, p. 173); and **Corpus Juris Secundum** (Volume 15A, p. 567). The reliance on these dictionaries and texts cannot carry the point at issue any further. The relevant question for consideration for the decision of the issue is whether there is any pleading in the petition to the effect that the offence of undue influence was committed with the consent of the returned candidate. Admittedly, there is no pleading of consent. It is then no answer to say that the petitioners have pleaded connivance and, according to dictionaries, connivance means consent. The plea of consent is one thing; the fact that connivance means consent (assuming that it does) is quite another. It is not open to a petitioner in an election petition to plead in terms of synonyms. In these petitions, pleadings have to be precise, specific and unambiguous so as to put the respondent on notice. The rule of pleadings that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary. 'Connivance' may in certain situations amount to consent, which explains why the dictionaries give 'consent' as one of the meanings of the word 'connivance'. But it is not true to say that 'connivance' invariably and necessarily means or amounts to consent, that is to say, irrespective of the context of the given situation. The two cannot, therefore, be equated. Consent implies that parties are *ad idem*. Connivance does not necessarily imply that parties are of one mind. They may or may not be, depending upon the facts of the situation. That is why, in the absence of a pleading that the offence of undue influence was committed with the consent of the returned candidate, one of the main ingredients of section 18(1) (a) remains unsatisfied.

31. The importance of a specific pleading in these matters can be appreciated only if it is realised that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says- 'connivance' here, or whether the petitioner has used expression as meaning 'consent'. It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word 'consent' for the word 'connivance' which occurs in the pleadings of the petitioners.

32. The legislative history of the statute lends support to our view that for the purposes of section 18(1) (a), connivance is not the same thing as consent. Originally, when the Act was passed in 1952, section 18(1)(a) provided that the Supreme Court shall declare the election of

the returned candidate void if it is of the opinion that the offence of bribery or undue influence has been committed by the returned candidate or by any person 'with the connivance' of the returned candidate. This sub-section was amended by section 7 of the Presidential and Vice-Presidential Elections (Amendment) Act of 1974, which came into force on March 23, 1974. The word 'connivance' was substituted by the word 'consent' by the Amendment Act. If connivance carried the same meaning as consent and if one was the same as the other. Parliament would not have taken the deliberate step of deleting the word 'connivance' and substituting it by the word 'consent'. The amendment made by the Amendment Act of 1947 shows that connivance and consent connote distinct concepts for the purpose of section 18(1) (a) of the Act.

33. Since, admittedly, there is no pleading in the Election Petition that the offence of undue influence was committed with the consent of the returned candidate, the petition must be held to disclose no cause of action for setting aside the election of the returned candidate under section 18(1) (a) of the Act.

34. Apart from this, Shri Asoke Sen is right that granting everything in favour of the petitioners and assuming that all that they have alleged is true and correct, no case is made out for setting aside the election of the returned candidate under section 18(1) (a) of the Act. We will first take up the allegation of the petitioners that Shri M.H. Beg, Chairman of the Minorities Commission, canvassed support for Respondent 1. The question which we have to consider is whether, in doing so, Shri Beg is guilty of the offence of undue influence. Section 18(2) of the Act provides that for purposes of section 18, the offences of bribery and undue influence at an election have the same meaning as in Chapter IXA of the Penal Code. That Chapter which was introduced into the Penal Code by Act 39 of 1920, deals with "Offences relating to Elections". Sections 171B and 171C of the Penal Code define the offences of bribery and undue influence respectively. Section 171C reads thus:

171C. Undue influence at elections: (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever- (a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or (b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

35. The gravamen of this section is that there must be interference or attempted interference with the 'free exercise' of any electoral right. 'Electoral right' is defined by section 171A(b) to mean the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election. In so far as is relevant for our purpose, the election petition must show that Shri Beg interfered with the free exercise of the

voters' right to vote at the Presidential election. The petition does not allege or show that Shri Beg interfered in any manner with the free exercise of the right of the voters to vote according to their choice or conscience. The petition alleges that Shri Beg commented severely upon the suitability of the rival candidate Shri H.R. Khanna by pointing out the so-called infirmities in his judgment in the Fundamental Rights case. On the supposition that Judges constitute brotherhood and are bound by ties of institutional loyalty, one may not approve of the tone and temper of the personal attack made by Shri Beg on Shri H.R.Khanna. But that is beside the point. We are neither concerned with the propriety of the statement made by Shri Beg nor with the question as to who out of the two candidates, is more suitable to be the President of India. The point of the matter is that by conveying to the voters that Respondent 1 was a much safer candidate than Shri Khanna and that Shri Khanna would not be a suitable candidate to hold the office of the President of India by reason of a judgment of his, Shri Beg could not be said to have interfered with the free exercise of the right of the voters to vote at the election. If the mere act of canvassing in favour of one candidate as against another were to amount to undue influence, the very process of a democratic election shall have been stifled because, the right to canvass support for a candidate is as much important as the right to vote for a candidate of one's choice. Therefore, in order that the offence of undue influence can be said to have been made out within the meaning of section 171C of the Penal Code, something more than the mere act of canvassing for a candidate must be shown to have been done by the offender. That something more may, for example, be in the nature of a threat of an injury to a candidate or a voter as stated in sub-section 2(a) of section 171C of the Penal Code or, it may consist of inducing a belief of divine displeasure in the mind of a candidate or a voter as stated in sub-section 2(b). The act alleged as constituting undue influence must be in the nature of a pressure or tyranny on the mind of the candidate or the voter. It is not possible to enumerate exhaustively the diverse categories of acts which fall within the definition of undue influence. It is enough for our purpose to say, that of one thing there can be no doubt: The mere act of canvassing for a candidate cannot amount to undue influence within the meaning of section 171C of the Penal Code.

36. In *Baburao Patel v. Dr. Zakir Husain* [AIR 1968 SC 904], this Court while emphasising the distinction between mere canvassing and the exercise of undue influence, observed:

It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercise of any electoral right begins. That is a matter to be determined in each case; but there can be no doubt that, if what is done is merely canvassing, it would not be undue influence. As sub-section (3) of section 171C shows, the mere exercise of a legal right without intent to interfere with an electoral right would not be undue influence.

37. In *Shiv Kripal Singh v. Shri V.V. Giri* [AIR 1970 SC 2097], the Court observed that “if any acts are done which merely influence the voter in making his choice between one candidate or another, they will not amount to interference with the free exercise of the electoral right”, that the expression ‘free exercise’ of the electoral right must be read in the context of an election in a democratic society and, therefore, candidates and their supporters must be allowed to canvass support by all legal and legitimate means. Accordingly, the

offence of undue influence can be said to have been committed only if the voter is put under a threat or fear of some adverse consequence, or if he is induced to believe that he will become an object of divine displeasure or spiritual censure if he casts or does not cast a vote in accordance with his decision:

But, in cases where the only act done is for the purpose of convincing the voter that a particular candidate is not the proper candidate to whom the vote should be given, that act cannot be held to be one which interferes with the free exercise of the electoral right.

38. *Ram Dial v. Sant Lal* [AIR 1959 SC 855] was a case of undue influence under proviso(a)(ii) to section 123(2) of the Representation of the People Act, 1951. The appellant therein had circulated a poster under the authority of the supreme religious leader of the Namdhari Sikhs in a constituency where a large number of voters were Namdhari Sikhs. This Court observed that there cannot be the least doubt that even a religious leader has the right to freely express his opinion on the comparative merits of the contesting candidates and to canvass for such of them as he considers worthy of the confidence of the electors. Such a course of conduct on his part will only be a use of his great influence amongst a particular section of the voters in the constituency and that, it will amount to an abuse of his great influence only if the words which he utters leave no choice to the persons addressed by him in the exercise of their electoral rights. On the facts of the case it was held that the religious leader, by his exhortations and warnings to the Namdhari electors, that disobedience of his mandate will carry divine displeasure and spiritual censure left no choice to them to exercise their right of voting freely.

39. Thus, the allegation of the petitioners that Shri Beg asked the voters to cast their votes in favour of Respondent 1 and not to cast them for Shri H.R. Khanna on the ground that the latter was not a safe or suitable candidate as compared with Respondent 1, does not make out the offence of undue influence as defined in Section 171C of the Penal Code. It must follow that the election petition does not disclose any cause of action for setting aside the election of Respondent 1 on the ground of undue influence as specified in section 18(1) (a) of the Act.

40. The remaining grounds alleged by the petitioners for invalidating the election of Respondent 1 are misconceived. The use of Government machinery, abuse of official position and appeal to communal sentiments so long as such appeal does not amount to undue influence, are not considered by the Legislature to be circumstances which would invalidate a Presidential or a Vice-Presidential election. Assuming, therefore, that any such acts were done, they cannot be relied upon for declaring the election of Respondent 1 void. As we have said already, the laws of election are self-contained codes and the rights arising out of elections are the off-springs of those laws. We cannot engraft the provisions of the Representation of the People Act, 1951 upon the statute under consideration and thereby enlarge the scope of an election petition filed to challenge a Presidential or Vice-Presidential election. Such an election can be set aside on the grounds specified in section 18(1) of the Act only. Since the other allegations made by the petitioners do not fall within the scope of that provision, they have to be rejected.

41. For these reasons, our finding on the issue under consideration is that the averments in the election petition, assuming them to be true and correct, do not disclose any cause of action

for setting aside the election of the returned candidate on the grounds stated in section 18(1)(a) of the Act.

42. It was contended on behalf of the petitioners that the Act would be unconstitutional if it is interpreted as limiting the challenge to the Presidential or Vice- Presidential election to the grounds set forth in section 18(1). In support of this argument reliance is placed by learned counsel for the petitioners on the provisions contained in Article 71(1) of the Constitution which says:

All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

It is urged that the Constitution has conferred upon the Supreme Court the power to inquire into and decide upon every kind of doubt or dispute arising out of or in connection with a Presidential election and since, section 18(1) restricts that power to the grounds stated therein, it is *ultra vires* Article 71(1). This argument overlooks that clause (3) of Article 71 confers power upon the Parliament, subject to the provisions of the Constitution, to make a law for regulating matters relating to or connected with the election of the President or the Vice-President. While enacting a law in pursuance of the power conferred by Article 71(3), the Parliament is entitled to specify the particular kind of doubts or disputes which shall be inquired into and decided by the Supreme Court. If the petitioners were right in their contention, every kind of fanciful doubt or frivolous dispute under the sun will have to be inquired into by this Court and election petitions will become a fertile ground for fighting political battles.

43. That leaves for consideration one other contention. Article 58(1) of the Constitution provides that no person shall be eligible for election as President unless he (a) is a citizen of India, (b) has completed the age of thirty-five years, and (c) is qualified for election as a member of the House of the People. Article 84(a) provides that a person shall not be qualified to be chosen to fill a seat in Parliament unless, *inter alia* he makes and subscribes an oath or affirmation set out for the purpose in the Third Schedule. The argument of the petitioners is that a candidate contesting a Presidential election must take the oath as prescribed by Article 84(a) and since Respondent 1 had not taken such oath, his election is unconstitutional. This argument is untenable. Article 58 which prescribes "Qualifications for Elections as President", provides three conditions of eligibility for contesting the Presidential election. One of these conditions is that the candidate must be qualified for election as a member of the House of the People. Article 84 speaks of "qualifications for membership of Parliament". No person can fill a seat in the Parliament unless, *inter alia*, he subscribes to the oath or affirmation according to the form set out in the Third Schedule. The form prescribed by the Third Schedule shows that it is restricted to candidates who desire to contest the election to the Parliament. In the very nature of things, a candidate who wants to contest the election for the office of the President cannot take the oath in any of the forms prescribed by the Third Schedule. That Schedule does not prescribe any form of oath for a person who desires to contest a Presidential election.

44. In the result, Election Petition No. 4 of 1982 is also dismissed.

Special Reference No. 1 of 1974

AIR 1974 SC 1682

RAY, C.J.-This reference has been made by the President under Article 143(1) of the Constitution of India for the opinion of this Court on certain questions of constitutional importance bearing upon the election to fill the vacancy on the expiry of the term of office of the President on 24th August, 1974.

2. The reference turns on the principal question as to whether the election to fill the vacancy caused on the expiry of the term of office of the President must be completed before the expiry of the term of office notwithstanding the fact that the Legislative Assembly of the State of Gujarat is dissolved.

3. Article 52 states that there shall be a President of India. Article 56(1) states that the President shall hold office for a term of five years from the date on which he enters upon his office. Article 60 states that every President before entering upon his office shall make and subscribe an oath or affirmation as mentioned therein. Article 63(1) states that an election to fill a vacancy caused by the expiration of the term of the office of President shall be completed before the expiration of the term. Article 56(1) (c) states that the President shall, notwithstanding, the expiration of his term, continue to hold office until his successor enters upon his office.

4. The fixed term of office mentioned in Article 56(1) as well as the mandate in Article 62(1) that the election to fill a vacancy caused by the expiration of the term of office shall be completed before the expiration of the term reflects the dominant constitutional purpose and intent regarding the time when the election of the President is to be held. Further, the provision in Article 62(2) that an election to fill a vacancy in the office of the President by reason of his death, resignation or removal or otherwise be held as soon as possible after and in no case later than six months from the date of the occurrence of the vacancy, shows that the time to hold an election to fill a vacancy is also mandatory in character.

5. The completion of election before the expiration of the term in the case of vacancy caused by the expiry of the term as well as filling the vacancy by holding an election not later than six months from the date of the occurrence of the vacancy in the other case does not contain any provision for extension of time. By way of contrast reference may be made to Article 83 where it is said that though the expiration of the period of five years shall operate as a dissolution of the house, the period may, while a proclamation of emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation has ceased to operate.

6. The interveners suggested that the word "otherwise" occurring in Article 62(2) of the Constitution contemplates a case of filling a vacancy occurring by the expiration of the term but where such vacancy cannot be filled up by completing the election before the expiration of the term by reason of dissolution of the Assembly. The interveners submitted that a vacancy could in such a case be filled up not later than six months from the date of the occurrence of the vacancy. The submission of the interveners is unsound. The word

"otherwise" does not refer to a vacancy caused by the expiration of the term of office for the obvious reason that the same is the subject matter of Article 62(1). The marginal note to Article 62 fully bears this out. Further, a President whose term has expired can continue to hold the office only under Article 56(1) (c) until his successor enters upon his office. Article 56(1) (c) is complementary to Article 62(1). Here successor means a successor elected before or even after the expiration of the term stated in Article 62(1) and as fully explained later on.

7. The word "otherwise" may take in cases where, for example, a President becomes disqualified to hold the office or where his election is declared void, and, therefore, he cannot hold the office. In such cases, an election is to be held not later than six months from the date of the occurrence of the vacancy.

8. Article 65(1) provides that where the office of the President by reason of his death, resignation or removal or otherwise becomes vacant, the Vice-President shall act as President until the date on which a new President elected to fill vacancy enters upon his office. Article 56(1) is complementary to Article 62(2). An election to fill a vacancy in the office of the President for the reasons mentioned in Article 62(2) obviously does not attract Article 56(1) (c). This is another reason which establishes that the word "otherwise" used in relation to vacancy in the office of the President under Article 62(2) cannot cover the case of a vacancy in the office of the President by the expiration of the term. Vacancy under Article 62(2) does not enable the President to continue in office.

9. The interveners suggested that section 7 of the Presidential and Vice-Presidential Elections Act, 1952 (hereinafter referred to as the 1952 Act) shows that an election to fill the vacancy in the office of the President may not be completed before the expiration of the term. The interveners, therefore, submitted that it could not be held that the completion of election before the expiration of the term was a mandatory provision.

10. Section 7 of the 1952 Act states that if a candidate whose nomination has been made and is found to be in order on scrutiny, dies after the time fixed for nomination and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission, and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election.

11. These provisions in section 7 of the 1952 Act are to be considered along with section 4 of the 1952 Act. Section 4(3) of the 1952 Act states that in the case of an election to fill a vacancy caused by the expiration of the term of office of the President or Vice-President, the notification under sub-section (1) shall be issued on, or as soon as conveniently may be, after the sixtieth day before the expiration of the term of office of the outgoing President or Vice-President, as the case may be, and the dates shall be so appointed under the said sub-section that the election will be completed at such time as will enable the President or the Vice-President thereby elected to enter upon his office on the day following the expiration of the term of office of the outgoing President or Vice-President, as the case may be.

12. The 1952 Act indicates that the provisions contemplate the completion of the election before the expiration of the term. Section 7 of the 1952 Act speaks of the contingency of death. In spite of the countermanding of the election in the case of death of a person whose

nomination has been found in order it is provided that any other candidate whose nomination was valid at the time of the countermanding of the poll will not be required to present a fresh nomination. Again, it is provided that no person who has withdrawn his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election. Therefore, it is the same process of Presidential election which, was commenced under the Act for completion before the expiration of the term. It is true that fresh nominations can be presented by persons other than those whose nominations have been found to be in order. That is only because people are given the choice for presenting fresh nomination papers for candidates of choice because of the new and unanticipated events. It is not entirely a fresh election. It is in some respects a new election. It is in other respects a continuation of the election which commenced but could not be completed because of death.

13. In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by carefully attending the whole scope of the provision to be construed. The key to the opening of every law, is the reason and spirit of the law, it is the *animus impotentia*, the intention of the law maker expressed in the law itself, taken as a whole.

14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and state interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute, has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God.

16. The effect of Article 62(1) was considered by this Court in **Narayan Bhasker Khare v. The Election Commission of India** [(1957) SCR 1081]. Das, C.J. spoke, for the Constitution Bench of seven learned Judges. The petitioner there made an application under Article 71(1) of the Constitution invoking the jurisdiction of this Court to inquire into and

decide what had been described as a grave doubt in connection with the election of the President and to direct the Election Commission not to proceed with the polling which had been fixed for 6 May, 1957 but to hold the same after completing the elections to the Lok Sabha and the Legislatures in all the States of the Indian Union including the Union territory. One of the contentions in that case was that one of the petitioners was a prospective candidate for election to the Lok Sabha from one of the Punjab constituencies where election was yet to be held and he would be prevented from exercising his right to vote for the election of the President. This Court held that Article 62 of the Constitution required that the election of the President must be completed within the time fixed by it and this provision is conceived in the interest of the people in general and is mandatory in character. The interveners submitted that the observation of this Court in the *Khare* case about the peremptory requirement to fill the vacancy caused by the expiration of the term of office was obiter. That is not so. Das, C. J. speaking of Article 62 said "it is necessary to bear in mind this clear mandatory provision of the Constitution". That is the true position.

17. There, is another important observation in the *Khare* case. It was contended there that the electoral college mentioned in Article 54 must be constituted after elections in all States and Union Territories are completed and should consist of all the elected members falling within both the categories because the Presidential election could not be held until the vacancies were filled up. Elections did not take place in Himachal Pradesh. Elections in two constituencies of the State of Punjab also did not take place. It was held that the election process could not be held up till after the expiry of the five years term because it would involve non-compliance with the mandatory provisions of Article 62. Das, C. J. referred to the electoral college and said that if there are vacancies in Parliament or in the Legislature of one or more States, the election of the President required by Article 62(1) to be held before the expiry of the term of the outgoing President cannot be held up until the vacancies were filled up. This Court found that not holding the election in Himachal Pradesh could not hold up the election of the President.

18. The term of office of the President is fixed. The election to fill the vacancy caused by the expiration of the term is to be completed before the expiration of the term. It is in that context that the outgoing President notwithstanding the expiration of the term continues to hold office under Article 56(1) until his successor enters upon office. The successor can only enter upon his office after he takes the oath under Article 60. He can take oath only after the election. It is possible that the, successor cannot enter upon his office on the day following the expiration of the term of office of the outgoing President for unavoidable reasons. That is why Articles 56(1), 56(1) (c) and 62(1) are to be read together to give effect to the constitutional intent and content that the election to the vacancy caused by the expiration of the term of the President is to be completed before the expiration of the term.

19. The interveners submitted that the true character of Article 62 depended on Articles 54 and 55 of the Constitution. Article 54 states that the President shall be elected by the members of an electoral college consisting of (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the states. The Constitution-makers may well have visualised that all legislative bodies should be in existence at the time of the Presidential election and all elected members of such bodies should participate in that

election. But that is only an ideal. The realisation of this ideal is not practicable, because of the likely vacancies in the legislative bodies due to death, disqualification, resignation and the like.

20. Article 55(1) states that as far as practicable, there shall be uniformity in the scale of representation of the different states at the election of the President. Article 55(2) states that for the purpose of securing such uniformity among the states *inter se* as well as parity between the states as a whole and the union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each state is entitled to cast at such election shall be determined in a manner set out in the sub-article.

21. The interveners submitted that the units of the electoral college were Houses of Parliament and the Legislative Assemblies of states. The Jan Sangh submitted that the democratic character of the Constitution demanded that there should be elected members of Legislative Assemblies of States to be entitled to cast votes at such election. It was said that if states were denied such right, they would be denied representation. It was also said that if states were denied the right to cast votes at the election, the parity between the states and the union would be disturbed.

22. The members of electoral college mentioned in Article 54 are not both Houses of Parliament and the Legislative Assemblies of the states. The essence as well as scope of Article 54 is merely to prescribe qualifications required for electors to elect President. The elected members of both Houses of Parliament and the Legislative Assemblies of states are the only members of the electoral college.

23. The essence of Article 55 merely lies in the application of formulae each elector having the required qualifications under Article 54 shall be entitled to exercise the number of votes in accordance with Article 55. Neither Article 54 nor Article 55 has anything to do either with the time of the election to fill the vacancy before the expiration of the term or to prevent the holding of the election before the expiration of the term by reason of dissolution of Legislative Assembly of a state.

24. The electoral college as mentioned in Article 54 is independent of the legislatures mentioned in Article 54. None of the legislatures mentioned in Article 54 has, for the purpose of that Article, any separate identity *vis-a-vis* the electoral college. The electoral college compendiously indicates a number of persons, holding the qualifications specified in the Article to constitute the electorate for the election of the President and to act as independent electors.

25. Neither Article 54 nor Article 55 prescribes the circumstances in which or the time when the election of the President shall take place. Article 55 has no concern with the competence of the election of the President because of dissolution of the Legislative Assembly of a state. Article 55(2) deals with the formulae for securing uniformity among the states *inter se* and parity between states as a whole and the union. It is important to notice that parity is not between each state separately as a unit on the one hand and the union on the other but between the states as a whole and the union.

26. Article 55(1) states that as far as practicable, there shall be uniformity in the scale of representation. It is indisputable that the uniformity among the states *inter se* and parity between the states as a whole and the union which are contemplated in Article 55(2) are not

the same thing as uniformity in the scale of representation of the different states contemplated in Article 55(1). The words 'as far as practicable' in Article 55(1) in relation to uniformity in the scale of representation of the states are important. Article 55(1) shows that the words 'as far as practicable' indicate that in practice the scale of representation may not be uniform because of the actual number of electors entitled at the date of election to cast their votes. The actual number of electors at the date of the election of the President may not be equal to the total number of all the elected members of both Houses of Parliament and all Legislative Assemblies of all states.

27. Article 55 indicates the method of calculating as to how many votes an elected member of the electoral college can cast at the Presidential election. Article 55 has nothing to do with any vacancy in the electoral college as mentioned in Article 71 (4), or a censer of membership of the electoral college, by reason of a member not fulfilling the character of elected member of both Houses of Parliament or of Legislative Assemblies of states.

28. The words "an electoral college consisting of" in Article 54 mean that the electoral college shall consist of persons mentioned therein. The words 'consisting of' refer to the strength of the electoral college. The Houses of Parliament and the Legislative Assemblies are mentioned in Article 54 only for the purpose of showing the qualifications of electoral college. The dissolution of the Assembly means that there are no elected members of that dissolved Assembly. The electoral college is always ready to meet the situation at the expiry of the term of office or any vacancy caused by death, resignation or removal or otherwise. The elected members of a dissolved Legislative Assembly of a state are no longer members of the electoral college consisting of the elected members of both Houses of Parliament and elected members of the Legislative Assemblies of the states and are, therefore, not entitled to cast votes at the Presidential election.

29. It was said by the interveners that Article 54 reflects the democratic pattern of participation by the states in the choice of the President and if a state were denied such a right, it would be undemocratic. Recourse was taken to Article 368 to show that Articles 54 and 55 were mentioned in the proviso to Article 368 and if any amendment of Article 54 and 55 was required, consent of the states was necessary. It was, therefore, said by the interveners that Articles 54 and 55 read with Article 368 would be a key to the interpretation of Article 62 that no election of the President could be held without the representation of elected members of Legislative Assemblies of the State where the Assembly has been dissolved. These submissions on behalf of the interveners are without substance.

30. Article 54 lays down the qualifications for membership of the electoral college. The Gujarat State Assembly has been dissolved under Article 174. As a result of the dissolution, there are no elected members of the Legislative Assembly in a state. The electoral college consists of elected members of State Assemblies. If the Legislative Assembly of a state is dissolved, the members of that dissolved Legislative Assembly do not fulfil the character of elected members of a state assembly. It will not only be undemocratic but also unconstitutional to deny the elected members of both the Houses of Parliament as well as the elected members of the Legislative Assemblies of the states the right to elect the President in accordance with the provisions of the Constitution only because the Assembly of a State is dissolved. The true meaning of Article 54 is that such persons as possess the qualification of

being elected members of both Houses of Parliament and of Legislative Assemblies of states at the crucial time of the date of election will be eligible members of the electoral college entitled to cast vote at the election to fill the vacancy caused by the expiration of the term of office of the President.

31. The submissions of the interveners that Article 62 will be construed in the light of Articles 54, 55 and 368 are unsound. It has always to be remembered that Constitution is "the revelation of great purposes" which were intended to be achieved by the Constitution as a continuing instrument of Government. In *Warburton v. Loveland* [(1832) 2D & Cl. 480] it has been said that 'no rule of construction can require that when the words of one part of a statute convey a clear meaning, it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part'. Article 62 is the constitutional date and other provisions like Articles 54, 55 subserve Article 62. The Legislative Assemblies of the States are not members of the electoral college. None of the Articles 368, 54, 55 can rob Article 62 of its constitutional content. Article 62 stands by itself independent of any other provision.

32. It is appropriate at this stage to refer to provisions contained in Article 71(4) of the Constitution. Article 71(4) was introduced by Constitution (Eleventh Amendment) Act, 1961. The provision in Article 71(4) is that the election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him. Article 71(4) was introduced after the decision of this Court in the *Khare* case. Das, C.J. said in the *Khare* case that though there are vacancies in the Parliament or the State Legislative Assemblies by reason of elections not having been held in Himachal Pradesh and two Constituencies in the State of Punjab, the holding of Presidential Election cannot be postponed. This Court in the *Khare* case stated that doubts or disputes of that nature could be canvassed only after the conclusion of the entire election. No opinion was expressed in the *Khare* case as to whether a vacancy of the type in that case in the Electoral College could be a ground for calling in question the election of the President. To remove all doubts, Article 71 (4) was introduced.

33. If as a result of dissolution of a Legislative Assembly of a state, there are no elected members of the Legislative Assembly of a state, a state will not have any elected members of a state Legislative Assembly to qualify for the electoral college. It may be said on the analogy of the observations in the *Khare* case that there are vacancies in the electoral college by reason of the fact that there are no elected members of the Legislative Assembly of a state where the Legislative Assembly is dissolved. That matter will not be a ground either for preventing the holding of the election on the expiry of the term of the President or suggesting that the election to fill the vacancy caused by the expiry of the term of the office of the President could be held only after the election to the Legislative Assembly of a state where the Legislative Assembly is dissolved is held.

34. Under Article 54, only elected members of both Houses of Parliament and the Legislative Assemblies of the states are members of the electoral college. The numerical strength of the electoral college will be the total number of elected members of both Houses of Parliament and the Legislative Assemblies of the states. At any particular time there may not be the full strength of the electoral college. At the relevant date of the Presidential election

if a person who was prior to that relevant date an elected member of the Houses of Parliament or of the Legislative Assemblies of the states and ceased to become an elected member of any of the legislative bodies by reason of death or resignation or disqualification or dissolution of the legislative body such a person would not possess the qualification to be an elector. Article 71(4) was really introduced after the **Khare** case to shut out any challenge to the election on the ground that there was any vacancy among members of the electoral college. In view of the constitutional declaration or exposition of Article 71(4) it is manifest that the language is of wide amplitude, viz., existence of any vacancy for any reason whatever among the members of the electoral college. It will take in any case where a person who as an elected member of the Houses of Parliament or the Legislative Assembly of a state became, entitled to be a member of the electoral college but ceased to be an elected member at the relevant date of the election and therefore became disentitled to cast vote at the election and that vacancy among members of the electoral college was not filled up.

35. We refrain from expressing any opinion on the question which has been posed during arguments as to what would be the position if there is "*malafide* dissolution" of a state Legislative Assembly or Assemblies, or if there is, after the dissolution of the Assembly or Assemblies, a "*malafide* refusal" to hold elections thereto within reasonable time before the Presidential election because such a question does not arise on the present reference. Likewise, we refrain from expressing any opinion on the effect of the dissolution of a substantial number of State Legislative Assemblies before the Presidential election.

36. The intervener Jana Sangh submitted that the reference should be declined for four reasons. First, that the recital in the order of reference that election to the Legislative Assembly of the State of Gujarat is impossible is not correct. It was said that the election is possible. Second, the vital question is not whether the Presidential election could be valid or not in the absence of the Gujarat State Assembly but whether the election of the President would be valid if the authority charged with election by acts of omission or commission have not held the Gujarat Assembly election. Third, the election to the State Assembly of Gujarat could have been held on the basis of the 1961 census. Fourth, Article 143 stipulates a general doubt about the Constitution and not doubts of parties.

37. This Court is bound by the recitals in the order of Reference. Under Article 143(1) we accept the statements of fact set out in the reference. The truth or otherwise of the facts cannot be inquired or gone into nor can Court go into the question of *bona fides* or otherwise of the authority making the reference. This Court cannot go behind the recital. This Court cannot go into disputed questions of fact in its advisory jurisdiction under Article 143(1).

38. The Federal Court in **Re The Allocation of Lands and Buildings in a Chief Commissioner's Province** [(1943) FCR 20] a reference under section 213(1) of the Government of India Act which is similar to Article 143 said that though the terms of that section do not impose an obligation on the Court, the court should be unwilling to accept a reference except for good reasons. This court accepted the reference for reasons which appeared to be of constitutional importance as well as in public interest.

39. In **Re. Kerala Education Bill** case [(1959) SCR 995] Das, C.J. referred to the Reference in **Re The Allocation of Lands and Buildings** and the Reference in **Re Levy of Estate Duty** [(1944) FCR 522] and the observation in both the cases that the Reference should

not be declined excepting for good reasons. This Court accepted the Reference on the questions of law arising or likely to arise. Das, C.J. in *In Re Kerala Education Bill* case said that it is for the President to determine what questions should be referred and if he does not have any serious "doubt" on the provisions, it is not for any party to say that doubts arise out of them. In short, parties appearing in the Reference cannot go behind the order of Reference and present new questions by raising doubts.

40. On behalf of the intervener Jana Sangh, reliance was placed on section 10(4) of the Delimitation Act, 1972 hereinafter referred to as the 1972 Act. Broadly stated, the submission on behalf of the Jana Sangh is that by reason of section 10(4) of the 1972 Act election to the Gujarat Legislative Assembly could be held on the basis of the 1961 census, and the existing electoral rolls.

41. The 1972 Act in section 8 speaks of the readjustment of number of seats. This readjustment is on the basis of the latest census figures-The latest census of 1971. The Delimitation Commission has by order under section 8 of the 1972 Act determined the total number of seats to be assigned to the Gujarat State Assembly as 182. The previous number was 168. Under section 9 of the 1972 Act the Commission shall distribute the seats in the Legislative Assembly to single member territorial constituencies and delimit them on the latest census figures. The Commission has published proposals for delimitation and invited objections. The Commission has not yet made any order determining the delimitation of assembly constituencies.

42. The provisions contained in Article 170 repel the submission that the election to the Gujarat Legislative Assembly can be held on the basis of 1961 census. Article 170 provides that the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State. Each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State. The expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published. The 1971 census has been published. Upon the completion of each census, the total number of seats and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine. The Delimitation Commission under the 1972 Act is engaged in the division of the State into territorial constituencies.

43. It is apparent and there is nothing in section 10(4) of the 1972 Act to the contrary which enjoins the Election Commission to hold elections to the House of the People or the Legislative Assembly dissolved after the census of 1971 according to the electoral rolls prepared of the constituencies delimited on the basis of the census of 1961. It is evident that under clause (2) of Article 170 read with the Explanation and clause (3) of Article 170 elections to the Legislative Assembly after the relevant figures of the population of the last preceding census have been ascertained and published can only be held on that basis of the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies readjusted by the Election Commission under the 1972 Act. Now that the census figures of 1971 have been published elections have to be held under

Article 170 only after delimitation of the constituencies has been made in accordance with clauses (2) and (3) of Article 170.

44. When a notification under section 8 of the 1972 Act has been published by assigning 182 seats to the Gujarat Assembly which notification under section 10(2) of the 1972 Act has the force of law and cannot be questioned in any court, elections to these 182 seats cannot be held on the basis of the old electoral rolls because those electoral rolls applied only to the 168 seats as fixed under the old Delimitation Act.

45. It is provided in Article 170 that the readjustment by the Delimitation Commission shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly. The Legislative Assembly of the State of Gujarat has been dissolved. Therefore, any election which has to be held to the Legislative Assembly of the State of Gujarat can only be held after the Delimitation of Constituencies under the 1972 Act. Any Legislative Assembly of a State which is to be composed after the 1971 census is to be in accordance with Article 170. The contention of Jana Sangh is without substance.

46. On behalf of the intervener Socialist Party, it was said that the Constitution (Eleventh Amendment) Act, 1961 is unconstitutional. We cannot go into that question in this Reference.

47. For the foregoing reasons we give the following answers:

1. Only such persons who are elected members of both Houses of Parliament and the Legislative Assemblies of the States on the date of the election to fill the vacancy caused by the expiration of the term of office of the President will be entitled to cast their votes at the election.

2. Subject to the aforesaid observation as to the effect of the dissolution of a substantial number of the Legislative Assemblies the vacancies caused by the dissolution of an Assembly or Assemblies will be covered by Article 74(4).

3, 4 and 5. The election to the office of the President must be held before the expiration of the term of the President notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved. The election to fill the vacancy in the office of the President is to be held and completed having regard to Articles 62(1), 54, 55 and the Presidential and Vice-Presidential Elections Act, 1952.

6. Article 56(1)(c) applies to a case where a successor as explained in the foregoing reasons has not entered on his office and only in such circumstances can a President whose term has expired continue.

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T.N. Seshan, Chief Election Commissioner of India v. Union of India
(1995) 4 SCC 611

AHMADI, C.J. - The President of India, in exercise of powers conferred upon him by clause (1) of Article 123 of the Constitution of India, promulgated an Ordinance (No.32 of 1993) entitled "The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993" ('the Ordinance') to amend "The Chief Election Commissioner and other Commissioners (Conditions of Service) Act, 1991" ('the Act'). This Ordinance was published in the Gazette of India on October 1, 1993. Before we notice the amendments made in the 1991 Act, by the said Ordinance it may be appropriate to notice the provisions of the 1991 Act. As the long title of the Act suggests it lays down the conditions of service of the Chief Election Commissioner ("the CEC") and Election Commissioners ("the ECs") appointed under Article 324 of the Constitution of India. Section 3(1) provides that the CEC shall be paid a salary which is equal to the salary of a Judge of the Supreme Court of India. Section 3(2) says that an EC shall be paid a salary which is equal to the salary of a Judge of a High Court. Section 4 lays down the term of office of the CEC and ECs to be six years from the date on which the incumbent assumes charge of his office provided that the incumbent shall vacate his office on his attaining, in the case of the CEC, the age of 65 years and the EC the age of 62 years, notwithstanding the fact that the term of office is for a period of six years. Section 8 extends the benefit of traveling allowance, rent free residence, exemption from payment of income-tax on the value of such rent free residence, conveyance facility, sumptuary allowance, medical facilities, etc., as applicable to a Judge of the Supreme Court or a Judge of the High Court to the CEC and the EC, respectively. By the Ordinance the title of the Act was sought to be amended by substituting the words "and to provide for the procedure for transaction of business by the Election Commission and for matters" for the words "and for matters". By the substitution of these words the long title of the Act got further elongated as an Act to determine the conditions of service of the CEC and other ECs and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto. In section 1 of the Principal Act for the words and brackets "the Chief Election Commissioner and other Election Commissioners (Conditions of Service)" the words and brackets "the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)" came to be substituted with the result that the amended provision read as the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991. The definition clause in section 2 also underwent a change, in that, the extant clause (b) came to be re-numbered as clause (c) and a new clause (b) came to be substituted by which the expression "Election Commission" came to be defined as Election Commission referred to in Article 324 of the Constitution of India. Consequent changes were also made elsewhere. In sub-section (1) of section 3, after the words "Chief Election Commissioner", the words "and other Election Commissioners" came to be inserted with the result they came to be placed at par in regard to salary payable to them and sub-section (2) came to be omitted. In section 4 the first proviso came to be substituted as under:

Provided that where the Chief Election Commissioner or an Election Commissioner attains the age of 65 years before the expiry of the said term of six years, he shall vacate his office on the date on which he attains the said age.

Thus, the age of superannuation of both the CEC and the ECs was fixed at 65 years. If they attain the age of 65 years before completing their tenure of six years they would in view of the proviso have to vacate office on attaining the age of 65 years. In Section 6, sub-section (2), after the words "Chief Election Commissioner" the words "or an Election Commissioner" came to be inserted and for the words "sub-section (4)" the words "sub-section (3)" came to be substituted. It further provided for the deletion of sub-section (3) and for renumbering sub-section (4) as sub-section (3) and provided that in clause (b) the words "or as the case may be, 62 years" shall be omitted. After section 8 in the Principal Act, by the Ordinance a new Chapter came to be inserted comprising of two provisions, namely, Sections 9 and 10. The new Chapter so inserted is relevant for our purpose and may be reproduced at this stage:

CHAPTER III

TRANSACTION OF BUSINESS OF ELECTION COMMISSION

9. The business of the Election Commission shall be transacted in accordance with the provisions of this Act.

10(1) The Election Commission may, by unanimous decision, regulate the procedure for transaction of the business as also allocation of the business amongst the Chief Election Commissioner and other Election Commissioners.

(2) Save as provided in sub-section (1) all business of the Election Commission shall, as far as possible, be transacted unanimously.

(3) Subject to the provisions of sub-section (2), if the Chief Election Commissioner differs in opinion on any matter, such matter shall be decided according to the opinion of the majority.

2. On the day of publication of the Ordinance, 1st October, 1993, the President of India, in exercise of powers conferred by clause 2 of Article 324 of the Constitution of India, fixed, until further orders, the number of Election Commissioners (other than the CEC) at two. By a further notification of even date the President was pleased to appoint Mr. M.S. Gill and Mr. G. V. G. Krishnamurthy as Election Commissioners with effect from 1st October, 1993.

3. The first salvo was fired by Cho Ramaswamy, a journalist, on 13th October, 1993. By a Writ Petition (Civil) No.791 of 1993 he prayed for a declaration that the Ordinance was arbitrary, unconstitutional and void and for issuance of a writ of *certiorari* to quash the notifications fixing the number of Election Commissioners at two and the appointment of Mr. M.S.Gill and Mr.G.V.G. Krishnamurthy made thereunder. This was followed by Writ Petition No.805 of 1993 by the incumbent CEC himself claiming similar relief on 26th October, 1993, two other writ petitions were also filed questioning the validity of the Ordinance and the notifications referred to earlier. Three of these writ petitions came up for preliminary hearing on November 15, 1993. While admitting the writ petitions and directing rule to issue in all of them, in the writ petition filed by the CEC, notice on the application for interim stay as well as for production of documents was ordered to issue and an ad-interim order to the following effect was passed:

Until further orders, to ensure smooth and effective working of the Commission and also to avoid confusion both in the administration as well as in the electoral process, we direct that the Chief Election Commissioner shall remain in complete overall control of the Commission's work. He may ascertain the views of other Commissioners or such of them as he chooses, on the issues that may come up before the Commission from time to time. However, he will not be bound their views. It is also made clear that the Chief Election Commissioner alone will be entitled to issue instructions to the Commission's staff as well as to the outside agencies and that no other Commissioner will issue such instructions.

By a subsequent order dated 15.12.1993, after hearing the learned Attorney General for the Union of India and the learned Advocates General for the States of Maharashtra and West Bengal, the Court directed that all the State Governments who want to be heard will be heard through their counsel and further directed that the interim order shall continue till further orders. Lastly, it observed that since questions involved related to the interpretation of Article 324 in particular, the matters should be placed before a Constitution Bench.

4. During the pendency of the aforesaid Writ Petitions, the Ordinance became an Act (Act No.4 of 1994) on 4th January, 1994 without any change.

6. The present CEC claims that after his appointment on 12.12.1990 he insisted on strict compliance with the Model Code of Conduct by all political parties and candidates for election and took stern action against infractions thereof regardless of the political party or candidate involved. The ruling party at the centre was irked as a few of the bye- elections of the ruling party leaders/cabinet ministers were put off for the Government's failure to deploy sufficient staff and police force for the elections and the ruling party lost the elections in Tripura on account of strict action taken by the CEC against erring officials and consequent postponement of elections. The ruling party made attempts to influence the CEC but could not do so as he did not allow the emissaries of the party to meet him. The CEC also filed a writ petition in the Supreme Court for enforcing the constitutional right of the Election Commission for staff and force. The CEC declined to postpone elections for four State assemblies despite requests from the ruling party, including the Prime Minister, got irritated with such unbending attitude of the CEC. The ruling party, therefore, with a view to freeze the powers of the CEC and to prevent him from taking any action against violation of code of conduct chose to amend the law and misused the power of the President under Article 324(2) of the Constitution by issuing the notification dated 1st October, 1993 fixing the number of ECs at two and simultaneously appointing Mr. M.S. Gill and Mr. G.V.G. Krishnamurthy as the other two ECs.

7. The CEC not only imputes *malafides* for the issuance of the aforesaid notifications and appointments but also alleges that the intention behind issuing the Ordinance was to sideline the CEC and to erode his authority so that the ruling party at the centre could extract favourable orders by using the services of the newly appointed ECs.

8. Sections 9 and 10 of the Ordinance (now Act) are challenged as *ultra vires* the Constitution on the plea that they are inconsistent with the scheme underlying Article 324 of the Constitution, in that, the said Article 324 did not give any power to the Parliament to

frame rules for transaction of business of the Election Commission. Section 10 is also challenged on the ground that it is arbitrary and unworkable, so also the notification fixing the number of other ECs at two is challenged as arbitrary and violative of Article 14 of the Constitution.

9. The writ petitions are resisted by the respondents, viz., the Union of India and the two other ECs, Mr. M.S. Gill and Mr. G.V.G. Krishnamurthy as wholly misconceived. It is contended on behalf of the Union Government that various advisory bodies had from time to time called for a multi-member body had any connection with the alleged discomfiture of the ruling party at the centre on account of the stiff attitude of the CEC. It is further stated that the multi-member body would not have been able to function without a supporting statute providing for dealing with different situations likely to arise in the course of transaction of business. The Ordinance was framed keeping in view the observations made in this regard by this Court in the case of *S.S. Dhanoa v. Union of India* [(1991) 3 SCC 567]. It is strongly denied that the changes in the law were made *malafide* with a view to taming the CEC into submission or to erode his authority by providing that, in the event of a difference of opinion, the majority view would prevail. It is contended that the plain language of Article 324(2) envisages a multi-member Commission and, therefore, any exercise undertaken to achieve that objective would be consistent with the scheme of the said constitutional provision and could, therefore, never be branded as *malafide* or *ultra vires* the Constitution. A provision to the effect that, in the event of a difference of opinion between the three members of the Election Commission, the majority view should prevail is consistent with democratic principles and can never be described as arbitrary or *ultra vires* Article 14 of the Constitution. The Union of India, has, therefore, contended that the writ petitions are wholly misconceived and deserve to be dismissed with costs.

10. The Preamble of our Constitution proclaims that we are a Democratic Republic. Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country. In order to ensure the purity of the election process it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. It is inherent in a democratic set up that the agency which is entrusted the task of holding elections to the legislatures should be fully insulated so that it can function as an independent agency free from external pressures from the party in power or executive of the day. This objective is achieved by the setting up of an Election Commission, a permanent body, under Article 324(1) of the Constitution. The superintendence, direction and control of the entire election process in the country has been vested under the said clause in a commission called the Election Commission. Clause (2) of the said article then provides for the constitution of the Election Commission by providing that it shall consist of the CEC and such number of ECs, if any, as the President, may from time to time fix. It is thus obvious from the plain language of this clause that the Election Commission is composed of the CEC and, when they have been appointed, the ECs. The office of the CEC is envisaged to be a permanent fixture but that cannot be said of the ECs as is made manifest from the use of the words "if any". Dr. Ambedkar while explaining the purport of this clause during the debate in the Constituent Assembly said:

Sub-clause (2) says that there shall be a Chief Election Commissioner and such other Election Commissioners as the President may, from time to time appoint. There were two alternatives before the Drafting Committee, namely, either to have a permanent, body consisting of four or five members of the Election Commission who would continue in office throughout without any break, or to permit the President to have an *ad-hoc* body appointed at the time when there is an election on the anvil. The Committee has steered a middle course. What the Drafting Committee proposes by sub-clause (2) is to have permanently in office one man called the Chief Election Commissioner, so that the skeleton machinery would always be available.

It is crystal clear from the plain language of the said clause (2) that our Constitution-makers realised the need to set up an independent body or commission which would be permanently in session with at least one officer, namely, the CEC, and left it to the President to further add to the Commission such number of ECs as he may consider appropriate from time to time. Clause (3) of the said article makes it clear that when the Election Commission is a multi-member body the CEC shall act as its Chairman. What will be his role as a Chairman has not been specifically spelt out by the said article and we will deal with this question hereafter. Clause (4) of the said Article further provides for the appointment of RCs to assist the Election Commission in the performance of its functions set out in clause (1). This, in brief, is the scheme of Article 324 in so far as the constitution of the Election Commission is concerned.

11. We may now briefly notice the position of each functionary of the Election Commission. In the first place, clause (2) states that the appointment of the CEC and other ECs shall, subject to any law made in that behalf by Parliament, be made by the President. Thus, the President shall be the appointing authority. Clause (5) provides that subject to any law made by Parliament, the conditions of service and the tenure of office of the RCs shall be such as may be determined by rule made by the President. Of course the RCs do not form part of the Election Commission but are appointed merely to help the commission, that is to say, the CEC and the ECs if any. As we have pointed out earlier the tenure, salaries, allowances and other perquisites of the CEC and ECs had been fixed under the Act as equivalent to a Judge of the Supreme Court and the High Court, respectively. This has undergone a change after the ordinance which has so amended the Act as to place them on par. However, the proviso to clause (4) of Article 324 says (i) the CEC shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and (ii) the conditions of service of the CEC shall not be varied to his disadvantage after his appointment. These two limitations on the power of Parliament are intended to protect the independence of the CEC from political and/or executive interference. In the case of ECs as well as RCs the second proviso to clause (5) provides that they shall not be removed from office except on the recommendation of the CEC. It may also be noticed that while under clause (4), before the appointment of the RCs, consultation with the Election Commission (not CEC) is necessary; there is no such requirement in the case of appointments of ECs. The provision that the ECs and the RCs once appointed cannot be removed from office before the expiry of their tenure except on the recommendation of the CEC ensures their independence. The scheme of Article 324 in this behalf is that after insulating the CEC by the first proviso to clause (5), the ECs

and the RCs have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the CEC. Of course, the recommendation for removal must be based on intelligible and cogent considerations which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the CEC to ensure that the ECs as well as the RCs are not at the mercy of political or executive bosses of the day. It is necessary to realise that this check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body. If, therefore, the power were to be exercisable by the CEC as per his whim and caprice, the CEC himself would become an instrument of oppression and would destroy the independence of the ECs and the RCs if they are required to function under the threat of the CEC recommending their removal. It is, therefore, needless to emphasise that the CEC must exercise this power only when there exist valid reasons which are conducive to efficient functioning of the Election Commission. This, briefly stated, indicates the status of the various functionaries constituting the Election Commission.

12. The concept of plurality is writ large on the face of Article 324, clause (2) whereof clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs. Visualising such a situation, clause (3) provides that in the case of a multi-member body the CEC will be its Chairman. If a multi-member Election Commission was not contemplated where was the need to provide in clause (3) for the CEC to act as its Chairman? There is, therefore, no room for doubt that the Election Commission could be a multi-member body. If Article 324 does contemplate a multi-member body, the impugned notifications providing for the other two ECs cannot be faulted solely on that ground. We may here quote, with approval, the observations of a two-Judge Bench of this Court in *S.S. Dhanoa v. Union of India* [(1991) 3 SCC 567]:

There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill-conforms to the tenets of democratic rule. It is true that the independence of an institution depends upon the persons who man it and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one man an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to a naught.

It must be realised that these observations were made, notwithstanding the fact that the learned judges were alive to and aware of the circumstances in which the President was required in that case to rescind the notifications creating two posts of ECs and appointing the petitioner Dhanoa and another to them.

13. There can be no dispute, and indeed there never was, that the Election Commission must be an independent body. It is also clear from the scheme of Article 324 that the said

body shall have the CEC as a permanent incumbent and under clause (2) such number of other ECs, if any, as the President may deem appropriate to appoint. The scheme of Article 324, therefore, is that there shall be a permanent body to be called the Election Commission with a permanent incumbent to be called the CEC. The Election Commission can therefore be a single-member body or a multi-member body if the President considers it necessary to appoint one or more ECs. Upto this point there is no difficulty. The argument that a multi-member Election Commission would be unworkable and should not, therefore, be appointed must be stated to be rejected. Our Constitution-makers have provided for a multi-member body. They saw the need to provide for such a body. If the submission that a multi-member body would be unworkable is accepted it would tantamount to destroying or nullifying clauses (2) and (3) of Article 324 of the Constitution. Strong reliance was, however, placed on *Dhanoa* case to buttress the argument. The facts of that case were just the reverse of the facts of the present case. In that case the President by a notification issued in pursuance of clause (2) of Article 324 fixed the number of ECs, besides the CEC, at two and a few days thereafter by a separate notification appointed the petitioner and one other as ECs. By yet another notification issued under clause (5) of Article 324 the President made rules to regulate their tenure and conditions of service. After watching the functioning of the multi-member body for about a couple of months, the President issued two notifications rescinding with immediate effect the notification by which the two posts of ECs were created and the notification by which the petitioner and one other were appointed thereto. The petitioner S.S. Dhanoa challenged the notifications rescinding the earlier notification firstly on the ground that once appointed an EC continues in office for the full term determined by rules made under clause (5) of Article 324 and, in any event, the petitioner could not be removed except on the recommendation of the CEC. At the same time it was also contended that the notifications were issued malafide under the advice of the CEC to get rid of the petitioner and his colleague because the CEC was from the very beginning ill-disposed or opposed to the creation of the posts of ECs. According to the petitioner, there were differences of opinion between the CEC on the one hand and the ECs on the other and since the CEC desired that he should have the sole power to decide he did not like the association of the ECs.

14. The principal question which the Division Bench of this Court was called upon to decide was whether the President was justified in rescinding the earlier notifications creating two posts of ECs and the subsequent appointments of the petitioner and his colleague as ECs. The Court found as a fact that there was no imminent need to create two posts of ECs and fill them up by appointing the petitioner and his colleague. The additional work likely to be generated on account of the lowering of the voting age from 21 years to 18 years could have been handled by increasing the staff rather than appoint two ECs. So the Court took the view that from the inception the Government had committed an error in creating two posts of ECs and filling them up. We do not at the present desire to comment on the question whether this aspect of the matter was justiciable. It was further found as a fact that the petitioner's and his colleague's attitude was not co-operative and had it not been for the sagacity and restraint shown by the CEC, the work of the Commission would have come to a standstill and the Commission would have been rendered inactive. It is for this reason that the court observed that no one need shed tears on the posts being abolished (vide paragraphs 20, 23, 24 and 25 of the judgment.). The Court, therefore, upheld the Presidential notifications rescinding the

creation of the two posts of ECs and the appointments of the petitioner and his colleague thereon. Notwithstanding this bitter experience, the Division Bench made the observations in paragraph 26 extracted hereinbefore, with which we are in respectful agreement. We cannot overlook the fact that when the Constitution-makers provided for a multi-member Election Commission they were not oblivious of the fact that there may not be agreement on all points, but they must have expected such high ranking functionaries to resolve their differences in a dignified manner. It is the constitutional duty of all those who are required to carry out certain constitutional functions to ensure the smooth functioning of the machinery without the clash of egos. This should have put an end to the matter, but the Division Bench proceeded to make certain observations touching on the status of the CEC *vis-a-vis* the ECs, the procedure to be followed by a multi-member body in decision making in the absence of rules in that behalf etc., on which considerable reliance was placed by counsel for the petitioners.

15. We have already highlighted the salient features regarding the composition of the Election Commission. We have pointed out the provisions regarding the tenure, conditions of service, salary, allowances, removability, etc., of the CEC, the ECs and the RCs. The CEC and the ECs alone constitute the Election Commission whereas the RCs are appointed merely to assist the Commission. The appointment of the RCs can be made after consulting the Election Commission since they are supposed to assist that body in the performance of the functions assigned to it by clause (1) of Article 324. If that be so there can be no doubt that they would rank next to the CEC and the ECs. That brings us to the question regarding the status of the CEC *vis-a-vis* the ECs. It was contended by the learned counsel for the petitioners that the CEC enjoyed a status superior to the ECs for the obvious reason that (i) the CEC has been granted conditions of service on par with a Judge of the Supreme Court which was not the case with the conditions of service of ECs before the Ordinance, (ii) the CEC has been given the same protection against removal from service as available to a Judge of the Supreme Court whereas the ECs can be removed on the CEC's recommendation, (iii) the CEC's conditions of service cannot be altered or varied to his disadvantage after his appointment, (iv) the CEC has been conferred the privilege to act as Chairman of the multi-member Commission and (v) the CEC alone is the permanent incumbent whereas the ECs could be removed, as happened in the case of **Dhanoo**. Strong reliance was placed on the observations in paragraphs 10 and 11 of **Dhanoo** case in support of the argument that the CEC enjoys a higher status *vis-a-vis* the ECs while functioning as the Chairman of the Election Commission. The observations relied upon read thus:

10. However, in the matter of the conditions of service and tenure of office of the Election Commissioners, a distinction is made between the Chief Election Commissioner on the one hand and Election Commissioners and Regional Commissioners on the other. Whereas the conditions of service and tenure of office of all are to be such as the President may, by rule determine, a protection is given to the Chief Election Commissioner in that his conditions of service shall not be varied to his disadvantage after his appointment, and he shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court. These protections are not available either to the Election Commissioners or to the Regional Commissioners. Their conditions of service can be varied even to their disadvantage after their appointment and they can be removed on the recommendation of the Chief

Election Commissioner, although not otherwise. It would thus appear that in these two respects not only the Election Commissioners are not on par with the Chief Election Commissioner, but they are placed on par with the Regional Commissioners although the former constitute the Commission and the latter do not and are only appointed to assist the Commission.

11. It is necessary to bear these features in mind because, although clause (2) of the article states that the Commission will consist of both the Chief Election Commissioner and the Election Commissioners if and when appointed, it does not appear that the framers of the Constitution desired to give the same status to the Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be *primus inter partes*, i.e., first among the equals, but is intended to be placed in a distinctly higher position. The conditions that the President may increase or decrease the number of Election Commissioners according to the needs of the time, that their service conditions may be varied to their disadvantage and that they may be removed on the recommendation of the Chief Election Commissioner militate against their being of the same status as that of the Chief Election Commissioner.

16. While it is true that under the scheme of Article 324 the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by Parliament, it is only in the case of the CEC that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the CEC after his appointment. Such a protection is not extended to the ECs. But it must be remembered that by virtue of the Ordinance the CEC and the ECs placed on par in the matter of salary, etc. Does the absence of such provision for ECs make the CEC superior to the ECs? The second ground relates to removability. In the case of the CEC he can be removed from office in like manner and on the like ground as a judge of the Supreme Court whereas the ECs can be removed on the recommendation of the CEC. That, however, is not an indicia for conferring a higher status on the CEC. To so hold is to overlook the scheme of Article 324 of the Constitution. It must be remembered that the CEC is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a CEC. That is not the case with other ECs. They are not intended to be permanent incumbents. Clause (2) of Article 324 itself suggests that the number of ECs can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irremovability that is bestowed on the CEC. If that were to be done, the entire scheme of Article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained. Having insulated the CEC from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs and even RCs by enjoining that they cannot be removed except on the recommendation of the CEC. This is evident from the following statement found in the speech of Shri K.M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr. Ambedkar:

We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole-

time officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either Provincial or Central, the Commission must be enlarged to cope with the work. More members therefore have to be added to the Commission. They are no doubt to be appointed by the President. Therefore, to that extent their independence is ensured. So there is no reason to believe that these temporary Election Commissioners will not have the necessary measure of independence.

Since the other ECs were not intended to be permanent appointees they could not be granted the irremovability protection of the CEC, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent CEC. This aspect of the matter escaped the attention of the learned Judges who decided *Dhanoa's* case. We are also of the view that the comparison with the functioning of the executive under Articles 74 and 163 of the Constitution in paragraph 17 of the judgment, with respect, cannot be said to be apposite.

17. Under clause (3) of Article 324, in the case of a multi-member Election Commission, the CEC 'shall act' as the Chairman of the Commission. As we have pointed out earlier, Article 324 envisages a permanent body to be headed by a permanent incumbent, namely, the CEC. The fact that the CEC is a permanent incumbent cannot confer on him a higher status than the ECs for the simple reason that the latter are not intended to be permanent appointees. Since the Election Commission would have a staff of its own dealing with matters concerning the superintendence, direction and control of the preparation of electoral rolls, etc., that staff would have to function under the direction and guidance of the CEC and hence it was in the fitness of things for the Constitution-makers to provide that where the Election Commission is a multi-member body, the CEC shall act as its Chairman. That would also ensure continuity and smooth functioning of the Commission.

18. That brings us to the question: what role has the CEC to play as the Chairman of a multi-member Election Commission? Article 324 does not throw any light on this point. The debates of the Constituent Assembly also do not help. Although there had been a multi-member Commission in the past, no convention or procedural arrangement had been worked out then. It is this situation which compelled the Division Bench of this Court in *Dhanoa* case to *inter alia* observe that in the absence of rules to the contrary, the members of a multi-member body are not and need not always be on par with each other in the matter of their rights, authority and powers. Proceeding further in paragraph 18 it was said: (SCC p. 580)

18. It is further an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary, such as the decision by majority, has to be laid down specifically by spelling out the kind of majority -whether simple, special, of all the members or of the members present and voting etc. In a case such as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. Hence, a realistic approach demands that either the procedure for transacting business is spelt out by a statute or a rule either prior to or simultaneously with the appointment of the Election Commissioners or that no appointment of

Election Commissioners is made in the absence of such procedure. In the present case, admittedly, no such procedure has been laid down.

We must hasten to add that the accuracy of the statement that in a multi-member body the rule of unanimity would prevail in the absence of express provision to the contrary was doubted by counsel for the respondents-ECs. At the same time, counsel for the Union of India and the contesting ECs contended that the Ordinance was promulgated by the President strictly in conformity with the view expressed in *Dhanoo* case.

19. From the discussion upto this point what emerges is that by clause (1) of Article 324, the Constitution-makers entrusted the task of conducting all elections in the country to a Commission referred to as the Election Commission and not to an individual. It may be that if it is a single-member body the decisions may have to be taken by the CEC but still they will be the decisions of the Election Commission. They will go down as respondents of the Election Commission and not the individual. It would be wrong to project the individual and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution; he can exist only if the institution exists. To project the individual as mightier than the institution, would be a grave mistake. Therefore, even if the Election Commission is a single-member body, the CEC is merely a functionary of that body; to put it differently, the alter ego of the Commission and no more. And if it is a multi-member body, the CEC is obliged to act as its Chairman. 'Chairman' according to the *Concise Oxford Dictionary* means a person chosen to preside over meetings, e.g., one who presides over the meetings of the Board of Directors. In *Black's Law Dictionary*, 6th Edition, page 230, the same expression is defined as a name given to a Presiding Officer of an assembly, public meeting, convention, deliberative or legislative body, board of directors, committee, etc. Similar meanings have been attributed to that expression in *Ballentine's Law Dictionary*, 3rd Edition, pages 189-190, *Webster's New Twentieth Century Dictionary*, Unabridged, 2nd Edition, page 299, and *Aiyer's Judicial Dictionary*, 11th Edition, page 238. The function of the Chairman would, therefore, be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for smooth transaction of business. The nature and duties of this office may vary depending on the nature of business to be transacted but by and large these would be the functions of a Chairman. He must so conduct himself at the meetings chaired by him that he is able to win the confidence of his colleagues in the Commission and carry them with him. This, a Chairman may find difficult to achieve if he thinks that others who are members of the Commission are his subordinates. The functions of the Election Commission are essentially administrative but there are certain adjudicative and legislative functions as well. The Election Commission has to lay down certain policies, decide on certain administrative matters of importance as distinguished from routine matters of administration and also adjudicate certain disputes, e.g., disputes relating to allotment of symbols. Therefore, besides administrative functions it may be called upon to perform quasi-judicial duties and undertake subordinate legislation making functions as well. See *M.S. Gill v. Chief Election Commissioner* [(1978) 2 SCR 272]. We need say no more on this aspect of the matter.

20. There can be no doubt that the Election Commission discharges a public function. As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and the ECs. The RCs may be appointed to assist the Commission. If that be so the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission, it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324, nor can we attribute it to the Constitution-makers. We must reject the argument that the ECs' function is only to tender advice to the CEC.

21. We have pointed out the distinguishing features from Article 324 between the position of the CEC and the ECs. It is essentially on account of their tenure in the Election Commission that certain differences exist. We have explained why in the case of ECs the removability clause had to be different. The variation in the salary, etc., cannot be a determinative factor otherwise that would oscillate having regard to the fact that the executive or the legislature has to fix the conditions of service under clause (5) of Article 324. The only distinguishing feature that survives for consideration is that in the case of the CEC his conditions of service cannot be varied to his disadvantage after his appointment whereas there is no such safeguard in the case of ECs. That is presumably because the posts are temporary in character. But even if it is not so, that feature alone cannot lead us to the conclusion that the final word in all matters lies with the CEC. Such a view would render the position of the ECs to that of mere advisers which does not emerge from the scheme of Article 324.

22. As pointed out earlier, neither Article 324 nor any other provision in the Constitution expressly states how a multi-member Election Commission will transact its business nor has any convention developed in this behalf. That is why in *Dhanoa* case this Court thought the gap could be filled by an appropriate statutory provision. Taking a clue from the observations in that connection in the said decision, the President promulgated the Ordinance whereby a new chapter comprising sections 9 and 10 was added to the Act indicating how the Election Commission will transact its business. Section 9 merely states that the business of the Commission shall be transacted in accordance with the provisions of the Act. Section 10 has three sub-sections. Sub-section (1) says that the Election Commission may, by unanimous decision, regulate the procedure for transaction of its business and for allocation of its business among the CEC and the ECs. It will thus be seen that the legislature has left it to the Election Commission to finalize both the matters by a unanimous decision. Sub-section (2) says that all other business, save as provided in sub-section (1), shall also be transacted unanimously, as far as is possible. It is only when the CEC and the ECs cannot reach a unanimous decision in regard to its business that the decision has to be by majority. It must be realised that the Constitution-makers preferred to remain silent as to the manner in which the Election Commission will transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same having regard to the level of personnel it had in mind to man the Commission. They must have depended on the sagacity and wisdom of the CEC and his colleagues. The bitter experience of the past, to which a reference is made in *Dhanoa* case, made legislative interference necessary once it was also

realised that a multi-member body was necessary. It has yet manifested the hope in sub-sections (1) and (2) that the Commission will be able to take decisions with one voice. But just in case that hope is belied the rule of majority must come into play. That is the purport of section 10 of the Act. The submission that the said two sections are inconsistent with the scheme of Article 324 inasmuch as they virtually destroy the two safeguards, namely (i) the irremovability of the CEC and (ii) prohibition against variation in service conditions to his disadvantage after his appointment, does not cut ice. In the first place, the submission proceeds on the basis that the other two ECs will join hands to render the CEC non-functional, a premise which is not warranted. It betrays the CEC's lack of confidence in himself to carry his colleagues with him. In every multi-member commission it is the quality of leadership of the person heading the body that matters. Secondly, the argument necessarily implies that the CEC alone should have the power to take decisions which, as pointed out earlier, cannot be accepted because that renders the ECs' existence ornamental. Besides, there is no valid nexus between the two safeguards and Section 9 and 10; in fact the submission is a repetition of the argument that a multi-member commission cannot function, that it would be wholly unworkable and that the Constitution-makers had erred in providing for it. Tersely put, the argument boils down to this: erase the idea of a multi-member Election Commission from your minds or else give exclusive decision making power to the CEC. We are afraid such an attitude is not conducive to democratic principles. Foot Note 6 at page 657 of **Halsbury's Laws of England**, 4th Edition (Re-issue), Vol. 7(1) posits:

The principle has long been established that the will of a Corporation or body can only be expressed by the whole or a majority of its principles, and the act of a majority is regarded as the act of the whole. (See Shkelton on the **Law and Practice of Meetings**, eighth edition, Compilation of AG, page 116).

The same principle was reiterated in **Grindley v. Barker** [126 ER 875 at 879 & 882]. We do not consider it necessary to go through various decisions on this point.

23. The argument that the impugned provisions constitute a fraud on the Constitution inasmuch as they are designed and calculated to defeat the very purpose of having an Election Commission is begging the question. While in a democracy every right thinking citizen should be concerned about the purity of the election process - this Court is no less concerned about the same as would be evident from a series of decisions - it is difficult to share the inherent suggestion that the ECs would not be as concerned about it. And to say that the CEC would have to suffer the humiliation of being overridden by two civil servants is to ignore the fact that the present CEC was himself a civil servant before his appointment as CEC.

24. The Election Commission is not the only body which is a multi-member body. The Constitution also provides for other public institutions to be multi-member bodies. For example, the Public Service Commission, Article 315 provides for the setting up of a Public Service Commission for the Union and every State and Article 316 contemplates a multi-member body with a Chairman. Article 338 provides for a multi-member National Commission for SC/ST comprising a Chairman, Vice-Chairman and other members. So also there are provisions for the setting up of certain other multi-member Commissions or Parliamentary Committees under the Constitution. These also function by the rule of majority and so we find it difficult to accept the broad contention that a multi-member Commission is

unworkable. It all depends on the attitude of the Chairman and its members. If they work in co-operation, appreciate and respect each other's point of view, there would be no difficulty, but if they decide from the outset to pull in opposite directions, they would by their conduct make the Commission unworkable and thus fail the system.

25. That takes us to the question of *malafides*. It is in two parts. The first part relates to events which preceded the Ordinance and the second part to post-Ordinance and notification events. On the first part the CEC contends that since, after his appointment, he had taken various steps with a view to ensuring free and fair elections and was constrained to postpone certain elections which were to decide the fate of certain leaders belonging to the ruling party at the Centre, i.e., the Indian National Congress (I), he had caused considerable discomfiture to them. His insistence on strict observance of the Model Code of Conduct had also disturbed the calculations of the ruling party. According to him, he had postponed the elections in Kalka Assembly constituency, Haryana, because the Chief Minister of Haryana, belonging to the ruling party at the Centre, had flouted the guidelines. So also he had postponed the elections in the State of Tripura which ultimately led to the dismissal of the Government headed by the Chief Minister belonging to the ruling party at the Centre. The postponement of the bye-elections involving Shri Sharad Pawar and Shri Pranab Mukherjee also upset the calculations of the said party. He had also postponed the election in Anipet Assembly constituency, Tamil Nadu, as the Chief Minister of the State had flouted the Model Code of Conduct by announcing certain projects on the eve of the elections. Shri Santosh Mohan Deb, Union Minister, belonging to the ruling party, was also upset because the CEC took disciplinary action against officials who were found present at his election meetings. The ruling party was also unhappy with his decision to announce general elections for the State Assemblies for Madhya Pradesh, Uttar Pradesh, Rajasthan, Himachal Pradesh and the National Capital Territory of Delhi as the party was not ready for the same. According to the CEC he had also spurned the request made through the Lieutenant Governor of Delhi by the said party for postponement of the Delhi elections. According to him, emissaries were sent by the said party at the Centre to him but he did not oblige and he even took serious exception regarding the conduct of the Governor of Uttar Pradesh, Shri Moti Lal Vohra, for violating the Model Code of Conduct. Since the ruling party at the Centre failed in all its attempts to prevail upon him, it decided to convert the Election Commission into a multi-member body and, after having the Ordinance issued by the President, the impugned notifications appointing the two ECs were issued. The extraordinary haste with which all this was done while the CEC was at Pune and the urgency with which one of the appointees Shri M.S. Gill was called to Delhi by a special aircraft betrayed the keenness on the part of the ruling party to install the two newly appointed ECs. The CEC describes in detail the post-appointment events which took place at the meeting of 11th October, 1993 in paragraphs 18 (c) to (f) and (g) of the writ petition. According to him, by the issuance of the Ordinance and the notifications the ruling party is trying to achieve indirectly that which it could not achieve directly. These, in brief, are the broad counts on the basis whereof he contends that the ruling party at the Centre was keen to dislodge him.

26. On behalf of the Union of India it is contended that the allegation that the power to issue an Ordinance was misused for collateral purpose, namely, to impinge on the

independence of the Election Commission, is wholly misconceived since it is a known fact that the demand for a multi-member Commission had been raised from time to time by different political parties. The Joint Committee of both Houses of Parliament had submitted a report in 1972 recommending a multi-member body and the Tarkunde Committee appointed on behalf of the Citizens for Democracy also favoured a multi-member Election Commission in its report submitted in August 1974. Similarly, the Committee on Electoral Reforms appointed by the Janata Dal Government, in its report in May, 1990, favoured a three member Election Commission. Various Members of Parliament belonging to different political shades had also raised a similar demand from time to time. The Advocates General of various States in their meeting held on 26th September, 1993 at New Delhi had made a similar demand. It was, therefore, not correct to contend that the decision to constitute a multi-member Election Commission was abruptly taken with a *malafide* intention, to curb the activities of the present CEC. The allegation that the decision was taken because the ruling party at the Centre was irked by the attitude of the CEC in postponing elections on one ground or the other is denied. The issue regarding the constitution of a multi-member Election Commission was a live issue and the same was discussed at various fora and even the Supreme Court in *Dhanoa* case had indicated that vast discretionary powers, with virtually no checks and balances, should not be left in the hands of a single individual and it was desirable that more than one person should be associated with the exercise of such discretionary powers. It was, therefore, in public interest that the Ordinance in question was issued and two ECs were appointed to associate with the CEC. The deponent contends that this was a bona fide exercise and it was unfortunate that a high ranking official like the CEC had alleged that one of the ECs had been appointed because he was a close friend of the Prime Minister, an allegation which was unfounded. It is therefore denied that the Ordinance and the subsequent notifications appointing the two ECs were intended to sideline the CEC and erode his authority. The Government *bonafide* followed the earlier reports and the observations made in *Dhanoa* case to which a reference has already been made. It is, therefore, contended that Sections 9 and 10 do not suffer from any vice as alleged by the CEC. The two ECs have also filed their counter affidavits denying these allegations. Shri G.V.G. Krishnamurthy, Respondent 3 in the CEC's petition, has pointed out that the CEC had made unprecedented demands, for example, (i) to be equated with Supreme Court Judges, and had pressurised the Government that he be ranked along with Supreme Court Judges in the Warrant of Precedence, (ii) the powers of contempt of court be conferred upon the Election Commission, (iii) the CEC had refused to participate in meetings as ex-officio member of the Delimitation Commission headed by Mr. Justice A.M. Mir, Judge of the High Court of J & K, on the ground that his position was higher, he having been equated with judges of the Supreme Court, (iv) the CEC be exempted from personal appearance in Court, (v) the Election Commission be exempted from the purview of the UPSC, so far as its staff was concerned, etc.

27. The learned Attorney General pointed out that no *malafides* can be attributed to the exercise of legislative power by the President of India under Article 123 of the Constitution. He further pointed out that having regard to the express language of Article 324(2) of the Constitution, it was perfectly proper to expand the Election Commission by making appropriate changes in the extant law. The question whether it is necessary to appoint other ECs besides the CEC is for the Government to decide and that is not a justiciable matter. The

demand for a multi-member Commission was being voiced for the last several years and merely because it was decided to make an amendment in the statute through an Ordinance, it is not permissible to infer that the decision was actuated by malice. It was lastly contended that Article 324 nowhere stipulates that before ECs are appointed, the CEC will be consulted. In the absence of an express provision in that behalf, it cannot be said that the failure to consult the CEC before the appointments of the two ECs vitiates the appointment.

28. One of the interveners, the petitioner of SLP No.16940 of 1993, has filed written submissions through his counsel wherein, while supporting the action to constitute the multi-member Commission, he has criticised the style of functioning of the CEC and has contended that his actions have, far from advancing the cause of free and fair elections, resulted in hardships to the people as well as the system. It has been pointed out that several rash decisions were taken by the CEC on the off-chance that they would pass muster but when challenged in court he failed to support them and agreed to withdraw his orders. It is, therefore, contended that the style of functioning of the present CEC itself is sufficient reason to constitute a multi-member Commission so that the check and balance mechanism that the Constitution provides for different institutions may ensure proper decision-making.

29. There is no doubt that when the Constitution was framed the Constitution-makers considered it necessary to have a permanent body headed by the CEC. Perhaps the volume of work and the complexity thereof could be managed by a single-member body. At the same time it was realised that with the passage of time it may become necessary to have a multi-member body. That is why express provision was made in that behalf in clause (2) of Article 324. It seems that for about two decades the need for a multi-member body was not felt. But the issue was raised and considered by the Joint Committee which submitted a report in 1972. Since no action was taken on that report, the Citizens for Democracy, a non-governmental organisation, appointed a committee headed by Shri Tarkunde, a former Judge of the Bombay High Court, which submitted its report in August 1974. Both these bodies favoured a multi-member Commission but no action was taken and, after a lull, when the Janata Dal came to power, a committee was appointed which submitted a report in May 1990. That committee also favoured a multi-member body. Prior to that, in 1989 a multi-member Commission was constituted but we know its fate. But the issue was not given up and demands continued to pour in from Members of Parliament of different hues. These have been mentioned in the counter-affidavit of the Union of India. It cannot, therefore, be said that this idea was suddenly pulled out of a bag. Assuming the present CEC had taken certain decisions not palatable to the ruling party at the Centre as alleged by him, it is not permissible to jump to the conclusion that that was cause for the Ordinance and the appointments of the ECs. If such a nexus is to weigh, the CEC would continue to act against the ruling party to keep the move for a multi-member Commission at bay. We find it difficult to hold that the decision to constitute a multi-member Commission was actuated by malice. Therefore, even though it is not permissible to plead malice, we have examined the contention and see no merit in it. It is wrong to think that the two ECs were pliable persons who were being appointed with the sole object of eroding the independence of the CEC.

31. That takes us to the question of legislative competence. The contention is that since Article 324 is silent, Parliament expected the Commission itself to evolve its own procedure

for transacting its business and since the CEC was the repository of all power to be exercised by the Commission falling within the scope of its activity, it did not see the need to engraft any procedure for transacting its business. If the Election Commission at any time saw the need for it, it would itself evolve its procedure but Parliament cannot do so and hence Sections 9 and 10 are unconstitutional. Except the legislation specifically permitted by clauses (2) and (5) of Article 324 and Articles 327 and 328, Part XV of the Constitution does not conceive of a law by Parliament on any other matter and hence the impugned legislation is unconstitutional.

32. Now it must be noticed at the outset that both clauses (2) and (5) of Article 324 contemplate a statute for the appointment of ECs and for their conditions of service. The impugned law provides for both these matters and provisions to that effect cannot be challenged as unconstitutional since they are expressly permitted by the said clauses (2) and (5). Once the provision for the constitution of a multi-member Commission is unassailable, provisions incidental thereto cannot be challenged. It was urged that the legislation squarely fell within Entry 72 of List I of the Seventh Schedule. That entry refers to "Elections to Parliament, to Legislatures of States and to the Offices of President and Vice-President; the Election Commission". If, as argued, the scope of this entry is relatable and confined to clauses (2) and (5) of Article 324 and Articles 327 and 328 only, it would be mere tautology. If the contention that the CEC alone has decisive power is not accepted, and we have not accepted it, and even if it is assumed that the normal rule is of unanimity, sub-sections (1) and (2) of Section 10 provide for unanimity. It is only if there is no unanimity that the rule of majority comes into play under sub-section (3). Therefore, even if we were to assume that the Commission alone was competent to lay down how it would transact its business, it would be required to follow the same pattern as is set out in Section 10. We, therefore, see no merit in this contention also.

33. We would here like to make it clear that we should not be understood to approve of the rating of *Dhanoa* case in its entirety. We have expressly approved it where required.

36. In the result, we uphold the impugned Ordinance (now Act 4 of 1994) in its entirety. We also uphold the two impugned notifications dated 1st October, 1993. Hence, the writ petitions fail and are dismissed. The interim order dated 15th November, 1993 will stand vacated. If, as is reported, the incumbent CEC has proceeded on leave, leaving the office in charge of Shri Bagga, Shri Bagga will forthwith hand over charge to Shri Gill till the CEC resumes duty. The IAs will stand disposed of. In the facts and circumstances of the case, we direct parties to bear their own costs. If the CEC has incurred the costs of his petition from the funds of the Election Commission, the other two ECs will be entitled to the same from the same source.

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Indian National Congress (I) v. Institute of Social Welfare

AIR 2002 SC 2158

V.N. KHARE, J. - The foremost question that arises in this group of appeals is whether the Election Commission of India under Section 29A of the Representation of the People Act, 1951 (the 'Act') has power to de-register or cancel the registration of a political party on the ground that it has called for hartal by force, intimidation or coercion and thereby violated the provisions of the Constitution of India.

2. The aforesaid question has arisen out of the directions issued by the High Court of Kerala on the writ petitions filed for enforcement of the decision in the case of ***Communist Party of India (Marxist) v. Bharat Kumar*** [AIR 1998 SC 184] wherein it was held that

There is a distinction between 'bundh' and 'hartal'. A call for a bundh involves coercion of others into towing the lines of those who called for the bundh and that the act was unconstitutional, since it violated the rights and liberty of other citizens guaranteed under the Constitution.

3. In the writ petitions filed before the High Court it was alleged that despite the law having been declared by the Supreme Court that calling of a bundh is unconstitutional, the political parties in the State of Kerala continued to call bundh under the name and cover of hartal. It was prayed that direction be issued to the government of Kerala for taking appropriate measures to give effect to the declaration of law by the Supreme Court in the case of ***Communist Party of India***. The High Court from time to time issued orders and in compliance thereof, the Chief Secretary as well as Director General of Police issued necessary orders, but such directions proved ineffective and the political parties continued to give call for bundh in the name of hartal. It was also alleged that some of the writ petitioners submitted representations to the Election Commission of India for taking necessary proceedings against the registered political parties for de-registration as they had contravened the provisions of the Constitution, but no action has been taken by the Election Commission in that regard. In one of the writ petitions one of the reliefs sought for with which we are concerned in this group of appeals, was to issue a direction to the Election Commission of India to take action against the registered political parties for violation of their undertaking that they will abide by the Constitution. In a nutshell, the case of the writ petitioners before the High Court was that by holding a hartal and enforcing it by force, threat and coercion, there is the performance of an unconstitutional act and one of the clear and definite ways of preventing such unconstitutional activity on the part of political parties registered under the Representation of the People Act is to take steps for their de-registration on the ground of violation of the Constitution of India.

4. In the said writ petitions, the Communist Party of India (Marxist) filed counter affidavit and stated therein that they did not give call for a bundh and, in fact, the call given by them was for a hartal. It is also stated therein that at the call for hartal, it was optional for every citizen either to open or close their shops and in fact there was only an appeal to public to join the hartal and further there was no element of compulsion in the appeal and, therefore, the Communist Party of India (Marxist) did not violate either the provisions of the Constitution or decision rendered by the Supreme Court in the case of ***Communist Party of India (Marxist)***

v. Bharat Kumar. Indian National Congress (I) also filed a counter affidavit submitting that the call for hartal given by them was not a bundh. It was also stated therein that giving a call for hartal was a part of freedom of speech and expression protected under Article 19(1)(a) of the Constitution and it was merely a device to elicit the support of the people towards the specific issues highlighted by political parties, organisation and also to inform and educate the public regarding specific problems affecting their day to day life. It was also stated that the State can take preventive measures in case there is any violence or interference of constitutional or legal rights of the citizens.

5. The Election Commission of India also filed its return and stated therein that it does not have power to de-register or cancel the registration of a political party under Section 29A of the Act. It was also stated by the Election Commission that similar matter arose before it in a petition filed by Shri Arjun Singh and others seeking de-registration of the Bharatiya Janata Party as a political party and also freezing of its reserved symbol 'Lotus' and the Election Commission of India by its order dated 19.2.92 rejected the petition after having found that it does not have power under Section 29A of the Act to de-register a registered political party. It was also brought to the notice of the High Court that the decision of the Election Commission of India was also tested by filing a special leave petition before the Supreme Court, but the same was dismissed on 28.8.92. In that view of the matter, no direction can be issued by the High Court to the Election Commission of India to take any proceeding for de-registration of a registered political party for having violated the constitutional provisions.

6. The High Court was of the view that mere giving a call for a hartal or advocating of it as understood in the strict sense cannot be held to be illegal in the context of the decision in **Communist Party of India v. Bharat Kumar**. However, the moment a hartal seeks to impinge the rights of others, it ceases to be a hartal in a real sense of the freedom and really turns out a violent demonstration affecting the rights of others and such an act has to be curtailed at the instance of other citizens whose rights are affected by such an illegal act. The High Court, as a matter of fact, found that what was called a hartal was not what was strictly meant by that term, but a form of a bundh involving intimidation and coercion of those who do not want to respond to the call or participate in it. The High Court after having found that the political parties have contravened the constitutional provisions of guaranteed freedom to the citizens, they are liable to be appropriately dealt with. In that context, the High Court was of the view that although Section 29A of the Act expressly does not empower the Election Commission of India to de-register a registered political party for having contravened the provisions of the Constitution, but on application of Section 21 of the General Clauses Act, the Election Commission of India has power on a complaint filed with it, to initiate proceedings for de-registration against a political party for having violated the constitutional provisions and after giving opportunity to such political parties, if it is found that they have committed breach of the provisions of the Constitution, the Election Commission of India has power to de-register or cancel the registration of such political parties. The High Court distinguished the summary dismissal of the special leave petition no. 8738/1992 filed by Shri Arjun Singh against Bharatiya Janata Party and another by the Apex Court on 28.8.92 on the ground that dismissal of a special leave petition without any reason is not binding as it does not lay down law within the meaning of Article 141 of the Constitution.

7. In the aforesaid view of the matter, the High Court while allowing the writ petitions passed the following orders:

i. We declare that the enforcement of a hartal call by force, intimidation, physical or mental and coercion would amount to an unconstitutional act and a party or has no right to enforce it by resorting to force or intimidation.

ii. We direct the State, Chief Secretary to the State, Director General of Police and all the administrative authorities and police officers in the State to implement strictly the directives issued by the directions given by the Director General of Police dated 4.2.1999 and set out fully in the earlier part of this judgment.

iii. We issue a writ of mandamus to the Election Commission to entertain complaints, if made, of violation of Section 29A(5) of the Representation of the People Act, 1951 by any of the registered political parties or associations, and after a fair hearing, to take a decision thereon for de-registration or cancellation of registration of that party or organisation, if it is warranted by the circumstances of the case.

iv. We issue a writ of mandamus directing the Election Commission to consider and dispose of in accordance with law, the Representation Ext. P9 in o.p. 20641 of 1998, after giving all the affected parties an opportunity of being heard.

v. We direct the State of Kerala, the Chief Secretary to the Government, the Director General of Police and all other officers of the State to take all necessary steps at all necessary times, to give effect to this judgment.

vi. We direct the State, District Collectors, all other officers of the State and Corporations owned or controlled by the State to take immediate and prompt action, for recovery of damages in cases where pursuant to a call for hartal, public property or property belonging to the corporation is damaged or destroyed, from the perpetrators of the acts leading to destruction/damage and those who have issued the call for hartal.

8. It is against the aforesaid decision of the High Court that these appeals have been filed by way of separate special leave petitions.

9. We have heard Shri Ashwani Kumar, learned senior counsel appearing for the Indian National Congress (I), Shri Soli J. Sorabjee, learned Attorney General appearing for the Union of India, Shri S. Muralidhar, learned counsel, appearing for Election Commission of India, Shri Rajeev Dhavan, learned senior counsel and Shri B.K. Pal, learned counsel appearing for the Communist Party of India (Marxist) and Communist Party of India, respectively, and Shri L.Nageswara Rao, learned senior counsel appearing for the writ petitioners-respondents.

10. Shri Soli Sorabjee, learned Attorney General and other learned counsel for the appellants appearing in other connected civil appeals stated that these appeals are pressed only against direction Nos. (iii) and (iv) given by the High Court to the Election Commission of India.

11. Learned counsel appearing for the appellants, *inter alia*, argued - that there being no express provision in the Act to cancel the registration of a political party under Section 29A of the Act, and as such no proceedings can be taken by the Election Commission of India against

a political party for having violated the provisions of the Constitution; that the Election Commission of India while exercising the power to register a political party under Section 29A of the Act acts quasi-judicially and once a political party is registered, no power of review having been conferred on the Election Commission of India, the Election Commission has no power to de-register a political party for having violated the provisions of the Constitution or committed breach of undertaking given to the Election Commission at the time of its registration; and that the view taken by the High Court that since the Election Commission has power to register a political party under Section 29A of the Act, it is equally empowered to revoke or rescind the order of registration on application of Section 21 of the General Clauses Act is erroneous.

13. Before we advert to the arguments raised by learned counsel for the parties it is necessary to refer to relevant provisions of the Act and rules framed thereunder and the provisions of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the 'Symbols Order') framed by the Election Commission in exercise of its power under Article 324 of the Constitution to find out whether the Election Commission has power to de-register a registered political party.

14. By the Representation of the People (Amendment) Act, 1988, Section 29A was inserted in the Act. The Statement of Objects and Reasons appended to the Bill which was introduced in the Parliament and subsequently was converted into an Act, runs as under:

At present, there is no statutory definition of political party in Election Law. The recognition of a political party and the allotment of symbols for each party are presently regulated under the Election Symbols (Reservation and Allotment) Order, 1968. It is felt that Election Law should define political party and lay down procedure for its registration. It is also felt that the political parties should be required to include a specific provision in the memorandum or rules and regulations governing their functioning that they would be fully committed to and abide by the principles enshrined in the preamble to the Constitution.

15. Before Section 29A of the Act came into force, the political parties were registered under the Election (Reservation and Allotment) Symbols Order 1968 (hereinafter referred to as the 'Symbols Order') read with Rules 5 and 10 of the Conduct of Election Rules. Paragraph 3 of the Symbols Order as it existed prior to the coming into force of Section 29A of the Act, runs as under:

3. Registration with the Commission of associations and bodies as political parties for the purposes of this Order - (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this Order shall make an application to the Commission for its registration as a political party for the purposes of this Order.

(2) Such application shall be made—

(a) if the association or body is in existence at the commencement of this Order, within sixty days next following such commencement;

(b) if the association or body is formed after the commencement of this Order, within sixty days next following the date of its formation;

Provided that no such application for registration shall be necessary on the part of any political party which immediately before the commencement of this Order is either a multi-state party or a recognised party other than a multi-state party and every such party shall be deemed to be registered with the Commission as a political party for the purposes of this Order.

(3) Every application under sub-paragraph (1) shall be signed by the chief executive officer of the association or body (whether such chief executive officer is known as Secretary or by any other designation) and either presented to a Secretary to the Commission or sent to such Secretary by registered post.

(4) Every such application shall contain the following particulars, namely :

- (a) the name of the association or body;
- (b) the State in which its head office is situated;
- (c) the address to which letters and other communications meant for it should be sent;
- (d) the names of its president, secretary and all other office-bearers;
- (e) the numerical strength of its members, and if there are categories of its members, the numerical strength in each category;
- (f) whether it has any local units; if so, at what levels (such as district level, thana or block level), village level, and the like);
- (g) the political principles on which it is based;
- (h) the policies, aims and objects it pursues or seeks to pursue;
- (i) its programs, functions and activities for the purpose of carrying out its political principles, policies, aims and objects;
- (j) its relationship with the electors and popular support it enjoys, and tangible proof, if any, of such relationship and support;
- (k) whether it is represented by any member or members in the House of the People or any State Legislative Assembly, if so, the number of such member or members;
- (l) any other particulars which the association or body may like to mention.

(5) The Commission may call for such other particulars as it may deem fit from the association or body.

(6) After considering all the particulars as aforesaid in its possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of this Order, or not so to register it; and the Commission shall communicate its decision to the association or body.

(7) The decision of the Commission shall be final;

(8) After an association or body has been registered as a political party as aforesaid, any change in its name, head office, office-bearers, address or political principles, policies, aims and objects and any change in any other material matters shall be communicated to the Commission without delay.

Section 29A of the Act runs as under:

29A. Registration with the Election Commission of association and bodies as political parties.- (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of provisions of this Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act.

(2) Every such application shall be made:

(a) if the association or body is in existence at the commencement of the Representation of the People (Amendment) Act, 1988, (1 of 1989), within sixty days next following such commencement.

(b) if the association or body is formed after such commencement, within thirty days next following the date of its formation.

(3) Every application under sub-section (1) shall be signed by the chief executive officer of the association or body (whether such chief executive officer is known as Secretary or by any other designation) and presented to the Secretary to the Commission or sent to such Secretary by registered post.

(4) Every such application shall contain the following particulars, namely:

(a) the name of the association or body;

(b) the State in which its head office is situated;

(c) the address to which letters and other communications meant for it should be sent;

(d) the names of its president, secretary, treasurer and other office-bearers;

(e) the numerical strength of its members, and if there are categories of its members, the numerical strength in each category;

(f) whether it has any local units; if so, at what levels;

(g) whether it is represented by any member or members in either House of Parliament or of any State Legislature; if so, the number of such member or members.

(5) The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.

(6) The Commission may call for such other particulars as it may deem fit from the association or body.

(7) After considering all the particulars as aforesaid in its possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of

this Part, or not so to register it; and the Commission shall communicate its decision to the association or body.

Provided that no association or body shall be registered as a political party under this sub-section unless the memorandum or rules and regulations of such association or body conform to the provisions of sub-section (5).

(8) The decision of the Commission shall be final.

(9) After an association or body has been registered as a political party as aforesaid, any change in its name, head office, office-bearers, address or in any other material matters shall be communicated to the Commission without delay.

16. A conjoint reading of Section 29A and paragraph 3 of the Symbols Order as it existed prior to enforcement of Section 29A of the Act shows that there were only two significant changes and other provisions remained the same. The first change is reflected in sub-section (5) of Section 29A of the Act which provides that the application for registration shall be accompanied by a copy of memorandum or rules and regulations of the political party seeking registration under the Act and such memorandum or rules and regulations shall contain a specific provision that such a political party shall bear true faith and allegiance to the Constitution of India, as by law established and to the principles of socialism, secularism and democracy and would uphold the sovereignty, unity and integrity of India. The second change is reflected in sub-section (4) of Section 29A of the Act which embodied in it, the provisions of different clauses of sub-paragraph (4) of paragraph 3 of the Symbols Order.

17. After Section 29A of the Act came into force, paragraph 3 of the Symbols Order stood amended inasmuch as the definition of a political party in paragraph 2(1)(4) of the Symbols Order was also amended. Earlier, under paragraph 3 of the Symbols Order, a political party was defined as a registered party. After Section 29A was inserted in the Act, the definition of a political party in the Symbols Order was amended to the effect that the political party means a party registered with the Election Commission under Section 29A of the Act. Consequently, paragraph 3 of the Symbols Order was also amended to the extent it prescribed additional information which a political party was required to furnish to the Election Commission along with an application for registration. Now such additional information the Election Commission is authorised to call for under sub-section (6) of Section 29A of the Act. A perusal of un-amended paragraph 3 of the Symbols Order shows that it did not provide for de-registration of a political party registered under the Symbols Order. Nor any such provision was made after the Symbols Order was amended after Section 29A was inserted in the Act. Further, neither the provisions of Section 29A of the Act nor the rules framed thereunder, provide for de-registration or cancellation of registration of a political party. We are, therefore, of the view that neither under the Symbols Order nor under Section 29A of the Act, the Election Commission has been conferred with any express power to de-register a political party registered under Section 29A of the Act on the ground that it has either violated the provisions of the Constitution or any provision of undertaking given before the Election Commission at the time of its registration.

18. The question then arises whether, in the absence of an express power in the Act, the Election Commission is empowered to de-register a registered political party. Learned

Attorney General, appearing for the Union of India urged that the Election Commission while exercising its power under Section 29A of the Act, acts quasi-judicially and in absence of any express power of review having been conferred on the Election Commission, the Election Commission has no power to de-register a political party. According to learned Attorney General, excepting in three circumstances when the Election Commission could not be deprived of the power to de-register a party are –

(a) when the Election Commission finds that the party has secured registration by playing fraud on the Commission,

(b) when a political party itself informs the Commission in pursuance of Section 29A(9) that it has changed its constitution so as to abrogate the provision therein conforming to the provisions of Section 29A(5) or does not believe in the provisions of the Constitution, rejecting the very basis on which it secured registration as a registration political party and

(c) any like ground where no enquiry is called for on the part of the Election Commission, the Commission has no power to de-register a political party.

Learned Attorney General further argued that in a situation where a complaint is made to the Election Commission and it is required to make an inquiry that a particular registered political party has committed breach of the undertaking given before the Election Commission or has violated the provisions of the Constitution, the Election Commission has neither any power to make any inquiry into such a complaint nor de-register such a political party.

19. Whereas, Shri L. Nageshwara Rao, learned counsel appearing for Respondent 1 urged that the discharge of function by the Election Commission under Section 29A of the Act cannot be termed as quasi-judicial function, in the absence of a *lis*-a proposition and apposition between the two contending parties which the statutory authority is required to decide. According to him, unless there is a *lis* or two contending parties before the Election Commission, the function assigned to the Election Commission under Section 29A is administrative in nature. His further argument is that where exercise of an administrative function manifests one of the attributes of quasi-judicial function, such a discharge of function is not quasi-judicial.

20. On the argument of parties, the question that arises for our consideration is, whether the Election Commission, in exercise of its powers under Section 29A of the Act, acts administratively or quasi-judicially. We shall first advert to the argument raised by learned counsel for the respondent to the effect that in the absence of any *lis* or contest between the two contending parties before the Election Commission under Section 29A of the Act, the function discharged by it is administrative in nature and not a quasi judicial one. The dictionary meaning of the word quasi is 'not exactly' and it is just in between a judicial and administrative function. It is true, in many cases, the statutory authorities were held to be quasi-judicial authorities and decisions rendered by them were regarded as quasi-judicial, where there was contest between two contending parties and the statutory authority was required to adjudicate upon the rights of the parties. In **Cooper v. Wilson** [(1937) 2 KB 309] it is stated that

The definition of a quasi-judicial decision clearly suggests that there must be two or more contending parties and an outside authority to decide those disputes.

In view of the aforesaid statement of law, where there are two or more parties contesting each other's claim and the statutory authority is required to adjudicate the rival claims between the parties, such a statutory authority was held to be quasi-judicial and decision rendered by it as a quasi-judicial order. Thus, where there is a *lis* or two contesting parties making rival claims and the statutory authority under the statutory provision is required to decide such a dispute, in the absence of any other attributes of a quasi-judicial authority, such a statutory authority is a quasi-judicial authority.

21. But there are cases where there is no *lis* or two contending parties before a statutory authority, yet such a statutory authority has been held to be quasi-judicial and decision rendered by it as quasi-judicial decision when such a statutory authority is required to act judicially. In ***Queen v. Dublin Corporation*** [(1878) 2 Ir. R. 371] it was held thus:

In this connection the term judicial does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. And if there be a body empowered by law to enquire into facts, makes estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts.

22. Atkin L.J. as he then was, in ***Rex v. Electricity Commissioners*** [(1924) 1 KB 171] stated that when any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, such body of persons is a quasi-judicial body and decision given by them is a quasi-judicial decision. In the said decision, there was no contest or *lis* between the two contending parties before the Commissioner. The Commissioner, after making an enquiry and hearing the objections was required to pass order. In a nutshell, what was held in the aforesaid decision was, where a statutory authority is empowered to take a decision which affects the rights of persons and such an authority under the relevant law required to make an enquiry and hear the parties, such authority is quasi-judicial and decision rendered by it is a quasi-judicial act.

23. In ***Province of Bombay v. Kusaldas S Advani***, it was held thus:

(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act ; and (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially. In other words, while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor, impose upon the authority the duty to act judicially, the absence of two such

parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially.

24. The legal principles laying down when an act of a statutory authority would be a quasi-judicial act, which emerge from the aforesaid decisions, are these: Where (a) a statutory authority is empowered under a statute to do any act (b) which would prejudicially affect the subject (c) although there is no lis or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial. Applying the aforesaid principle, we are of the view that the presence of a lis or contest between the contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority is sufficient to hold that such a statutory authority is a quasi judicial authority. However, in the absence of a lis before a statutory authority, the authority would be quasi-judicial authority if it is required to act judicially.

25. Coming to the second argument of learned counsel for the respondent, it is true that mere presence of one or two attributes of quasi-judicial authority would not make an administrative act as a quasi-judicial act. In some cases, an administrative authority may determine a question of fact before arriving at a decision which may affect the right of an appellant but such a decision would not be a quasi-judicial act. It is a different thing that in some cases fair-play may demand affording of an opportunity to the claimant whose right is going to be affected by the act of the administrative authority; still such an administrative authority would not be a quasi-judicial authority.

26. What distinguishes an administrative act from a quasi-judicial act is, in the case of quasi-judicial functions under the relevant law the statutory authority is required to act judicially. In other words, where law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority.

27. Learned counsel for the respondent then contended that a quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial and in that view of the matter, the function discharged by the Election Commission under Section 29A of the Act is totally administrative in nature. Learned counsel in support of his argument relied upon the following passage from **Wade & Forsyth's Administrative Law**:

A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A typical example is a minister deciding whether or not to confirm a compulsory purchase order or to allow a planning appeal after a public inquiry. The decision itself is administrative, dictated by policy and expediency. But the procedure is subject to the principles of natural justice, which require the minister to act fairly towards the objections and not (for example) to take fresh evidence without disclosing it to them. A quasi-judicial decision is therefore an administrative decision which is subject to some measure of judicial procedure.

28. We do not find any merit in the submission. At the outset, it must be borne in mind that another test which distinguishes administrative function from quasi-judicial function is, the authority who acts quasi-judicially is required to act according to the rules, whereas the authority which acts administratively is dictated by policy and expediency. In the present case, the Election Commission is not required to register a political party in accordance with any policy or expediency but strictly in accordance with the statutory provisions. The afore-quoted passage from *Administrative Law* by Wade & Forsyth is wholly inapplicable to the present case. Rather, it goes against the argument of learned counsel for the respondent. The afore-quoted passage shows that where an authority whose decision is dictated by policy and expediency exercises administratively although it may be exercising functions in some respects as if it were judicial, which is not the case here.

29. We shall now examine Section 29A of the Act in the light of the principles of law referred to above. Section 29A deals with the registration of a political party for the purposes of the Representation of the People Act. Sub-section (1) of Section 29A of the Act provides who can make an application for registration as a political party. Sub-sections (2) and (3) of the said Section lay down making an application to the Commission. Sub-sections (4) and (5) of the said Section provide for contents of the application. Sub-section (7) of Section 29 provides that the Election Commission after considering all the particulars in its possession and any other necessary and relevant factors and after giving the representatives of the association reasonable opportunity of being heard shall decide either to register the association or body as a political party or not so to register it and thereupon the Commission is required to communicate its decision to the political party. Further, sub-section (8) of Section 29A attaches finality to the decision of the Commission.

30. From the aforesaid provisions, it is manifest that the Commission is required to consider the matter, to give opportunity to the representative of the political party and after making enquiry and further enquiry arrive at the decision whether to register a political party or not. In view of the requirement of law that the Commission is to give decision only after making an enquiry, wherein an opportunity of hearing is to be given to the representatives of the political party, we are of the view that the Election Commission under Section 29A is required to act judicially and in that view of the matter the act of the Commission is quasi-judicial.

31. This matter may be examined from another angle. If the directions of the High Court for considering the complaint of the respondent that some of the appellants/political parties are not functioning in conformity with the provisions of Section 29A is to be implemented, the result will be that a detailed enquiry has to be conducted where evidence may have to be adduced to substantiate or deny the allegations against the parties. Thus, a *lis* would arise. Then there would be two contending parties opposed to each other and the Commission has to decide the matter of de-registration of a political party. In such a situation the proceedings before the Commission would partake the character of quasi-judicial proceeding. De-registration of a political party is a serious matter as it involves divesting of the party of a statutory status of a registered political party. We are, therefore, of the view that unless there is express power of review conferred upon the Election Commission, the Commission has no

power to entertain or enquire into the complaint for de-registering a political party for having violated the Constitutional provisions.

32. However, there are three exceptions where the Commission can review its order registering a political party. One is where a political party obtained its registration by playing fraud on the Commission; secondly, it arises out of sub-section (9) of Section 29A of the Act and thirdly, any like ground where no enquiry is called for on the part of the Election Commission, for example, where the political party concerned is declared unlawful by the Central Government under the provisions of the Unlawful Activities (Prevention) Act, 1967 or any other similar law.

33. Coming to the first exception, it is almost settled law that fraud vitiates any act or order passed by any quasi-judicial authority even if no power of review is conferred upon it. In fact, fraud vitiates all actions. In *Smith v. East Ellos Rural Distt. Council* [(1956) 1 All ER 855] it was stated that the effect of fraud would normally be to vitiate all acts and order. In *Indian Bank v. Satyam Fibres (India) Pvt. Ltd.* [(1996) 5 SCC 550], it was held that a power to cancel/recall an order which has been obtained by forgery or fraud applies not only to courts of law, but also statutory tribunals which do not have power of review. Thus, fraud or forgery practised by a political party while obtaining a registration, if it comes to the notice of the Election Commission, it is open to the Commission to de-register such a political party.

34. The second exception is where a political party changes its nomenclature of association, rules and regulations abrogating the provisions therein conforming to the provisions of Section 29A (5) or intimating the Commission that it has ceased to have faith and allegiance to the Constitution of India or to the principles of socialism, secularism and democracy, or it would not uphold the sovereignty, unity and integrity of India so as to comply with the provisions of Section 29A(5). In such cases, the very substratum on which the party obtained registration is knocked off and the Commission in its ancillary power can undo the registration of a political party. Similar case is in respect of any like ground where no enquiry is called for on the part of the Commission. In this category of cases, the case would be where a registered political party is declared unlawful by the Central Government under the provisions of the Unlawful Activities (Prevention) Act, 1967 or any other similar law. In such cases, power of the Commission to cancel the registration of a political party is sustainable on the settled legal principle that when a statutory authority is conferred with a power, all incidental and ancillary powers to effectuate such power are within the conferment of the power, although not expressly conferred. But such an ancillary and incidental power of the Commission is not an implied power of revocation. The ancillary and incidental power of the Commission cannot be extended to a case where a registered political party admits that it has faith in the Constitution and principles of socialism, secularism and democracy, but some people repudiate such admission and call for an enquiry by the Election Commission. Reason being, an incidental and ancillary power of a statutory authority is not the substitute of an express power of review.

35. Now, coming to the decisions relied upon by the learned counsel for the respondent, we are of the view that none of the decisions relied upon are of any assistance to the argument of learned counsel for the respondent. The decision of this Court in *Province of Bombay v. Kusaldas Advani* has been dealt with by us in the foregoing paragraph and is of no help to the

case of the respondent. In the case of *Radhey Shyam Khare v. State of M.P* [AIR 1959 SC 107] the State government issued an order on the ground of expediency and policy and, therefore, it was held that the impugned order is administrative in nature. In *T.N. Seshan v. Union of India* [(1995)4 SCC 611] it was held that the Election Commission besides administrative function is required to perform quasi-judicial duties and undertake subordinate legislation making functions as well. This decision also is of no help to the case of the respondent. In the case of *State of H.P. v. Raja Mahendra Pal* [AIR 1999 SC 1786] this Court found that Price Committee appointed by the government was not constituted under any statutory or plenary administrative power and, therefore, did not discharge any quasi-judicial function. This decision again is of no assistance to the case of the respondent.

36. It was next urged by the learned counsel for the appellants that the view taken by the High Court that by virtue of application of provisions of Section 21 of the General Clauses Act, 1897 the Commission has power to de-register a political party if it is found having violated the undertaking given before the Election Commission, is erroneous. According to him, once it is held that the Commission while exercising its powers under Section 29A of the Act acts quasi-judicially and an order registering a political party is a quasi-judicial order, the provision of Section 21 of the General Clauses Act has no application. We find merit in the submission.

37. We have already extensively examined the matter and found that Parliament consciously had not chosen to confer any power on the Election Commission to de-register a political party on the premise that it has contravened the provisions of sub-section (5) of Section 29A. The question which arises for our consideration is whether in the absence of any express or implied power, the Election Commission is empowered to cancel the registration of a political party on the strength of the provisions of Section 21 of the General Clauses Act. Section 21 of the General Clauses Act runs as under:

21. Power to issue, to include power to add, to amend, vary or rescind notification, orders, rules or bye-laws - Where by any central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred then that power includes a power exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

38. On perusal of Section 21 of the General Clauses Act, we find that the expression 'order' employed in Section 21 shows that such an order must be in the nature of notification, rules and bye-laws etc. The order which can be modified or rescinded on the application of Section 21 has to be either executive or legislative in nature. But the order which the Commission is required to pass under Section 29A is neither a legislative nor an executive order but is a quasi-judicial order. We have already examined this aspect of the matter in the foregoing paragraph and held that the functions exercisable by the Commission under Section 29A is essentially quasi-judicial in nature and order passed thereunder is a quasi-judicial order. In that view of the matter, the provisions of Section 21 of the General Clauses Act cannot be invoked to confer powers of de-registration/cancellation of registration after enquiry by the Election Commission. We, therefore, hold that Section 21 of the General Clauses Act has no application where a statutory authority is required to act quasi-judicially.

39. It may be noted that the Parliament deliberately omitted to vest the Election Commission of India with the power to de-register a political party for non-compliance with the conditions for the grant of such registration. This may be for the reason that under the Constitution the Election Commission of India is required to function independently and ensure free and fair elections. An enquiry into non-compliance with the conditions for the grant of registration might involve the Commission in matters of a political nature and could mean monitoring by the Commission of the political activities, programmes and ideologies of political parties. This position gets strengthened by the fact that on 30th June, 1994 the Representation of the People (Second Amendment) Bill, 1994 was introduced in the Lok Sabha proposing to introduce Section 29-B whereunder a complaint to be made to the High Court within whose jurisdiction the main office of a political party is situated for cancelling the registration of the party on the ground that it bears a religious name or that its memorandum or rules and regulations no longer conform to the provisions of Section 29-A (5) or that the activities are not in accordance with the said memorandum or rules and regulations. However, this bill lapsed on the dissolution of the Lok Sabha in 1996.

40. To sum up, what we have held in the foregoing paragraphs are as under:

1. That there being no express provision in the Act or in the Symbols Order to cancel the registration of a political party, and as such no proceeding for de-registration can be taken by the Election Commission against a political party for having violated the terms of Section 29A(5) of the Act on the complaint of the respondent.

2. The Election Commission while exercising its power to register a political party under Section 29A of the Act, acts quasi-judicially and decision rendered by it is a quasi-judicial order and once a political party is registered, no power of review having been conferred on the Election Commission, it has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration.

3. However, there are exceptions to the principle stated in paragraph 2 above where the Election Commission is not deprived of its power to cancel the registration. The exceptions are these –

(a) where a political party has obtained registration by practising fraud or forgery;

(b) where a registered political party amends its nomenclature of association, rules and regulations abrogating therein conforming to the provisions of Section 29A(5) of the Act or intimating the Election Commission that it has ceased to have faith and allegiance to the Constitution of India or to the principles of socialism, secularism and democracy or it would not uphold the sovereignty, unity and integrity of India so as to comply with the provisions of Section 29A(5) of the Act; and

(c) any like ground where no enquiry is called for on the part of the Commission.

4. The provisions of Section 21 of the General Clauses Act cannot be extended to the quasi-judicial authority. Since the Election Commission while exercising its power under Section 29A of the Act acts quasi-judicially, the provisions of Section 21 of the General Clauses Act has no application.

41. For the aforesaid reasons, the appeals deserve to be allowed in part. Consequently, direction nos. (iii) and (iv) of the impugned judgment are set aside. The appeals are allowed in part. The contempt petitions are rejected. There shall be no order as to costs.

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Guru Gobind Basu v. Sankari Prasad Ghosal

AIR 1964 SC 254

S.K. DAS, Ag. C.J. – 2. The short facts giving rise to the appeal are these. The appellant before us is Guru Gobind Basu who is a chartered accountant and a partner of the firm of auditors carrying on business under the name and style of G. Basu and Company. This firm acted as the auditor of certain companies and corporations, such as Life Insurance Corporation of India, Durgapur Projects Ltd., and Hindustan Steel Ltd., on payment of certain remuneration. The appellant was also a Director of the West Bengal Financial Corporation having been appointed or nominated as such by the State Government of West Bengal. The appointment carried with it the right to receive fees or remuneration as director of the said corporation.

3. In February-March, 1962, the appellant was elected to the House of People from Constituency No. 34 (Burdwan Parliamentary Constituency) which is a single member constituency. The election was held in February, 1962. There were two candidates, namely, the appellant and respondent 3 to this appeal. The appellant was declared elected on March 1, 1962, he having secured 1,55,485 votes as against his rival who secured 1,23,015 votes. This election was challenged by two voters of the said constituency by means of an election petition dated April 10, 1962. The challenge was founded on two grounds:

- (1) that the appellant was, at the relevant time, the holder of offices of profit both under the Government of India and the Government of West Bengal and this disqualified him from standing for election under Article 102(1)(a) of the Constitution; and
- (2) that he was guilty of certain corrupt practices which vitiated his election.

The second ground was abandoned at the trial, and we are no longer concerned with it.

4. The Election Tribunal held that the appellant was a holder of offices of profit both under the Government of India and the Government of West Bengal and was therefore, disqualified from standing for election under Article 102(1)(a) of the Constitution. The Election Tribunal accordingly allowed the election petition and declared that the election of the appellant to the House of the People was void. There was an appeal to the High Court under section 116-A of the Representation of the People Act, 1951. The High Court dismissed the appeal, but granted a certificate of fitness under Article 133(1)(c) of the Constitution.

5. The only question before us is whether the appellant was disqualified from being chosen as, and for being, a member of the House of the People under Article 102(1)(a) of the Constitution. The answer to the question depends on whether the appellant held any offices of profit under the Government of India or the Government of any State other than such offices as had been declared by Parliament by law not to disqualify their holder. It has not been seriously disputed before us that the office of auditor which the appellant held as partner of the firm G. Basu and Company was an office of profit. It has not been contended by the appellant before us that the office of profit which he held had been declared by Parliament by law not to disqualify the holder. Therefore the arguments before us have proceeded entirely on the question as to the true scope and meaning of the expression "under the Government of India or the Government of any State" occurring in clause (a) of Article 102(1) of the

Constitution. The contention on behalf of the appellant has been that on a true construction of the aforesaid expression, the appellant cannot be said to hold an office of profit under the Government of India or the Government of West Bengal. On behalf of the respondents the contention is that the office of auditor which the appellant holds is an office of profit under the Government of India in respect of the Life Insurance Corporation of India, Durgapur Projects Ltd. and Hindustan Steel Ltd.; and in respect of the West Bengal Financial Corporation of which the appellant is a Director appointed by the Government of West Bengal, he holds an office of profit under the Government of West Bengal. These are the respective contentions which fall for consideration in the present appeal.

6. It is necessary to state here that if in respect of any of the four companies or corporations it be held that the appellant holds an office of profit under the Government, be it under the Government of India or the Government of West Bengal, then the appeal must be dismissed. It would be unnecessary then to consider whether the office of profit which the appellant holds in respect of the other companies is an office of profit under the Government or not. We would therefore take up first the two companies, namely, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., which are 100% Government companies and consider the respective contentions of the parties before us in respect of the office of auditor which the appellant holds in these two companies. If we hold that in respect of any of these two companies the appellant holds an office of profit under the Government of India, then it would be unnecessary to consider the position of the appellant in any of the other companies.

7. It is not disputed that Hindustan Steel Ltd., and Durgapur Projects Ltd. are Government companies within the meaning of Section 2(18) read with Section 617 of the Indian Companies Act, 1956. It has been stated before us that 100% of the shares of Durgapur Projects Ltd. are held by the Government of West Bengal and 100% of the shares of Hindustan Steel Ltd. are held by the Union Government. We may now read Section 619 of the Indian Companies Act, 1956.

(1) In the case of a Government company, the following provisions shall apply, notwithstanding any thing contained in sections 224 to 233.

(2) The auditor of a Government company shall be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India shall have power-

(a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instructions in regard to any matters relating to the performance of his functions as such.

(b) to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf, and for the purposes of such audit, to require information or additional information to be furnished to any person or persons so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General may, by general or special order, direct.

(4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner, as he may think fit.

(5) Any such comments upon, or supplement to the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

It is clear from the aforesaid provisions that notwithstanding Section 224 of the Act which empowers every company to appoint an auditor or auditors at each annual general meeting, the appointment of an auditor of a Government company rests solely with the Central Government and in making such appointment the Central Government takes the advice of the Comptroller and Auditor-General of India. Under Section 224(7) of the Act an auditor appointed under Section 224 may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf. The remuneration of the auditors of a company is to be fixed in accordance with the provisions of sub-section (8) of Section 224. It is clear however that sub-section (7) of Section 224 does not apply to a Government company because the auditor of a Government company is not appointed under Section 224 of the Act, but is appointed under sub-section (2) of Section 619 of the Act. It is clear therefore that the appointment of an auditor in a Government company rests solely with the Central Government and so also his removal from office. Under sub-section (3) of Section 619 the Comptroller and Auditor-General of India exercises control over the auditor of a Government company in respect of various matters including the manner in which the company's accounts shall be audited. The Auditor-General has also the right to give such auditor instructions in regard to any matter relating to the performance of his functions as such. The Auditor-General may conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf. In other words, the Comptroller and Auditor-General of India exercises full control over the auditors of a Government company. The powers and duties of auditors in respect of companies other than Government companies are laid down in Section 227 of the Act but by virtue of sub-section (1) of Section 619 of the Act, the provisions in Section 227 of the Act do not apply to a Government company because a Government company is subject to the provisions of Section 619 of the Act. Under Section 619-A of the Act, where the Central Government is a member of a Government company, an annual report of the working and affairs of the company has to be prepared and laid before both Houses of Parliament with a copy of the audit report and the comments made by the Comptroller and Auditor General. Under Section 620 of the Act the Central Government may by notification direct that any of the provisions of the Act, other than Sections 618, 619 and 639, shall not apply to any Government company.

8. The net result of the aforesaid provisions is that so far as Durgapur Projects Ltd. and Hindustan Steel Ltd. are concerned, the appellant was appointed an auditor by the Central Government; he is removable by the Central Government and the Comptroller and Auditor-General of India exercises full control over him. His remuneration is fixed by the Central Government under sub-section (8) of Section 224 of the Act though it is paid by the company.

9. In these circumstances the question is, does the appellant hold an office of profit under the Central Government? We may now read Article 102(1) of the Constitution.

102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder

We have stated earlier that the sole question before us is whether the office of profit which the appellant undoubtedly holds as auditor of Durgapur Projects Ltd., and Hindustan Steel Ltd. is or is not under the Government of India. According to Mr. Chaudhuri who has argued the appeal on behalf of the appellant, the expression “under the Government” occurring in Article 102(1)(a) implies sub-ordination to Government. His argument is that ordinarily there are five tests of such subordination, namely:

- (1) whether the Government makes the appointment to the office;
- (2) whether the Government has the right to remove or dismiss the holder of office;
- (3) whether the Government pays the remuneration;
- (4) what are the functions which the holder of the office performs and does he perform them for the Government; and
- (5) does the Government exercise any control over the performance of those functions.

His argument further is that the tests must all co-exist and each must show subordination to Government so that the fulfilment of only some of the tests is not enough to bring the holder of the office under the Government. According to him all the tests must be fulfilled before it can be said that the holder of the office is under the Government. His contention is that the Election Tribunal and the High Court were in error in holding that the appellant was a holder of office under the Government, because they misconstrued the scope and effect of the expression “under the Government” in Article 102(1)(a) of the Constitution. He has contended that tests (3), (4) and (5) adverted to above are not fulfilled in the present case. The appellant gets his remuneration from the company though fixed by Government; he performs functions for the company and he is controlled by the Comptroller and Auditor-General who is different from the Government.

10. On behalf of the respondents it is argued that the tests are not cumulative in the sense contended for by the appellant, and what has to be considered is the substance of the matter which must be determined by a consideration of all the factors present in a case, and whether stress will be laid on one factor or the other will depend on the circumstances of each particular case. According to the respondents, the tests of appointment and dismissal are important tests in the present case, and in the matter of a company which is a 100% Government company, the payment of remuneration fixed by Government, the performance of the functions for the company and the exercise of control by the Comptroller and Auditor-General, looked at from the point of view of substance and taken in conjunction with the

power of appointment and dismissal, really bring the holder of the office under the Government which appoints him.

11. One point may be cleared up at this stage. On behalf of the respondents no question has been raised that Durgapur Projects Limited, or Hindustan Steel Limited, is a department of Government or an emanation of Government - a question which was considered at some length in *Narayanaswamy v. Krishnamurthi* [ILR 1958 Mad. 513]. Learned counsel for the respondents has been content to argue before us on the basis that the two companies having been incorporated under the Indian Companies Act, 1956 are separate legal entities distinct from Government. Even on that footing he has contended that in view of the provisions of Section 619 and other provisions of the Indian Companies Act, 1956, an auditor appointed by the Central Government and liable to be removed from office by the same Government, is a holder of an office of profit under the Government in respect of a company which is really a hundred per cent Government company.

12. We think that this contention is correct. We agree with the High Court that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and 'the holder of a post or service under the Government'; see Articles 309 and 314. The Constitution has also made a distinction between 'the holder of an office of profit under the Government' and 'the holder of an office of profit under a local or other authority subject to the control of Government'; see Articles 58(2) and 66(4). In *Maulana Abdul Shakur v. Rikhab Chand* [(1958) SCR 387] the appellant was the manager of a school run by a committee of management formed under the provisions of the Durgah Khwaja Saheb Act, 1955. He was appointed by the administrator of the Durgah and was paid Rs. 100 per month. The question arose whether he was disqualified to be chosen as a member of Parliament in view of Article 102(1)(a) of the Constitution. It was contended for the respondent in that case that under Sections 5 and 9 of the Durgah Khwaja Saheb Act, 1955 the Government of India had the power of appointment and removal of members of the committee of management as also the power to appoint the administrator in consultation with the committee; therefore the appellant was under the control and supervision of the Government and that therefore he was holding an office of profit under the Government of India. This contention was repelled and this court pointed out the distinction between 'the holder of an office of profit under the Government' and 'the holder of an office of profit under some other authority subject to the control of Government'. Mr. Chaudhuri has contended before us that the decision is in his favour. He has argued that the appellant in the present case holds an office of profit under the Durgapur Projects Ltd. and the Hindustan Steel Ltd. which are incorporated under the Indian Companies Act; the fact that the Comptroller and Auditor-General or even the Government of India exercises some control does not make the appellant any less a holder of office under the two companies. We do not think that this line of argument is correct. It has to be noted that in *Maulana Abdul Shakur* case [(1958) SCR 387] the appointment of the appellant in that case was not made by the Government nor was he liable to be dismissed by the Government. The appointment was made by the administrator of a committee and he was liable to be dismissed by the same body. In these circumstances this Court observed:

No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting, within the four corners of the Act. Merely because the Committee or the members of the Committee are removable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government, though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test.

It is clear from the aforesaid observations that in *Maulana Abdul Shakur* case the factors which were held to be decisive were:

(a) the power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion, and

(b) payment from out of Government revenues, though it was pointed out that payment from a source other than Government revenues was not always a decisive factor.

In the case before us the appointment of the appellant as also his continuance in office rests solely with the Government of India in respect of the two companies. His remuneration is also fixed by the Government. We assume for the purpose of this appeal, that the two companies are statutory bodies distinct from Government but we must remember at the same time that they are Government companies within the meaning of the Indian Companies Act, 1956 and 100% of the shares are held by the Government. We must also remember that in the performance of his functions the appellant is controlled by the Comptroller and Auditor-General who himself is undoubtedly holder of an office of profit under the Government, though there are safeguards in the Constitution as to his tenure of office and removability therefrom. Under Article 148 of the Constitution, the Comptroller and Auditor-General of India is appointed by the President and he can be removed from office in like manner and on the like grounds as a judge of the Supreme Court. The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and until they are so determined shall be as specified in the Second Schedule to the Constitution. Under clause (4) of Article 148 the Comptroller and Auditor-General is not eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office. Clause (5) of the said Article lays down that subject to the provisions of the Constitution and of any law made by Parliament, the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General. Under Article 149 of the Constitution, the Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law

made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of the Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively. The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union have to be submitted to the President and the reports of the Comptroller and Auditor General relating to the accounts of the State have to be submitted to the Governor. From the aforesaid provisions it appears to us that the Comptroller and Auditor-General is himself a holder of an office of profit under the Government of India, being appointed by the President and his administrative powers are such as may be prescribed by rules made by the President, subject to the provisions of the Constitution and of any law made by Parliament. Therefore, if we look at the matter from the point of view of substance rather than of form, it appears to us that the appellant as the holder of an office of profit in the two Government companies, Durgapur Projects Ltd. and Hindustan Steel Ltd., is really under the Government of India; he is appointed by the Government of India, he is removable from office by the Government of India; he performs functions for two Government companies under the control of the Comptroller and Auditor-General who himself is appointed by the President and whose administrative powers may be controlled by rules made by the President.

13. In *Ramappa v. Sangappa* [(1959)1 SCR 1167], the question arose as to whether the holder of a village office who has a hereditary right to it is disqualified under Article 191 of the Constitution, which is the counterpart of Article 102, in the matter of membership of the State Legislature. It was observed therein:

The Government makes the appointment to the office though it may be that it has under the statute no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The office is, therefore, held by reason of the appointment by the Government and not simply because of a hereditary right to it. The fact that the Government cannot refuse to make the appointment does not alter the situation.

14. There again the decisive test was held to be the test of appointment. In view of these decisions we cannot accede to the submission of Mr. Chaudhury that the several factors which enter into the determination of this question-the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf-must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office under the Government, Central or State, is not satisfied. The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor-not decisive of the question. As we have said earlier whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements-the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the

question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered.

15. For the reasons given above we have come to the conclusion that the Election Tribunal and the High Court were right in coming to the conclusion that the appellant as an auditor of the two Government companies held an office of profit under the Government of India within the meaning of Article 102(1)(a) of the Constitution. As such he was disqualified for being chosen as, and for being, a member of either House of Parliament.

16. The appeal accordingly fails and is dismissed with costs.

* * * * *

Ashok Kumar Bhattacharya v. Ajoy Biswas

(1985) 1 SCC 151

SABYASACHI MUKHARJI, J.- This appeal arises out of the judgment and an order of the Gauhati High Court in an election petition. The petitioner appellant was a voter in the West Tripura Parliamentary Constituency from No. 7 Ramnagar Assembly Segment. He contested the mid-term Lok Sabha election held in 1980 from the West Tripura Parliamentary Constituency as a nominee of Congress (I). There were six candidates including the petitioner contesting the said election. Respondent 1 was a C.P.I.(M) candidate. 8th December, 1979 was the date of filing of the nominations. Nominations were scrutinised on 11th December, 1979 and the withdrawal date was 13th December, 1979. On 6th January, 1980 the polling was held and the result of the election was declared on 8th January, 1980. The main contest was between the petitioner/appellant and the respondent 1, Ajoy Biswas. The respondent 1 had secured 1,98,335 votes as against the appellant who had secured 1,42,990 votes. The respondent no. 1 was declared elected.

2. The only point on which the election petition by the appellant/petitioner was pressed before the High Court and the only point urged before us in this appeal, is whether respondent 1 was disqualified for being elected as a member of the House of People as he held an office of profit under the Government of Tripura within the meaning of Article 102(1)(a) of the Constitution. On the relevant date, respondent 1 was the accountant-in-charge of the Agartala Municipality. Therefore, the question involved in this appeal, is, whether an accountant-in-charge of the Agartala Municipality holds an office of profit within the meaning of Article 102(1)(a) of the Constitution. In order to determine this question, it will be necessary to refer to certain facts.

3. Respondent 1 was employed in Agartala Municipality and held the post carrying the scale of pay of Rs. 80-180 per month. The Commissioners of the Agartala Municipality were superseded by an order of the State Government under Section 553 of the Bengal Municipal Act, 1932 as extended to the State of Tripura in 1975. The effect of Section 554 of the said Act is that during the period of supersession the powers and duties of the Commissioners and Chairman shall be exercised and performed by the Administrator appointed by the State Government under that section. Respondent 1 who was under suspension at the time of supersession was dismissed from service in the disciplinary proceedings against him by the Administrator of Agartala Municipality on 20th December, 1975. The State Government thereafter had confirmed the order of dismissal. When the Left Front Government came in power in the State of Tripura, respondent 1 was reinstated to the post of accountant-in-charge of Agartala Municipality on 6th May, 1978 with immediate effect by the Administrator. So, at the relevant time he was an assistant accountant and was accountant-in-charge under the Agartala Municipality drawing a monthly salary of Rs. 200.

4. It is necessary to briefly note some of the relevant provisions of the said Act in view of the contentions urged in this appeal. Proviso (ii) to Section 66(2) of the said Municipal Act provides that no appointment carrying a monthly salary of more than two hundred rupees or a salary rising by periodical increments to more than two hundred rupees shall be created without the sanction of the State Government, and every nomination to, and dismissal from,

any such nomination shall be subject to confirmation by the State Government. It appears that the Deputy Secretary to the Government of Tripura by his letter dated 6th May 1978 had conveyed to the Administrator, Agartala Municipality, decision of the Government for cancellation of the order of confirmation of the dismissal communicated to him on 19th December, 1975. As a result, the cancellation order ceased to be effective and respondent 1 was reinstated and it was further provided that the period between the date of dismissal and the date of reinstatement would be treated as period spent on duty for all purposes.

5. The Act further provides that there shall be established for each Municipality a body of Commissioners consisting of such members or Commissioners, not being more than twenty nor less than six, as the State Government may specify in the notification constituting the Municipality. Such Commissioners shall be a body corporate by the name of the Municipal Commissioners of the place by reference to which the Municipality is known, having perpetual succession and a common seal, and by that name shall sue and be sued. The Municipality consists of elected Commissioners. A Chairman is elected by the Commissioners from amongst the Commissioners within 30 days from the date of publication of the result of the general election of the Commissioners in the Municipality failing which the State Government has the power to appoint one of the Commissioners to be the Chairman. A Vice-Chairman is also to be elected from amongst themselves. The Chairman is empowered within certain limitations to transact the business connected with the Act and exercise all the powers vested in the Commissioners under the Act, except as otherwise provided. The Commissioners are to hold office for four years commencing from the date of the first meeting of the newly formed body of Commissioners after a general election of Commissioners in the Municipality at which a quorum is present. An elected Chairman or Vice-Chairman may, at any time, be removed from his office by a resolution of the Commissioners as laid down in section 61(2) or (3) of the said Act. The Act also empowered the State Government to remove an elected Commissioner on certain grounds set out in section 62 of the said Act.

6. In view of the contentions raised in this appeal, it would be relevant to refer and set out section 66 of the said Act which is as follows:

66. Appointment of subordinate officers.-

(1) The Commissioners at a meeting may, subject to the provisions of this Act and the Rules made thereunder from time to time, determine what officers and what servants of the Commissioners are necessary for the municipality and may fix the salaries and allowances to be paid and granted to such officers and servants.

(2) Subject to the scale of establishment approved by the Commissioners under subsection (1), the Chairman shall have power to appoint such persons as he may think fit, and from time to time to remove such persons and appoint others in their places.

Provided as follows:

(i) a person shall not be appointed to an office carrying a monthly salary of more than fifty rupees or a salary rising by periodical increments to more than fifty rupees without the sanction of the Commissioners at a meeting, and an officer or servant whose post

carries a monthly salary of more than twenty rupees shall not be dismissed without such sanction.

(ii) no appointment carrying a monthly salary of more than two hundred rupees or a salary rising by periodical increments to more than two hundred rupees shall be created without the sanction of the State Government, and every nomination to, and dismissal from, any such appointment shall be subject to confirmation by the State Government.

(iii) no person holding an office carrying a monthly salary of one hundred rupees or more shall be dismissed unless such dismissal is sanctioned by a resolution of the Commissioners passed at a special meeting called for the purpose and, except with the consent of the State Government, unless such resolution has been supported by the votes of not less than two-thirds of the total number of Commissioners holding office for the time being.

(3) Notwithstanding anything contained in sub-section (2), the creation of and nomination to or suspension, removal or dismissal from, the post of Executive officer shall, irrespective of the salary assigned to the post, be subject to confirmation by the State Government.

7. The Act further provides that besides the officers and the servants mentioned above, all or any of the officers mentioned in section 67 may be appointed by the Commissioners. In certain circumstances, the Act provides, that the State Government may have an Executive officer for such period as may be specified in the Notification. Section 93 provides that as soon as may be after the first day of April in every year not later than such date as may be fixed by the State Government, the Commissioners shall submit to the State Government a report on the administration of the Municipality during the preceding year in such form and with such details as the State Government may direct, and a copy of the report shall also be submitted by the Commissioners to the District Magistrate. The Commissioners of a Municipality may acquire and hold property within or without the limits of the Municipality, and all property within the Municipality, of the nature specified in section 95, other than property maintained by the Central Government or any other local Authority, are vested in and belong to the Commissioners, and are under their direct management and control. By section 102 of the said Act, the Commissioners are empowered to purchase, take on lease or otherwise acquire any land for the purposes of the said Act, and may sell, lease, exchange or otherwise dispose of any land not required for such purposes. They are also empowered to enter into and perform any contract necessary for the purpose of the Act. A fund called the Municipal fund is constituted for each Municipality and all sums received by or on behalf of the Commissioners under the said Act or otherwise, and the balance, if any, standing at the credit of the Municipal fund of the Municipality at the commencement of the said Act, are credited to the said fund. The purposes to which the Municipal Fund is applicable are enumerated in section 108 of the Act. If any work is estimated to cost above ten thousand rupees, the State Government may require the plans and estimates of such works to be submitted for its approval, or for the approval of any servant of the Government before such work, in such form as it might prescribe.

8. There are provisions for imposing taxes, tolls and fees under section 123 of the said Act and to make assessment of the rate on the annual value of the holdings under section 128 of the said Act. Powers are conferred to impose taxes. There are other provisions for raising fund

for the Municipality by way of charging fee for registration etc. The Act empowers raising of funds for the Municipality for carrying out the purposes of the said Act.

9. In this connection it may be relevant to refer to clause (31) of section 3 of the General Clauses Act, 1897, and in view of the provisions of the Act it was held by the High Court that Agartala Municipality is a 'Local Authority' within the meaning of that expression as defined in clause (31) of section 3 of the General Clauses Act, 1897. We are of the opinion that the High Court was right.

10. In view of the facts narrated before, it was found by the High Court, and in our opinion rightly, that respondent 1 was at the relevant time holding an office of profit under a local municipality. Section 66 which we have set out hereinbefore indicates that the appointment of persons to the category of post held by respondent 1 was to be made by the Commissioners of Municipality, but the appointment was subject to the confirmation by the State Government. The High Court held and we are of the opinion rightly that the respondent 1 was an officer of the Commissioners. Section 63 of the said Act provides that such officers and servants of the Commissioners shall be subordinate to the Executive Officer appointed by the Commissioners. Respondent 1 was appointed by Commissioners, though sanction of the Government was obtained. He could be removed by the Commissioners, again subject to the sanction of the Government. He was paid out of the municipal funds which the Municipality was and is competent to raise. From the analysis of the provisions of the Act it is clear that though the Government exercises certain amount of control and supervision, respondent 1 was not an employee of the Government nor was he required to perform governmental functions for the Government.

11. Municipalities are separately mentioned in contradistinction of the State Government as it will be clear from reference to Item 5 in List II of the VII Schedule of the Constitution. Therefore, a local authority as such is a separate and distinct entity. This will become further clear from Article 58(2) of the Constitution.

12. The question involved in this appeal is whether respondent 1 held an office of profit under sub-clause (a) of Clause (1) of Article 102 of the Constitution. Sub-clause (a) of Article 102 (1) provides as follows:-

Article 102- Disqualification for membership - (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-

(a) If he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder.

13. In contradistinction, clause (2) of Article 58 which mentions disqualifications for election as President provides as follows :-

58. Disqualifications for elections President:

(1).....

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

14. In fact a person who is holding an office of profit either under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments is disqualified from becoming the President but if a person holds an office of profit under the Government of India or the Government of any state he is only disqualified from being a member of Parliament. A holder of the office of profit under any local or other authority subject to the control of the State or Central Government is as such not disqualified from becoming a Member of Parliament. Keeping in view these provisions, it is necessary to consider the question whether respondent 1 was holding an office of profit under the State Government.

15. In the case of **D. R. Gurushantappa v. Abdul Khuddus Anwar** [(1969) 3 SCR 425] this Court had to consider whether a candidate employed in a company owned by the Government was disqualified under Article 102(1) (a) and 191 (1)(a) of the Constitution and in this connection considered the relevant provisions of Articles 102(1) (a) and 191(1) (a) of the Constitution. After discussing the case of **Gurugobinda Basu v. Sankari Prasad Ghosal** [(1964) 4 SCR 311] and the decision in the case of **Maulana Abdul Shakur v. Rikhab Chand** [(1958) 3 SCR 387], this Court came to the conclusion that the mere fact that the Government had control over the Managing Director and other Directors as well as the power of issuing directions relating to the working of the company could not lead to the inference that every employee of the company was under the control of the Government.

16. The true principle behind this provision in Article 102 (1) (a) is that there should not be any conflict between the duties and the interests of an elected member. Government controls various activities in various spheres and in various measures. But to judge whether employees of any authority or local authorities under the control of Government become Government employees or not, or holders of office of profit under the Government the measure and nature of control exercised by the Government over the employee must be judged in the light of the facts and circumstances in each case so as to avoid any possible conflict between his personal interests and duties and those of the Government. This position was further examined in the case of **Surya Kant Roy v. Imamul Hai Khan** [(1975) 3 SCR 909] There, under the Bihar and Orissa Mining Settlement Act, 1920, a Board called the Mines Board of Health may be established to provide for the control and sanitation of any area within which the persons employed in a mine reside and for the prevention therein of the outbreak and spread of epidemic diseases. After analysing the facts of that case, this Court held that the mere fact that the candidate was appointed Chairman of the Board by the State Government would not make him a person holding an office of profit under the State Government. There the Supreme Court referred to the decision in the case of **Shivamurthy Swami v. Agadi Sanganna Andanappa** [(1971) 3 SCC 870]. This Court in **Surya Kant Roy v. Imamul Hai Khan** observed at page 911 as follows:

Here again it is to be pointed out that the Government does not pay the remuneration nor does the holder perform his functions for the Government. To hold otherwise would be to hold that local bodies like Municipal Councils perform their functions for the Government though in one sense the functions they perform are governmental functions.

17. In the case of **D.R. Gurushantappa v. Abdul Khuddus Anwar** mentioned herein before, at page 434 this Court observed as follows:

Thus, in the case of election as President or Vice President, the disqualification arises even if the candidate is holding an office of profit under a local or any other authority under the control of the Central Government or the State Government, whereas, in the case of a candidate for election as a Member of any of the Legislatures, no such disqualification is laid down by the Constitution if the office of profit is held under a local or any other authority under the control of the Governments and not directly under any of the Governments. This clearly indicates that in the case of eligibility for election as a member of a Legislature, the holding of an office of profit under a corporate body like a local authority does not bring about disqualification even if that local authority be under the control of the Government. The mere control of the Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature in the manner in which such disqualification comes into existence for being elected as the President or the Vice-President. The Company, in the present case, no doubt did come under the control of the Government and respondent 1 was holding an office of profit under the Company; but, in view of the distinction indicated above, it is clear that the disqualification laid down under Article 191 (1) (a) of the Constitution was not intended to apply to the holder of such an office of profit.

18. This view was again reiterated by this Court in the case of **Madhuker G.E. Panakakar v. Jaswant Chabbildas Rajani** [(1976) 3 SCR 832 at 851] where this Court observed as follows:

The core question that comes to the fore from the survey of the panorama of case law is as to when we can designate a person gainfully engaged in some work having a nexus with Government as the holder of an 'office of profit' under the Government in the setting of disqualification for candidature for municipal or like elections. The holding of an office denotes an office and connotes its holder and this duality implies the existence of the office as an independent continuity and an incumbent thereof for the once.

Certain aspects appear to be elementary. For holding an office of profit under the Government one need not be in the service of Government and there need be no relationship of master and servant (**Guru Gobinda**). Similarly, we have to look at the substance, not the form. Thirdly, all the several factors stressed by this Court as determinative of the holding of an 'office' under Government, need not be conjointly present, the critical circumstances, not the total factors, prove decisive. A practical view not pedantic basket of tests, should guide in arriving at a sensible conclusion.

19. In a recent decision of this Court in the case of **Biharilal Dobray v. Roshan Lal Dobray** [(1984)1 SCC 155] this Court was concerned with the question whether an office of profit was held directly under the Government in the facts of that case. There was an assistant teacher of a Basic Primary School run by the U.P. Board of Basic Education under the U.P.

Basic Education Act, and it was held that it was an office of profit under the State Government within the meaning of Article 191 (1) (a) of the Constitution and therefore he was disqualified from election. There the respondent was originally employed as an assistant teacher in a Basic Primary School which was being run and managed by the Zila Parishad. On coming into force of the U.P. Basic Education Act, 1972, he became an employee of the Board of Basic Education under Section 9 (1) of the Act. While holding the post of an assistant teacher as such he filed his nomination for his election to the State Legislative Assembly. But the Returning officer rejected his nomination paper on the ground that he was holding an office of profit under the State Government and hence he was disqualified under Article 191 (1) (a) for being elected as an M.L.A. Article 191 (1) (a) is in terms *pari materia* with Article 102 (1) (a) of the Constitution regarding the election to the State Assembly. The respondent herein filed an election petition and the High Court allowed the same declaring that the election of the appellant by rejecting the nomination of the respondent was void. The appellant therefore preferred the appeal to this Court. This Court allowed the appeal and it was held that the respondent was holding an office of profit under the State Government.

20. As we have mentioned before, the object of enacting provisions like Article 102 (1) (a) and Article 191(1) (a) is that a person who is elected to Parliament or a Legislature should be free to carry on his duties fearlessly without being subjected to any kind of governmental pressure. The term 'office of profit under the Government' used in clause (a) of Article 102(1) is an expression of wider import than a post in connection with the Union or of any State which is dealt with in Part XIV of the Constitution. The measure of control by the Government over a local authority should be judged in order to eliminate the possibility of conflict between duty and interest and to maintain the purity of the elected bodies. After reviewing various cases, and the provisions of the various sections of the U.P. Basic Education Act, 1972, especially in view of section 13 of the Act, this Court held in the last mentioned case that the measure of control was such that the U.P. Education Board was an authority which was not truly independent of the Government and every employee of the Board was in fact holding an office of profit under the State Government. The statement of Objects and Reasons of the U.P. Basic Education Act, 1972 and sections 4, 6, 7, 13 and 19 all of which have been set out *in extenso* in that decision make that conclusion irresistible.

21. For determination of the question whether a person holds an office of profit under the Government, each case must be measured and judged in the light of the relevant provisions of the Act. Having regard to the provisions of the Bengal Municipal Act, 1932 as extended to Tripura, the provisions of which have been set out hereinbefore, we are of the opinion that the State Government does not exercise any control over officers like respondent 1 and that he continues to be an employee of the Municipality though his appointment is subject to confirmation by the Government. Just by reason of this condition an employee of a local authority does not cease to be an employee of the Municipality. Local authority as such or any other authority does not cease to become independent entity separate from Government. Whether in a particular case it is so or not must depend upon the facts and circumstances of the relevant provisions. To make in all cases employees of local authorities subject to the control of Government and to treat them as holders of office of profit under the Government would be to obliterate the specific differentiation made under Article 58(2) and Article 102

(1) (a) of the Constitution and to extend disqualification under Article 58 (2) to one under Article 102 (1) (a) to an extent not warranted by the language of the Article.

22. Having noted the relevant provisions, we are of the opinion that respondent 1 was not at the relevant time a holder of office of profit under the Government. Some amount of control is recognised even in a local authority which is taken account of under Article 58. The High Court held that respondent 1 did not hold an office of profit under the Government of Tripura on the date of filing of the nomination on an analysis of relevant provisions of the Act which we have set out hereinbefore. We are in agreement with this view of the High Court.

23. In the premises, respondent 1 was not disqualified from filing his nomination. The appeal, therefore, fails and is accordingly dismissed with costs.

* * * * *

Jaya Bachchan v. Union of India

AIR 2006 SC 2119

After obtaining the opinion of the Election Commission as required by Article 103(2) of the Constitution of India, the President of India in exercise of powers conferred under clause (1) of Article 103 had decided that the petitioner stands disqualified for being a Member of Rajya Sabha on and from 14th July, 2004. As per the opinion of the Election Commission rendered to the President of India under clause (2) of Article 103 that the petitioner became disqualified under Article 102(1)(a) of the Constitution for being a Member of Rajya Sabha on 14th July, 2006 on her appointment by the Government of Uttar Pradesh as Chairperson of the U.P. Film Development Council terming the same as “office of profit” under the Government of Uttar Pradesh. The petitioner challenged both the said decision of the President of India as well as the opinion of the Election Commission rendered by it to the President of India.

The petitioner relied on the decisions in *Umrao Singh v. Darbara Singh* [(1969) 1 SCR 421] and *Divya Prakash v. Kultar Chand Rana* [(1975) 1 SCC 264] and also referred to *Biharilal Dobray v. Roshan Lal Dobray* [(1984) 1 SCC 551] and contended that the post of Chairperson of the Council, and the conferment of the rank of a Cabinet Minister were only decorative; that she did not receive any remuneration or monetary benefit or other facilities from the State Government. After a careful examination of the decisions relied upon by the petitioner, the Hon’ble Supreme Court held that it was well settled that where the office carries with it certain emoluments or the order of the appointment states that the person appointed was entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments and stated that what was relevant was whether pecuniary gain is ‘receivable’ in regard to the office and not whether pecuniary gain was in fact, received or received negligibly.

The Supreme Court held that the office did carry with it a monthly honorarium of Rs. 5000/-, entertainment expenditure of Rs. 10,000/-, other facilities including free accommodation and medical facilities and that these were pecuniary gains, cannot be denied. Thus, the Hon’ble Supreme Court found no merit in the writ petition and the same was accordingly dismissed.

Y.K. SABHARWAL, C.J.I., C.K. THAKKER and R.V. RAVEENDRAN, JJ. -

ORDER

The challenge in this petition filed under Article 32 of the Constitution of India, is to the order of the Hon’ble President of India, dated 16th March 2006, whereby, in exercise of powers conferred under clause (1) of Article 103 of the Constitution of India, the Hon’ble President has decided, after obtaining the opinion of the Election Commission as required by Article 103(2), that the petitioner stands disqualified for being a Member of the Rajya Sabha on and from the 14th day of July 2004. The challenge is also to the opinion dated 2nd March, 2006 rendered by the Election Commission to the Hon’ble President under clause (2) of

Article 103, that the Petitioner became disqualified under Article 102(1)(a) of the Constitution for being a Member of the Rajya Sabha on and from 14th July, 2004 on her appointment by the Government of Uttar Pradesh as Chairperson of the U.P. Film Development Council.

2. The Government of Uttar Pradesh, by Official Memorandum dated 14-7-2004, appointed the petitioner as the Chairperson of Uttar Pradesh Film Development Council (for short 'the Council') and sanctioned to her the rank of a Cabinet minister with the facilities as mentioned in O.M. No. 14/1/46/87-C Ex.(1) dated 22.3.1991 (as amended from time to time). The benefits to which she became entitled, as a consequence, are:

- (i) Honorarium of Rs. 5,000/- per month.
- (ii) Daily allowance @ Rs. 600 per day within the State and Rs. 750/- outside the State.
- (iii) Rs. 10,000/- per month towards entertainment expenditure.
- (iv) Staff car with driver, telephones at office and residence, one P.S., one P.A. and two class IV employees.
- (v) Body guard and night escort.
- (vi) Free accommodation and medical treatment facilities to her and family members.
- (vii) Free accommodation in government circuit houses/guest houses and hospitality while on tour.

3. The Election Commission, after referring to the facts and the law enunciated by this Court in several decisions, has expressed the opinion that the office of Chairperson of the Council to which the petitioner was appointed by the State Government by O. M. dated 14.7.2004, on the terms and conditions specified therein, is an "office of profit" under the Government of Uttar Pradesh for the purposes of Article 102(1)(a) of the Constitution. The Commission also found that Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 did not exempt the said office of profit from disqualification under Article 102(1) (a) of the Constitution.

4. The petitioner contends that the post of Chairperson of the council, and the conferment of the rank of Cabinet Minister, were only "decorative"; that she did not receive any remuneration or monetary benefit from the State Government; that she did not seek residential accommodation, nor used telephone or medical facilities; that though she travelled several times in connection with her work as chairperson, she never claimed any reimbursement; and that she had accepted the chairpersonship of the Council honorarily and did not use any of the facilities mentioned in the O.M. dated 22.3.1991. The petitioner contends that in the absence of any finding by the Election Commission that she had received any payment or monetary consideration from the State government, she could not be said to hold any office of profit under the State Government and, therefore, her disqualification was invalid.

5. It is not in dispute that the Council is not an autonomous body or statutory corporation, that the council has no budget of its own, and that all its expenses are met by the Department of the State Government administratively in-charge of it. Similarly, the fact that the petitioner was appointed as Chairperson of the Council, conferring on her the rank of a Cabinet Minister entitling her to all the remuneration and benefits as provided in the O.M. dated 22.3.1991 (extracted above), is also not disputed.

6. Clause (1) (a) of Article 102 provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. The term 'holds an office of profit' though not defined, has been the subject matter of interpretation, in several decisions of this Court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is 'holding an office of profit'. The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word 'honorarium' cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket / actual expenses, the office will be an office of profit for the purpose of Article 102(1)(a). This position of law stands settled for over half a century.

7. The petitioner relied on the decisions in *Umrao Singh v. Darbara Singh* [(1969)1 SCR 421] and *Divya Prakash v. Kultar Chand Rana* [(1975)1 SCC 264].

8. In *Umrao Singh* case, the question that arose for consideration was whether payment of a monthly consolidated allowance for performing all official duties and journeys concerning the work and a mileage allowance for the journeys performed for official work outside the district and daily allowance for the days of attendance of meetings/travel/halt, would convert the office of Chairman of a Panchayat Samiti into an office of profit. This Court held that these were allowances paid for the purpose of ensuring that the Chairman did not have to spend money out of his own pocket for discharging his official duties, and therefore, receipt of such allowances did not make the office one of profit.

9. In *Divya Prakash* case, this Court held that the post of the Chairman of the Board of School Education of the State of Himachal Pradesh was not an office of profit. The candidate was appointed specifically in an honorary capacity without any remuneration. Further that post of Chairman did not carry with it a scale of pay. On the same date the Bench also decided the case of *K.B. Rohamare v. Shankar Rao* [(1975)1 SCC 252] where while discussing the question at length, *Ravanna Subanna v. G. S. Kaggeerappa* [AIR 1954 SC 653] was cited with approval. It was held in the said case that amount of money *receivable* (emphasis supplied by us) by a person in connection with the office he holds is material when deciding whether the office carried any profit.

10. Learned counsel for the petitioner has also referred to *Biharilal Dobray v. Roshanlal Dobray* [(1984) 1 SCC 551] and contended that, citing *Divya Prakash* case with approval, it was held that when a candidate is appointed in an honorary capacity without any remuneration, even though the post carried remuneration, he cannot be said to be holding an office of profit and thus, was not disqualified under Article 191 (1) (a) of the Constitution. In *Biharilal Dobray* case it was held that the respondent was holding an office of profit under the State Government and his nomination was rightly rejected by the Returning Officer. In that case, the only question was whether the post the respondent was holding was one under the State Government or not. The observations made with reference to *Divya Prakash* case were clearly *obiter*. Further, an error seems to have been made while noticing *Divya Prakash* case. In *Divya Prakash* case, it was held that the post did not carry with it any remuneration but in *Biharilal Dobray* case, it was said that the post carried remuneration.

11. A careful examination of the decisions relied upon by the learned counsel on behalf of the petitioner shows that each of those cases turned on its own facts and did not lay down any proposition of law contrary to what has been laid down in a series of decisions starting from *Ravanna Subanna* to *Shibu Soren*. It is well settled that where the office carries with it certain emoluments or the order of appointment states that the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments. What is relevant is whether pecuniary gain is “receivable” in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly.

12. In this case, as noticed above, the office carried with it a monthly honorarium of Rs. 5000/-, entertainment expenditure of Rs. 10,000/-, staff car with driver, telephones at office and residence, free accommodation and medical treatment facilities to self and family members, apart from other allowances etc.- that these are pecuniary gains, cannot be denied. The fact that the petitioner is affluent, or was not interested in the benefits/facilities given by the State Government, or did not in fact receive such benefits till date, are not relevant to the issue.

13. In this view, the question whether the petitioner actually received any pecuniary gains or not is of no consequence. We find no merit in the writ petition and the same is, accordingly, dismissed

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Consumer Education & Research Society v. Union of India

(2009) 9 SCC 648

K. G. BALAKRISHNAN, C.J. - 1. These two writ petitions filed under Article 32 of the Constitution by way of public interest litigation, challenge the constitutional validity of the Parliament (Prevention of Disqualification) Amendment Act, 2006 (Act No. 31/2006, 'Amendment Act'). It amended the Parliament (Prevention of Disqualification) Act, 1959 ('Principal Act'). The Amendment Act adds to the list of 'Offices of Profit' which do not disqualify the holders thereof for being chosen as, or for being the Members of Parliament.

Historical background

2. The expression 'Office of Profit' is not defined in the Constitution. The view that certain offices or positions held by a Member of Parliament (Hereinafter also referred to as 'MP') may be either incompatible with his/her duty as an elected representative of the people, or affect his/her independence, and thus weaken the loyalty to his/her constituency and, therefore, should disqualify the holder thereof, had its origin in the Parliamentary history of the United Kingdom. (See: The Introduction to the Bhargava Committee Report on Office of Profit, dated 22.10.1955). The concept of 'office of profit' has a history of more than four centuries in United Kingdom and it has evolved through many phases. The first was the "privilege" phase (prior to 1640). The second was the "corruption" phase (from 1640). The third was the "ministerial responsibility" phase (after 1705). Initially the English Parliament claimed priority over the services of its Members and it was considered derogatory to its privilege if any of its Members accepted some other office which would require a great deal of their time and attention. This led to the evolution of the idea that the holding of certain offices would be incompatible with the responsibilities of a Member of Parliament. This was the first phase. During the second phase, there was a protracted conflict between the Crown and the House of Commons. Loyalty to the King and the loyalty to the House of Commons representing the will of the people became growingly irreconcilable and it was thought that if any Member accepted an 'office of profit' under the Crown, there was every chance of his loyalty to Parliament being compromised.

Subsequently came the third phase. The King was reduced to the position of a constitutional head and the cabinet, functioning in the name of the Crown became the centre of the executive government. The Privy Councillors, who during the second phase were invariably considered to be the henchmen of the King and were as such looked upon with suspicion by the House of Commons, yielded place to the Ministers, who for some time were also disqualified from holding a seat in the House. Later it came to be recognized that the application of the disqualification rule to incumbent ministers was too extreme and with the intent of ensuring effective coordination between the executive and the legislature, it was accepted that the Members of the executive should be represented in the Parliament. This recognition led to the passing of several enactments by the British Parliament. The Re-Election of Ministers Act enacted by the British Parliament in 1919 and 1926 required any Member who was appointed to a 'political office' to seek re-election.

3. As we have adopted the British Parliamentary form of Government, the concept of 'office of profit' was also adopted with some modifications. The concept of 'office of profit' began to develop with the entry of non-official members in the Legislature. A clear and precise statement in this regard was made in Section 26(1)(a) of the Government of India Act, 1935 which provided that a person shall be disqualified for being chosen as, and for being, a Member of either Chamber if he held any office of profit under the Crown of India, other than an office declared by Act of the Federal Legislature not to disqualify its holder.

4. When the Constitution of India came into force on 26th January, 1950 declaring that a person holding an office of profit would be disqualified, the explanation to Article 102 clarified that a person who is a Minister (either for the Union or for any State) shall not be deemed to hold an office of profit. However, there existed Ministers of State as also Deputy Ministers in the Union Government who were not specifically exempted from disqualification under Article 102 because the expression 'minister' was construed as referring only to a Cabinet Minister. In order to address this situation, the Parliament (Prevention of Disqualification) Act, 1950 was enacted. Section 2 of the said Act provided:

2. *Prevention of disqualification for membership of Parliament:* A person shall not be disqualified for being chosen as, and for being a member of Parliament by reason only of the fact that he holds any of the following offices of profit under the Government of India or the Government of any State, namely, an office of Minister of State or a Deputy Minister, or a Parliamentary Secretary or a Parliamentary Under Secretary.

5. This was followed by the Parliament (Prevention of Disqualification) Act, 1951 declaring that certain offices (specified in Section 2 thereof) under the government shall not disqualify, and shall be deemed never to have disqualified the holders thereof for being chosen as, or for being, Members of Parliament. The said Act was given retrospective effect from 26.1.1950.

6. In 1954, a Committee was constituted under the chairmanship of Pandit Thakur Das Bhargava to study the various matters connected with the disqualification of MP's and to make recommendations in order to enable the government to consider the manner in which a comprehensive legislation should be brought. The Committee submitted its report in 1955. In 1959 the Parliament (Prevention of Disqualification) Act, 1959 was enacted, thereby declaring that certain offices of profit under the government shall not disqualify the holders thereof for being chosen as or for being, Members of Parliament. Section 3 of the Principal Act (amended from time to time) declared that none of the following offices in so far as it is an office of profit under the government of India or the government of any State, shall disqualify the holder thereof for being chosen as, or for being, a Member of Parliament:

"(a) any office held by a Minister, Minister of State or Deputy Minister for the Union or for any State, whether ex officio or by name;

(aa) the office of a Leader of the Opposition in Parliament;

(ab) the office of Deputy Chairman, Planning Commission;

(ac) the office of each leader and deputy leader of a recognized party and recognized group in either House of Parliament;

(b) the office of Chief Whip, Deputy Chief Whip or Whip in Parliament or of a Parliamentary Secretary;

(ba) the National Commission for Minorities constituted under Section 3 of the National the office of Chairperson of –

(i) Commission for Minorities Act, 1992 (19 of 1992);

(ii) the National Commission for the Scheduled Castes and Scheduled Tribes constituted under clause (1) of article 338 of the Constitution;

(iii) the National Commission for Women constituted under Section 3 of the National Commission for Women Act, 1990 (20) of 1990;

(c) the office of member of any force raised or maintained under the National Cadet Corps Act, 1948 (56 of 1948), or the Reserve and Auxiliary Air Forces Act, 1952 (62 of 1952);

(d) the office of a member of a Home Guard constituted under any law for the time being in force in any State;

(e) the office of sheriff in the city of Bombay, Calcutta or Madras;

(f) the office of chairman or member of the syndicate, senate, executive committee, council or court of a university or other body connected with a university;

(g) the office of a member of any delegation or mission sent outside India by the Government for any special purpose;

(h) the office of chairman or member of a committee (whether consisting of one or more members), set up temporarily for the purpose of advising the Government or any other authority in respect of any matter of public importance or for the purpose of making an inquiry into, or collecting statistics in respect of, any such matter, if the holder of such office is not entitled to any remuneration other than compensatory allowance;

(i) the office of Chairman, director or member of any statutory or non- statutory body other than any such body as is referred to in clause (h), if the holder of such office is not entitled to any remuneration other than compensatory allowance, but excluding (i) the office of chairman of any statutory or non-statutory body specified in Part I of the Schedule, (ii) the office of chairman or secretary of any statutory or non-statutory body specified in Part II of the Schedule;

(j) the office of village revenue officer, whether called a lambardar, malguzar, patel, deshमुख or by any other name, whose duty is to collect land revenue and who is remunerated by a share of, or commission on, the amount of land revenue collected by him, but who does not discharge any police functions."

7. The trigger for the present controversy arose when a Member of the Rajya Sabha - Mrs. Jaya Bachchan was appointed as the Chairperson of the Uttar Pradesh Film Development Council on 14.7.2004. A complaint was made that this amounted to the holding of an 'office of profit' on her part and thus, she was not entitled to continue as a Member of

the Rajya Sabha in view of Article 102(1)(a) of the Constitution. A Presidential Order was passed under Article 103(1) of the Constitution of India by which the said Member of the Rajya Sabha was disqualified from being a Member of the Rajya Sabha on the ground that she was holding an 'office of profit'. That order was challenged before this Court in **Jaya Bachchan v. Union of India** [(2006) 5 SCC 266] and the challenge was rejected by this Court. Thereafter, it was discovered that a large number of MPs' were holding 'Offices of Profit' and they also would incur the same disqualification. A Bill titled the Parliament (Prevention of Disqualification) Amendment Bill, 2006 was therefore introduced on 16th of May, 2006 in the Lok Sabha and was passed on the same day. On the next day, it was introduced in the Rajya Sabha and was debated on and passed on the same day. The Bill was sent to the President of India for his assent on 25th May, 2006. The President returned the Bill on 30th May, 2006 to the Parliament for reconsideration under Article 111 of the Constitution of India. The Bill was passed again by both the Houses without amendment and presented to the President for assent and the said assent was given on 18.8.2006. Thus, the Amendment Act came into existence.

8. Section 2 of the Amendment Act inserted the following clauses as (ad) after clause (ac) of section 3 of the Principal Act:

“(ad) the office of the chairperson of the National Advisory Council constituted by the Government of India in the Cabinet Secretariat vide Order No. 631/2/1/2004-Cab, dated the 31st May, 2004;”

Section 2 of Amendment Act also inserted after clause (j) the following clauses, which were to be deemed to have been inserted with effect from the 4th day of April, 1959, namely:

“(k) the office of Chairman, Deputy Chairman, Secretary or Member (by whatever name called) in any statutory or non-statutory body specified in the Table;

(l) the office of Chairperson or trustee (by whatever name called) of any Trust, whether public or private, not being a body specified in the Schedule;

(m) the office of Chairman, President, Vice-President or Principal Secretary or Secretary of the Governing Body of any society registered under the Societies Registration Act, 1860 or under any other law relating to registration of societies, not being a body specified in the Schedule.”

Section 3 of the Amendment Act inserted a Table referred to in Section 2(k), listing 55 statutory and non-statutory bodies, following the Schedule in the Principal Act, which was also deemed to have been inserted with effect from 4th April, 1959. Section 4 contained a special provision as to validation and other matters and it is extracted below:

4(1) Notwithstanding any judgment or order of any court or tribunal or any order or opinion of any other authority, the offices mentioned in clauses (ad), (k), (l) and (m) of Section 3 of the Principal Act shall not disqualify or shall be deemed never to have disqualified the holders thereof for being chosen as, or for being, as member of either House of Parliament as if the Principal Act as amended by this Act and been in force at all material times.

(2) Nothing contained in sub-section (1) shall be construed as to entitle any person who has vacated a seat owing to any order or judgment, as aforesaid, to claim any reinstatement or any other claim in that behalf.

(3) For the removal of doubts, it is hereby clarified that any petition or reference pending before any court or other authority on the date of commencement of this Act, shall be disposed of in accordance with the provisions of the Principal Act, as amended by this Act."

Relevant constitutional provisions:

9. In order to understand the scope, applicability and impact of the Amendment Act, it is necessary to refer to the constitutional provisions (Article 101 to 104 of the Constitution of India) which deal with the disqualification of Members of Parliament. Article 101 enumerates the circumstances in which the seats of Members of Parliament will become vacant. Article 103 deals with the procedure to be followed in case a decision is required as to the disqualification of sitting MPs. Article 104 lays down the penalty for sitting and voting, by disqualified Members. The corresponding provisions relating to disqualification of members of the State Legislature are Articles 190, 191, 192 and 193. They correspond to and are substantially similar to Articles 101, 102, 103 and 104 which are applicable to Parliament.

10. Article 102(1)(a) lays down that a Member of either House of Parliament shall be disqualified if he holds any 'office of profit' under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. Section 101(3)(a) provided that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in Article 102(1), his seat shall thereupon become vacant. Article 103 provides for reference of any question as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in Article 102(1) to the decision of the President, whose decision on the question is made final.

Contentions

11. The learned senior counsels Shri Harish Salve and Shri Ravinder Srivastava who appeared on behalf of the petitioners contended that the amendment that retrospectively exempted certain offices of profit from the disqualification rule was violative of the constitutional scheme of Articles 101 to 104 of the Constitution. It was submitted that the purpose of removal of disqualification by a retrospective amendment to the Act was to ensure that persons who had ceased to be MPs on account of incurring disqualifications would be re-inducted to Parliament without election, and that was impermissible and unconstitutional. It was asserted that several MPs were holding "offices of profit under the Government of India or the State Government, other than offices declared by Parliament by law not to disqualify their holder" (for short 'the disqualifying offices of profit') when they were elected. It was further stated that several others had accepted the disqualifying offices of profit, after becoming Members, i.e. during their tenure as Members of Parliament. Hence, it was reasoned that a person holding such office of profit, was disqualified to become or be a Member of Parliament and that such Member's seat would become vacant on the very day when they were elected (with respect to those who were already holding the disqualifying

office of profit, when they were elected) and on the day they accepted the disqualifying office of profit (with respect to those who accepted such disqualifying offices of profit during their tenure as Members of Parliament). It was submitted that when a Member's seat had already become vacant by virtue of incurring a constitutional disqualification, his/her membership cannot be revived by enacting a legislation which retrospectively removed the applicable disqualification. According to the petitioner, a legislation retrospectively removing the disqualification will help a person to continue to be a Member, only if he/she had continued as a Member and his/her seat had not fallen vacant. The reasoning advanced was that in instances where the seat had already become vacant on account of incurring a constitutional disqualification, any legislative attempt to revive the membership of the Member whose seat had become vacant, would violate Articles 102(1) read with Article 101(3)(a) of the Constitution.

12. Alternatively, it was submitted that the objects and reasons as well as the provisions of the Amendment Act made it obvious that retrospective operation had been given to its provisions with the sole intention of enabling the continuance of MPs who would have otherwise been disqualified under Article 102(1)(a) of the Constitution. Therefore, such retrospective operation is unconstitutional. It is submitted that ever since the recommendations of the Bhargava Committee in November, 1955, a constitutional convention had evolved wherein every Lok Sabha had a Joint Committee for the purpose of identifying and classifying 'offices of profit'. Whenever a particular 'office' had to be exempted from the disqualification rule, the Joint Committee's opinion was sought on the question of whether the said office was an 'office of profit' or not, whether the holding of such office by a MP would conflict with his duties, and whether or not the office should be granted exemption. It was only after a report was given by the Joint Committee recommending exemption, that a particular 'office' would be exempted. It was contended that the said constitutional convention which has been followed for more than half a century was violated when 55 offices were given a 'wholesale' exemption with retrospective effect without obtaining any report from the Joint Committee on the question of whether the said "offices of profit" deserved to be exempted or not. It was hence argued that the Amendment Act was a colourable legislation which violated a well established constitutional convention. It was also contended that the provisions of the impugned legislation violated the guarantee of "equality before law and equal protection of the laws" that has been enshrined in Article 14 of the Constitution. It was contended that the offices under certain bodies which had been enumerated in the Schedule, were included without any basis in discernible principles. It was argued that there was no rational criterion for the wholesale exemption of the enumerated 55 'offices of profit' from the disqualification rule, by means of the impugned legislation.

13. On the other hand, Shri Gopal Subramaniam and Shri Mohan Parasaran, learned Additional Solicitors General, opposed these contentions on behalf of the respondents. In response to the first contention, it was submitted that the power of Parliament to enact a law declaring with retrospective effect that certain offices of profit will not disqualify the holder from being chosen as, and for being a Member of Parliament has already been upheld by this court in *Srimati Kanta Kathuria v. Manak Chand Surana* [(1969) 3 SCC 268]. It was further submitted that a Member's seat would become vacant, not at the point of accepting the

disqualifying office of profit, but after the President of India has decided and declared under Article 103(1) of the Constitution, with the aid and advice of Election Commission of India, that the Member had incurred the alleged disqualification. Hence it was contended that till such a decision by the President, a Member who is alleged to have incurred a disqualification continues to be a Member. It was submitted that since there was no declaration of disqualification by the President and because the Amendment Act had retrospectively removed the disqualifications, the seats of Members (who had accepted the disqualifying office of profit) did not fall vacant. Reference was made to section 4(2) of the Amendment Act which makes it clear that nothing contained in sub-section (1) thereof, shall be construed as to entitle any person who has vacated a seat owing to any order or judgment as aforesaid, to claim any reinstatement or any other claim in that behalf. It was submitted that no Member who held an office of profit in respect of which the grounds for disqualification was removed by the Amendment Act, would incur disqualification and consequently all of them would continue to be Members and their seats did not fall vacant under Article 101(3).

14. The respondents also contended that the Amendment Act did not violate Article 14. They submitted that the past practice of seeking the opinion of a Joint committee on any proposal to add to the list of exempted offices of profit cannot be described as 'Constitutional Convention'. It was submitted that even if there was a practice of referring such questions to a Joint Committee, the same cannot denude the power of Parliament to make a law under Article 102(1)(a) of the Constitution.

15. The aforesaid contentions give rise to the following questions for consideration by this Court:

(i) Whether the Amendment Act retrospectively exempting certain offices of profit from disqualification, violates Articles 101 to 104 of the Constitution and is therefore invalid?

(ii) Whether exemption of as many as 55 offices relating to statutory bodies/non-statutory bodies, without referring the proposal to the Joint Committee would render the Amendment a colourable legislation which violated any 'constitutional convention' or Article 14 of the Constitution?

Re : Question (i)

16. The question of whether a law can be made retrospectively to remove the disqualification incurred on account of holding offices of profit is no longer *res integra*. This Court in ***Srimati Kanta Kathuria*** has clearly laid down that the power of Parliament to enact a law under Article 102(1)(a) includes the power of Parliament to enact such law retrospectively. In that case, the appellant Mrs. Kanta Kathuria, an Advocate practicing at Bikaner was appointed as a Special Government Pleader. She was subsequently elected to the Rajasthan Legislative Assembly. The respondent therein challenged her election alleging that she was disqualified to be chosen as a Member of the Legislative Assembly since she held the office of Special Government Pleader, which was an office of profit under the Government of Rajasthan. The High Court accepted the contention and allowed the Election Petition. The elected candidate preferred an appeal to the Supreme Court on August 2, 1968. During the pendency of the appeal, The Rajasthan State Legislature passed the Rajasthan Legislative Assembly Members (Prevention of Disqualification) Act, 1969 which removed the

disqualification that had been applicable to Government pleaders, Government Advocates and Special Government Pleaders with retrospective effect. The respondent contended that the Rajasthan State Legislature was not competent to remove the disqualification retrospectively. Two opinions were delivered - one by Hidayatullah.C.J. (for himself and Mitter J), and another by Sikri, J, (as he then was) (for himself, Ray, J. and Jaganmohan Reddy, J) since there was a difference of opinion on the question whether, on the date of her election, the appellant held an office of profit. The minority view was that she did, whereas the majority view was that she did not. However, there was unanimity in respect of the finding that the state legislature was competent to enact a law for the purpose of removing the disqualification with retrospective effect. Hidayatullah, C.J. had made the following observations in the majority opinion:

“In other words, the Legislature of a State is empowered to declare that an office of profit of a particular description or name would not disqualify its holder.” (Para. 26)

“It has been held in numerous cases by this Court that the State Legislatures and Parliament can legislate retrospectively subject to the provisions of the Constitution. Apart from the question of fundamental rights, no express restriction has been placed on the power of the Legislature of the State, and we are unable to imply, in the context, any restriction.” (Para. 40).

“The apprehension that it may not be a healthy practice and this power might be abused in a particular case are again no grounds for limiting the powers of the State Legislature.” (Para. 43)

The minority concurred and held as follows (Sikri, J. at Para. 12 and 13):

“12. At the hearing our attention was drawn to a number of such Acts passed by our Parliament and the Legislatures of the States. It seems that there is a settled legislative practice to make validation laws. It is also well-recognised that Parliament and the Legislatures of the States can make their laws operate retrospectively. Any law that can be made prospectively may be made with retrospective operation except that certain kinds of laws cannot operate retroactively. This is not one of them.

13. This position being firmly grounded we have to look for limitations, if any, in the Constitution. Article 191 (which has been quoted earlier) itself recognises the power of the Legislature of the State to declare by law that the holder of an office shall not be disqualified for being chosen as a member. The Article says that a person shall be disqualified if he holds an office of profit under the Government of India or the Government of any State unless that office is declared by the Legislature not to disqualify the holder. Power is thus reserved to the Legislature of the State to make the declaration. There is nothing in the words of the article to indicate that this declaration cannot be made with retrospective effect. It is true that it gives an advantage to those who stand when the disqualification was not so removed as against those who may have kept themselves back because the disability was not removed. That might raise questions of the propriety of such retrospective

legislation but not of the capacity to make such laws. Regard being had to the legislative practice in this country and in the absence of a clear prohibition either express or implied we are satisfied that the Act cannot be declared ineffective in its retrospective operation."

17. In *Indira Nehru Gandhi v. Raj Narain* [(1975) Supp. SCC 1], another Constitution Bench of this Court reiterated *Kantha Kathuria*. The following observations were made by A.N. Ray, C.J.:

"The power of the Legislature to pass a law includes a power to pass it retrospectively. An important illustration with reference to retrospective legislation in regard to election is the decision of this court in *Kantha Kathuria's case*." (Para. 138)

"A contention was advanced that the legislative measure could not remove the disqualification retrospectively, because the Constitution contemplates disqualification existing at certain time in accordance with law existing at that time. One of the views expressed in that case is that Article 191 recognizes the power of the Legislature of the State to declare by law that the holder of the office shall not be disqualified for being chosen as a member. Power is reserved to a Legislature of the State to make the declaration. There is nothing in the Article to indicate that this declaration cannot be made with retrospective effect. The act was held not to be ineffective in its retrospective operation on the ground that it is well recognized that Parliament and State Legislatures can make their laws operate retrospectively. Any law that can be made prospectively can be made with retrospective operation." (Para. 139)

18. *Kanta Kathuria* and *Indira Gandhi* were followed by a three judge bench of this Court in *Nongthombam Ibomcha Singh v. Leisangthem Chandramani Singh & Ors.* [(1976) 4 SCC 291] where this Court affirmed the decision of the High Court that the respondent therein was not disqualified from seeking election because of the fact that he held the office of the Speaker. The following reasoning was given by H.R. Khanna, J. (at Para. 3):

"We find that the Manipur Legislature has now passed the Manipur Legislature (Removal of Disqualifications) (Amendment) Act, 1975 (Manipur Act 1 of 1975). As a result of this amendment, a person holding the office of Speaker of Manipur Legislative Assembly shall not be disqualified from seeking election to the Legislative Assembly of that State because of his holding that office. The amending Act, according to Clause (2) of Section 1, shall be deemed to have come into force on February 6, 1973. The fact that the legislature is competent to enact such a law with retrospective operation is well-established. In view of the above amending Act, the respondent cannot be held to be disqualified from seeking election to the Legislative Assembly of Manipur on account of his having held the office of the Speaker of the Legislative Assembly."

19. We now proceed to examine another aspect of the first question. Article 101(3) provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in Article 102, his seat will thereupon become vacant. Article 103

provides that if any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred to the decision of the President and his decision shall be final. The use of the words “becomes subject to” in Article 101 and in Article 103 clearly demonstrates that these Articles contemplate a situation where a sitting MP incurs the disqualification during his tenure and they do not apply to a candidate who held a disqualifying office of profit before being elected as a Member of Parliament.

20. This does not mean that a Member, who was holding a disqualifying office of profit when he was elected and sworn in as a MP, is immune from challenge. Separate provisions deal with pre-election disqualifications. Section 36 of Representation of the People Act, 1951 (Hereinafter ‘RP Act’) provides that the Returning Officer shall examine the nomination papers and shall decide all objections which may be made to any nomination and may after a summary inquiry, if any, reject the nomination if he is of the view that on the date fixed for the scrutiny of nominations the candidate was either not qualified or was disqualified for being chosen to fill the seat under the provisions of Article 102 or 191. Even if his/her nomination is not rejected and a person holding a disqualifying office of profit, is elected as a MP, an election petition can be filed under section 100(1)(a) of RP Act which provides that if the High Court is of opinion that on the date of his election, a returned candidate was disqualified from being chosen to fill the seat under the Constitution, the High Court shall declare the election of the returned candidate to be void.

21. This position was clearly settled by the decisions of two Constitution Benches of this Court in *Election Commission, India v. Saka Venkata Subba Rao & Union of India* [1953 SCR 1144] and *Brundaban Nayak v. Election Commission of India* [(1965) 3 SCR 53]. Both these decisions referred to and dealt with Article 190 and 192 which are applicable to State Legislatures and whose provisions are identical with the provisions of Articles 101 and 103 relating to Parliament.

22. Thus, it is clear that where a person was under a disqualification at the time of his election, the provisions of Articles 101(3)(a) and 103 will not apply. He/She will continue as a Member unless the High Court in an election petition filed on that ground, declares that on the date of election, he/she was disqualified and consequently, declares his/her election to be void. It follows therefore that if an elected candidate was under a disqualification when he was elected, but no one challenges his/her election, he/she would continue as a Member irrespective of the fact that he/she was under a disqualification when elected.

23. We now consider the third aspect of the first question. Article 102(1)(a) provides that a person shall be disqualified for being a Member of either House of Parliament if he holds any office of profit under the Government of India or Government of any State other than an office declared by Parliament by law not to disqualify its holder. Article 101(3)(a) provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1) of Article 102, his seat shall thereupon become vacant. Article 103 provides that if any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final. Article 104 provides that if a person sits or holds as a Member of either House of Parliament

when he knows that he is disqualified for membership thereof, he shall be liable in respect of each day on which he so sits or votes, to a penalty of five hundred rupees to be recovered as a debt due to the Union.

24. The constitutional scheme therefore is that a person shall be disqualified from continuing as a Member of Parliament if he/she holds any disqualifying office of profit. Such a disqualification can result in the vacation of his/her seat when the Member admits or declares that he/she is holding the disqualifying office of profit. However, If he/she does not make a voluntary declaration about the same, the question of whether he/she is disqualified or not, if raised, shall have to be referred for a decision by the President of India the same will be made after obtaining the opinion of the Election Commission of India. The question of whether a particular member has incurred a disqualification can be referred for the decision of the President by any citizen by means of making an application to the President. It is only after the President decides that the Member has incurred an alleged disqualification that the particular member's seat would become vacant. The words "if any question arises as to whether a Member of either House of Parliament has become subject to any disqualifications" conclusively shows that the question of whether a Member has become subject to any disqualification under clause (1) of Article 102 has to be decided only by the President. Such a question would of course be a mixed question of fact and law. The Constitution provides the manner in which that question is to be decided. We are of the view that it is only after such a decision is rendered by the President, that the seat occupied by an incumbent MP becomes vacant. The question of a person being disqualified under Article 102(1) and the question of his seat becoming vacant under Article 101(3)(a) though closely interlinked, are distinct and separate issues.

25. The constitutional scheme in Articles 101 to 104 contains several irrefutable indications that the vacancy of the seat would occur only when a decision is rendered by the President under Article 103 which declares that a Member has incurred a disqualification under Article 102(1) and not at the point of time when the Member is alleged to have incurred the disqualification.

26. We may first refer to the different circumstances in which a seat of a Member becomes vacant:

(i) Clause (2) of Article 101 provides that where a person is chosen as a Member both of the Parliament and of a House of Legislature of a State then at the expiry of such period as may be specified in the rules made by the President, that person's seat in Parliament shall become vacant unless he/she has previously resigned from his/her seat in the legislature of the State.

(ii) Clause 3(a) of Article 101 provides that if a Member of either House of Parliament becomes subject to any disqualification mentioned in clause (1) of Article 102, his/her seat shall thereupon become vacant. Clause (1) of Article 102 refers to five circumstances in which a person shall be disqualified for being chosen and for being a Member of Parliament, (one of which is if he/she holds any office of profit under the government of India or government of any State other than an office declared by the Parliament by law not to disqualify its holder). Article 103 provides that if any question arises as to whether a Member

of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President whose decision shall be final.

(iii) Clause 3(a) of Article 101 also provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (2) of Article 102, his/her seat shall thereupon become vacant. Clause (2) of Article 102 refers to a person being disqualified for being a Member of either House of Parliament on ground of defection under the Tenth Schedule to the Constitution. Paragraph (6) of Tenth Schedule provides that if any question arises about whether a Member of a House has become subject to disqualification under the Tenth Schedule, the question shall be referred for the decision of the Chairman, or as the case may be, the Speaker of such House and his/her decision shall be final.

(iv) Clause 3(b) of Article 101 provides that if a Member of either House of Parliament resigns his/her seat and his/her resignation is accepted by the Chairman or the Speaker, as the case may be, his/her seat shall thereupon become vacant.

(v) Clause (4) of Article 101 provides that if for a period of 60 days a Member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his/her seat vacant.

27. It can be seen from the above-mentioned permutations that there are several possibilities may lead to a seat becoming vacant. It is also clear that a seat becomes vacant only on after an adjudication in cases falling under Article 101(3)(a), whereas, the seats become vacant without any adjudication on the happening of specified events in respect of vacancies arising under Article 101(2), 101(3)(b) and 101(4). A vacancy under Article 101(3)(a) would occur in the case of disqualifications enumerated under Article 102(1) only after there has been a decision on the subject of such disqualification by the President. The exception to this proposition would of course arise when there is a voluntary admission of the disqualification by a particular Member to the Speaker/Chairman of the House, as the case may be. The vacancy under Article 101(3)(a) will occur in the case of the disqualification mentioned under Article 102(2), only after a decision has been made on the subject of such disqualification by the Chairman or the Speaker of such House as the case may be. Thus, Para. 6(1) of Tenth Schedule of the Constitution is analogous to Article 103(1) of the Constitution and both contemplate adjudication by an authority on the subject of disqualification, albeit with respect to distinct grounds. On the other hand, in case of a person who resigns, the vacancy occurs [as per Art. 101(3)(b)] when the resignation is accepted by the Chairman or the Speaker and in such case, the Constitution does not contemplate any adjudication on the subject of disqualification. Similarly, in the case of a Member being absent without permission for a period of 60 days the vacancy arises when the House declares his seat vacant and there is no provision for adjudication about such disqualification. In the case of a person having a dual membership of Parliament and a State Legislature, on the expiration of 15 days (provided by the Prohibition of Simultaneous Membership Rules 1950), the person's seat in Parliament becomes vacant without any further adjudication.

28. Thus we find that for a vacancy to occur under Article 101(4), there should be a declaration by the House, for a vacancy to occur under Article 101(3)(b) there should be acceptance of resignation by the Chairman or the Speaker of the House and under Article 101(2) the vacancy arises automatically on the expiry of 15 days after the point of time that the particular MP became a Member of the State Legislature. However, the vacancies contemplated in Article 101(3)(a) will arise only when the disqualification is decided upon and declared by the President under Article 103(1) or declared by the Chairman or the Speaker of the House under Para. 6(1) of Tenth Schedule. Therefore in the case of vacancy under Article 101(3)(a), the vacancy of the seat is not automatic consequent upon incurring the disqualification but would occur only upon a declaration of the disqualification by the designated authority. For example, if a Member gives up membership of a political party or votes or abstains from voting in the House in a manner that is contrary to the directions issued by his/her political party, Para. 2 of Tenth Schedule provides that the said Member of the House shall be disqualified. However, the vacancy of his/her seat does not become operative on the day he/she gives up membership of the political party or when he/she votes or abstains from voting in a manner that is contrary to the directions issued by his/her political party. With regard to disqualification on the ground of defection, the vacancy of the seat would become operative only when a decision is rendered by the Chairman or the Speaker of the House as the case may be declaring his disqualification. Similarly in respect of the disqualification on the ground of holding an office of profit, the vacancy of the seat would become operative only when the President decides the issue on the subject of the alleged disqualification and declares that a particular Member has incurred the same. Such a decision may be made either on the basis of an adjudication where the question is disputed, or on the basis of an admission by the Member concerned.

29. We also find support for this view from a reading of Sections 147, 149 and 151A of the RP Act. Section 147 deals with a casual vacancy in the Council of States and Section 149 deals with casual vacancies in the House of People, on account of the seat of a Member becoming vacant or being declared vacant or his election being declared void. Section 151A provides that when such casual vacancy arises, the Election Commission shall have to fill up the vacancy by holding bye-elections within a period of six months from the date of occurrence of the vacancy. There is no difficulty in calculating this six month period where a Member's seat becomes vacant on account of his/her seat being declared vacant under Article 101(4) or when it becomes vacant on account of his/her resignation being accepted by the Chairman or the Speaker under Article 101(3)(b). However, the position will be different when the vacancy to be filled up arises on account of any of the disqualifications mentioned in clause (1) or clause (2) of Article 102.

For example if a person gives up his membership of a political party or if he votes or abstains from voting in a manner that is contrary to the directions issued by his/her political party, the election cannot be held within six months from that date. Similarly when a Member accepts an office of profit on a particular day, it is not possible to hold election within six months from the date of such acceptance of office of profit on the ground that he/she was disqualified on that day. In such cases if the vacancy of the seat is automatic, the bye-elections will have to be held within six months from such date of incurring disqualification.

However in many cases, the Election Commission may not even know about the occurrence of the disqualification. Furthermore, the very occurrence of disqualification is likely to be disputed in most cases. Therefore, even though the occurrence of a vacancy is an automatic consequence of incurring a disqualification, the same would arise only after the disqualification is declared by the decision of the appropriate authority (President, Speaker, or Chairman of the House as the case may be).

30. Therefore, upon a proper construction of the provisions of Articles 101 to 103, it is evident that a declaration by the President under Article 103(1) in the case of a disqualification under Article 102(1) and a declaration by the Speaker or the Chairman under Para 6 of Tenth Schedule in the case of a disqualification under Article 102(2) is a condition precedent for the vacancy of the seat. If Article 101(3)(a) is interpreted otherwise, it will lead to absurd results thereby making it impossible to implement or enforce the relevant provisions of the Constitution or the RP Act. Let us visualize some of these possibilities. Assume a scenario where a political party states that one of its Members gave up his/her membership, and on the other hand the concerned member denies the same fact. The six month period prescribed for conducting a bye-election cannot obviously be computed from the alleged date of surrender of membership. The said period should be properly computed from the date on which a decision on the subject of disqualification is given by the Chairman or Speaker of the House. Similarly when somebody alleges that a sitting MP had accepted an office of profit, there would be no automatic vacancy of the seat, as the question whether the Member accepted any office of profit or not, may be a disputed issue. Therefore under the constitutional scheme, the vacancy would occur only when the dispute is resolved by a decision of the President which could then result in a declaration of disqualification. Hence, it is tenable to hold that when Article 101(3)(a) states that when a Member of House of Parliament becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 102, it means when the President or the Speaker/Chairman as the case may be, by his decision declares that Member had incurred the disqualification and not earlier. There is however no doubt that the decision of the President or Chairman/Speaker of the House, is merely an adjudication and confirmation of a pre-existing fact. Therefore the disqualification is not created by the decision of the President. However, the vacancy of the seat is a consequence of the decision arrived at by the designated authority.

31. In this context, we may refer to the following observations of the Constitution Bench in *Brundaban Nayak* in respect of Article 192 (which equally apply to Article 103) which makes it clear that a decision/declaration by the Governor/President is not optional, but a necessity in cases under 191(1) and 101(1). It was held that, [(1965) 3 SCR 53, Gajendragadkar, J. at Para. 14]:

"It is true that Article 192(2) requires that whenever a question arises as to the subsequent disqualification of a member of the Legislative Assembly, it has to be forwarded by the Governor to the Election Commission for its opinion. It is conceivable that in some cases, complaints made to the Governor may be frivolous or fantastic; but if they are of such a character, the Election Commission will find no difficulty in expressing its opinion that they should be rejected straightaway. The object of Article 192 is plain. No person who has incurred any of the

disqualifications specified by Article 191(1), is entitled to continue to be a member of the Legislative Assembly of a State, and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Article 190(3)(a), there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that any member of the Legislative Assembly has incurred one of the disqualifications mentioned in Article 191(1) and should, therefore, vacate his seat. The whole object of democratic elections is to constitute legislative chambers composed of members who are entitled to that status, and if any member forfeits that status by reason of a subsequent disqualification, it is in the interest of the constituency which such a member represents that the matter should be brought to the notice of the Governor and decided by him in accordance with the provisions of Article 192(2)." (emphasis supplied)

Kanta Kathuria also clearly held that when a Member accepts an office of profit and incurs a disqualification, and such disqualification is retrospectively removed, the Member would continue to be a Member.

32. However, the petitioners have contended that Kanta Kathuria had failed to notice the two earlier Constitution Bench judgments on this aspect in **Saka Venkata Subba Rao** and **Brundaban Nayak** and therefore, may not be good law. On a careful examination of these precedents, we find no merit in this contention. The petitioners contended that **Saka Venkata Subba Rao** had held that the seat became vacant automatically when the Member accepted the office of profit and therefore, retrospective removal of disqualification will not revive the membership. The issue in **Saka Venkata Subba Rao** was whether Articles 190(3) and 192(1) applied to a Member who had already incurred a disqualification at the time of being elected. The issue as to when a Member's seat would become vacant, if he accepts an office of profit during his tenure as a legislator did not arise in that case. The observations relied on (extracted in para 21 above) was made in the context of distinguishing between a person who had already incurred under a disqualification at the time of being elected and a person who allegedly incurred a disqualification after having becoming a Member. What this Court stated was that a person under disqualification when elected does not vacate his seat under Article 190(3)(a), but will continue until his/her election is set aside under Section 100 of RP Act. The question of when the seat of a sitting member (who incurs disqualification by accepting an office of profit during the tenure of his membership) would become vacant, neither arose for consideration and nor was it decided in the said case.

Therefore, **Saka Venkata Subba Rao** is of no assistance to contend that there is an automatic vacation of seat when a Member accepts an office of profit and incurs a disqualification during his tenure.

34. In **Brundaban Nayak**, a private citizen (second respondent) complained to the Governor that the appellant had incurred disqualification under Article 191(e), subsequent to his election as a Member of the Orissa Legislative Assembly. The Governor forwarded the said complaint of the second respondent to the Election Commission which issued a notice to the appellant for an enquiry into the complaint. The appellant challenged the jurisdiction of the Election Commission to hold an enquiry into such complaint. This court while examining

the said issue observed that no person who has incurred any of the disqualifications specified by Article 191(1), is entitled to continue to be a Member of the Legislative Assembly of a State, and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Article 190(3)(a) there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that any Member of the Legislative Assembly has incurred one of the disqualifications mentioned in Article 191(1) and should, therefore, vacate his seat. The observation was thus in the context of considering the jurisdiction of the Election Commission and the right of a citizen to make a complaint under Article 191(1). In fact, the observations lend support to the view that it is only after the decision by the Governor under Article 192 (corresponding to the decision by the President under Article 103) declaring that a Member has incurred a disqualification, that such a Member's seat would become vacant.

35. The petitioners next placed reliance on observations in another Constitution Bench decision in *P.V. Narasimha Rao v. State* [(CBI/SPE), (1998) 4 SCC 626]. S.P. Bharucha, J. noted as follows:

The question for our purposes is whether having regard to the terms of Articles 101, 102 and 103, the President can be said to be an authority competent to remove a member of Parliament. It is clear from Article 101, that the seat of the member of the Parliament becomes vacant immediately upon his becoming subject to the disqualifications mentioned in Article 102, without more. The removal of a member of Parliament is occasioned by operation of law and is self operative. Reference to the President under Article 103 is required only if a question arises as to whether a Member of Parliament has earned such disqualification; that is to say, if it is disputed. The President would then have to decide whether the Member of Parliament had become subject to the automatic disqualification contemplated by Article 101. His order would not remove the Member of Parliament from his seat or office but would declare that he stood disqualified. It would operate not with effect from the date upon which it was made but would relate back to the date upon which the disqualification was earned.

The aforesaid observations are made, as noticed above, in the context of examining whether the President can be said to be an authority competent to remove a Member. The question was answered by holding that he/she merely adjudicates whether a Member had incurred disqualification and he/she does not disqualify a Member. The observations relied on by the petitioner that "the removal of a Member is occasioned by operation of law and is self operative" and that "the seat of the Member of Parliament becomes vacant immediately upon his becoming subject to the disqualifications mentioned in Article 102, without more" are therefore to be understood in relation to the nature of powers vested with the President under Article 103. The question which was being considered and the context in which these observations were made was completely different. It is also of some interest to note that the said observations were made by Bharucha and Rajendra Babu, JJ. (as they then were). S.C. Agrawal, J. [for himself and Dr. Anand J. (as he then was)] explained the position differently:

“The said function of the President is in the nature of an adjudicatory function which is to be exercised in the event of a dispute giving rise to the question whether

a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102 being raised. If the President holds that the Member has become subject to a disqualification mentioned in clause (1) of Article 102, the Member would be treated to have ceased to be a Member on the date when he became subject to such disqualification. If it is not disputed that a Member has incurred a disqualification mentioned in clause (1) of Article 102, the matter does not go to the President and the Member ceases to be a Member on the date when he incurred the disqualification. The power conferred under Article 103(1) cannot, therefore, be regarded as a power of removal of a Member of Parliament. ...”

The fifth Member of the Bench (G.N. Ray, J.) in his separate opinion agreed with S.C. Agrawal and Dr. Anand, JJ. with respect to one issue and with S.P. Bharucha and Rajendra Babu, JJ., in respect of another issue. The learned judge did not express any view with regard to Article 101. Therefore reliance on the observations of Bharucha and Rajendra Babu, JJ (as they then were) to contend that the seat of a sitting MP stands vacated on the date on which he/she accepts the disqualifying office of profit and not on the date when the President declares him/her to be disqualified, would be contrary to the provisions of Article 101 to 104 as well as the Constitution Bench decisions of this Court in *Kanta Kathuria*, *Brundaban Nayak* and *Indira Gandhi*. It is evident from the said decision in *P.V. Narasimha Rao* that when the President adjudicates on the subject of whether a Member was disqualified or not and gives a finding that he/she is disqualified, he/she is merely deemed to have ceased being a Member from the date that he/she had incurred the disqualification. It follows that a member continues to be one until the decision of the President and when the outcome of the decision is that he/she is disqualified it relates back to the date when the said disqualification was incurred. If the President holds that the Member has not incurred the disqualification, the person continues as a Member.

36. There is no doubt that the disqualification, when declared by the President will become operative from the date the Member accepted the ‘office of profit’. It is also not in doubt that the vacation of the seat is consequential. However, the question is whether the seat of the Member become vacant without anything more when a person accepts an ‘office of profit’? The obvious answer is ‘no’. If the Member does not make a voluntary declaration that he/she has incurred a disqualification and if no one raises a dispute about the same, the Member would continue in spite of accepting an office of profit. There is nothing strange about this position. We have already noted that when a person who has incurred a disqualification offers himself /herself as a candidate and is subsequently elected and if no one objects and if the Returning Officer accepts the nomination and if no election petition is filed challenging the election, then he/she would continue as a Member in spite of the disqualification. Therefore, our considered opinion is that while a disqualification results in the vacation of the seat of a Member, the vacancy occurs only when the President decides and declares the disqualification under Article 103.

37. When the Amending Act retrospectively removed the disqualification with regard to certain enumerated offices, any Member who was holding such office of profit, was freed from the disqualification retrospectively. As of the date of the passage of the Amendment Act,

none of the Members who were holding such offices had been declared to be disqualified by the President, Section 4(2) was not attracted and consequently they continued as Members.

Re : Question (ii)

38. Which 'offices' should be excluded for the purpose of disqualification, is a question that properly lies in the legislative domain. In this case, what kind of office would amount to an 'office of profit' under the Government and whether such an office of profit is to be exempted is a matter to be considered by the Parliament. The key concern that certain offices or places held by a MP may be either incompatible with his/her duty as an elected representative of the people or affect his/her independence and thus weaken his/her loyalty to his/her constituency and, therefore, should disqualify the holder thereof, is a matter to be addressed by the Parliament. It is also not possible to classify and include the offices exempted from the said disqualification in a generic sense. While making the legislation exempting any office, the question whether such office is incompatible with his/her position as a MP and whether his/her independence would be compromised and whether his/her loyalty to his/her constituency will be affected, should no doubt be kept in mind to safeguard the independence of the Members of the legislature and to ensure that they are free from any kind of undue influence from the executive.

The learned counsel for the petitioners have not advanced any contention that any of the newly exempted 'offices' suffer from any such impropriety or will be prejudicial to the constituency or affect the independence of the member. The plea regarding violation of Article 14 merely because several other similar offices of profit are not included in the exempted category, has no basis. As each office of profit may have different effects and consequences on the Member, there is no viable basis for the assumption that all offices of profit are equal and that all offices of profit should be excluded. The argument based on Article 14 of the Constitution is highly illogical and without any force.

39. This brings us to the last question. It is not in serious dispute that ever since Bhargava Committee submitted its report in November, 1955, whenever an office of profit had to be exempted the matter used to be referred to a Joint Committee and its opinion whether the office should be exempted or not, was being taken and only when there was a recommendation that a particular office should be exempted, the Act was being amended to add that office to the list of exemptions. However, this was merely a parliamentary procedure and not a constitutional convention. Once the Parliament is recognized as having the power to exempt from disqualification and to do so with retrospective effect, any alleged violation of any norm or traditional procedure cannot denude the power of Parliament to make a law. Nor can such law which is otherwise valid be described as unconstitutional merely because a procedure which was followed on a few occasions was not followed for the particular amendment.

40. For the aforesaid reasons, we are of the opinion that the impugned legislation is constitutionally valid and the writ petitions are without any merits and are dismissed.

* * * * *

Konappa Rudrappa Nadgouda v. Vishwanath Reddy

AIR 1969 SC 447

HIDAYATULLAH, C.J. - This is an appeal from the judgment and order of the High Court of Mysore, September 15, 1967, in an election matter in which the present appellant was the election petitioner. The election concerned the Yadagiri constituency and was held in February 1967 during the last general elections. To begin with, there were seven candidates. Of these five withdrew leaving the seat to be contested by the appellant and the first respondent here. The first respondent was returned as the successful candidate having obtained 4,000 and odd votes in excess of his rival. On March 30, 1967 the defeated candidate preferred an election petition which has given rise to the present appeal. The election petition was dismissed by the High Court and in this appeal, the election petitioner claims that the decision of the High Court was erroneous and that the election of the first respondent was void for reasons to be stated hereafter.

2. The first respondent was a partner in a firm known as that Yadagiri Construction Company, Yadagiri. This firm held several contracts from the Mysore Government. In this appeal, we are concerned with two contracts only which were the construction of (1) a road known as "Nalwar Sonthi Road" in Gulbarga Division for a distance of four miles and (2) a dispensary building for the Primary Health Centre at Wadagara. The contention of the election petitioner was that these contracts were subsisting on January 20, 1967 when the nominations were filed and the subsistence of the contracts with the Government rendered the election of the first respondent void. The election petitioner claimed that he was entitled to be declared elected after considering that the votes cast in favour of the 1st respondent as thrown away. The High Court in its judgment held that the contracts were not subsisting and that the election was therefore not affected.

3. The matter is one of fact, but it is necessary, before we enter into an examination of the facts, to set out the law relating to disqualification of candidates on this ground. Under Section 9A of the Representation of the People Act, 1951 it is provided as follows:

A person shall be disqualified if, and for so long as there subsists a contract entered into by him in course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government.

Explanation: For the purpose of this section where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.

4. It may be mentioned here that previously the section did not contain the Explanation. In ***Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*** [(1954) SCR 817] the existence of liability on part of the Government to pay for a fully executed contract was held to be a disqualification. It appears that Parliament thought that since Government moves slowly and many bills remain outstanding for a long time, this part of the disability may be removed. The amendment, therefore, takes away from the ban of the section the subsistence of one side of

the contract, viz., the performance thereof by Government by paying for the goods supplied or the work executed. In other respects, the law remains very much the same as it was when the ruling referred to above was given. We shall have to refer to certain observations in the ruling which, in our opinion, must be taken into account before reaching the conclusion whether the contract or contracts continued to subsist on the date on which the candidate offered himself for election. We shall now continue our narration of the facts.

5. As has been stated already, there were two contracts-one for the construction of a road for a distance of four miles and the other for the construction of a dispensary building. Two separate agreements have been produced which were entered into by the Yadagiri Construction Company with the Government for the execution and performance of these contracts. It was urged in the High Court by the election petitioner that both these contracts remained incomplete and, therefore, they subsisted and that the candidate was under a disqualification and could not stand for the election. The contract for the construction of the road entered into by Yadagiri Construction Company included twelve items which the firm had to complete. They are conveniently described as items 1 to 7 and 8 to 12. The case of the election petitioner was that, although item 1 to 7 had been completed, items 8 to 12 remained to be completed. In the Schedule to the contract for the building of the dispensary, a number of items were included in the Schedule. Of these, 8 items were found to be incomplete and, therefore, the same position ensued as in the case of the road. The evidence led in the case consisted of documents from the Public Works Department and oral testimony of the engineers who were in charge of these constructions and others. After appraising the evidence, the High Court came to the conclusion that although some of the items from these two contracts might not have been completed, still the contracts as a whole were substantially performed and, therefore, there was no bar to the candidature of the 1st respondent. The High Court also held that although these agreements contained a clause for maintenance and repairs over a period of time after the completion of the work of construction, that did not make the contracts to subsist and therefore, that too was not a disability.

6. Mr. Chagla in arguing the appeal tries to establish that both the conclusions of the High Court are erroneous. The evidence in the case, as is usual, is widely discrepant between the parties. They both held certificates issued by the Public Works Department, one set showing that the work had been completed and a subsequently issued set showing that something remained to be done and that the contracts were still subsisting. We shall refer to these documents now.

7. The contract in relation to the road was entered into on December 17, 1962 and is evidenced by Ex. P-10. The Schedule to the contract showed that the construction had to be completed according to it. The contract went on to provide by clause 20 as follows:

The contractor is to maintain the reconstructed portion of the road for a period of three months after the Executive Engineer has certified the same to be completed to his satisfaction.

The Schedule to this contract provided for surfacing of the road, collection of Shahabad soling stones, collection of muram for earth work, spreading muram over soling, and metal etc. In addition to the proper construction of the road, it was the duty of the contractor to

supply and fix mile and hectometer stones and to fix the road boundaries and demarcation stones etc. This work represents items 8 to 12. Those relating to the road proper are items 1-7 to which also reference has been made earlier.

8. Now it is agreed on both sides that items 1-7 were duly completed. The dispute is with regard to items 8-12. Nomination to the Assembly had to be filed on 20th January, 1967 at the latest. 21st January was fixed for scrutiny of the nomination papers and the election was to follow in the month of February. On 18th January, 1967, the first respondent obtained a certificate that his contracts had been fully performed. He approached the Executive Engineer on the 19th. The Executive Engineer was busy throughout the day. The respondent therefore asked his Personal Assistant (who incidentally is a gazetted officer of the rank of an Assistant Engineer) to give him the necessary certificate. The Personal Assistant telephoned to the Assistant Engineers in-charge and on their statement that the work had been physically completed, he granted the certificates to that effect. It appears that the election petitioner was also busy in his turn. He obtained cancellation of these certificates from the Executive Engineer on the following day. The Executive Engineer asked the Assistant Engineers to state whether the work had been completed and the Assistant Engineer thereupon gave the certificate that items 8-12 of the first contract were not complete. We have so far described the contract dealing with the road.

9. The contract for the construction of the dispensary was executed on February 23, 1966. The schedule to that contract contained a description of 27 items which had to be completed. In addition, there was the requirement that the entire premises would be cleaned and put in habitable state and then handed over. Here also, the dispute is whether the entire contract had been completed or not. It is the case of the election petitioner that 9 items were left incomplete including the construction of a compound wall 30 ft. long for the quadrangular open yard, supplying welded mesh for the front waiting room and to the rear opening, whitewashing of one room, paint work, floors etc. This also was certified at first to be completed but later the certificate was revised and it was stated that the work was not complete. It is between these two rival certificates and the evidence relating to them that the matter has to be decided.

10. In respect of the road, the Assistant Engineer in-charge of the work gave a notice on December 20, 1966 saying that certain work was not complete. Items 8-12 were, however, not mentioned there. The High Court was of the opinion that this omission completely demonstrated that portion of the work which is now stated to be incomplete must have been completed. In answer to this, Mr. Chagla has contended that he had asked for the issue of a Commission in the High Court for the inspection of the spot (which petition he has repeated here) and he stated that even today this part of the work has not been completed. However we do not go by such petitions nor are we inclined to issue a Commission which has been asked for in this Court. We consider the evidence, such as it is, and we find the correct situation to be this. P.W. 3, the Assistant Engineer no doubt stated in his notice that the "balance items" were only three, he had really mentioned 4 items, but had struck out item no. 2. That, however, did not show that no other work remained to be done. The certificates that are there in favour of the completion of the work were given by the Personal Assistant to the Executive Engineer on the day the Executive Engineer was absent. No doubt, the Personal Assistant

worked as the head of the office in the absence of the Executive Engineer, but it is on record and duly proved that he had no authority to issue the completion certificates which he did. The Personal Assistant explained that he had issued the certificates because they were urgently required for election purposes and because the Assistant Engineer under whose supervision the construction of the road was taking place had reported completion of the work. The Executive Engineer, however, verified this again from the Assistant Engineer and found that items 8-12 remained to be completed. Mr. Narasaraju complains of the conduct of the Executive Engineer by saying that he did not visit the spot to see for himself whether the completion had been made or not. He states that in Ex. P-11 in which the completion was reported on 18-1-1967 there is no mention of items 8-12 and it is different in language from Ex. C-1 in which items 8-12 are shown not to have been completed. We do not think that anything turns on that. The Officers of the Public Works Department have come to the witness box and have maintained that these items were infact not completed before the election took place. We are satisfied that although the construction of the road was complete the additional items which are described as "miscellaneous" in the contract still remained to be completed. What bearing this will have upon the election of the first respondent is something which we shall consider after we have analysed the evidence with regard to the hospital.

11. In respect of the hospital also, the first respondent obtained the certificate from the Personal Assistant to the Executive Engineer that the work had been completed. This is Ex. P-1. Here again, the Assistant Engineer was consulted and the certificate showed that there was physical completion of the work. Later this certificate was also contradicted by the issuance of another certificate by the Executive Engineer that the work remained incomplete. This information was given by the Executive Engineer to the Returning Officer by Ex. P. 13 because it was an important matter connected with the election. Mr. Narasaraju hinted that some outside influence was at work in the cancellation of the earlier certificate in as much as the Minister for the Public Works Department was present at Yadagiri and had also camped at Gulbarga on the following day. He pointed out that the Chief Engineer and the Executive Engineer were also present. The insinuation is that this was done under the pressure of the Minister, because the Congress had been consistently losing the seat at Yadagiri and it was intended that the first respondent should be knocked out to ensure Congress victory. We do not find any evidence which shows that the Minister took any interest in this matter although his presence may give rise to some suspicion. We cannot go on suspicion alone. It is obvious that both sides were straining every nerve to get some documentary evidence in their hands to prove, one that the work was incomplete and the other, that the work was completed. The later certificates clearly show that certain parts of the work remained to be completed and they certainly were overlooked when the first certificate was given. That they were minor items is not much to the purpose. The contracts as such were not fully performed. Although we were hesitating whether to apply the de minimis rule to this case we think that there are other considerations why we should refrain from applying that rule. We make our position clear. If the work is completed, it would not mean that the contract is subsisting, if, say, a glass pane is found broken or a tower bolt or a drop bolt or a handle has not been fixed where it should have been. The law is not so strict as all that and a sensible view of the section will have to be taken. The right of a person to stand for an election is a valuable right just as a

right of a person to vote was considered a valuable right in the leading case of *Ashby v. White* [(1703) 2 Ld. Raym. 938]. But if the contract subsists in such manner that it cannot be said to have been substantially completed, the law must take its own course. It is of the essence of the law of Elections that candidates must be free to perform their duties without any personal motives being attributed to them. A contractor who is still holding a contract with the Government is considered disqualified, because he is in a position after successful election to get concession for himself in the performance of his contract. That he may not do so is not relevant. The possibility being there, the law regards it necessary to keep him out of the elections altogether. But as we stated, this will be only where the contract has not been fully performed, although what is full performance of a contract or completion, is a matter on which we do not wish to express a final opinion in this case, because it depends on the circumstances of each case and more particularly because there is here another condition to which we have referred.

12. In both the contracts, there was a condition that for a period of three months in one and for a period of one year in the other, the contractor would make due repairs to all the defective parts in the execution of the contract. The question is whether the contract can be said to be subsisting in view of this clause. Both sides referred us to *Hudson's Building and Engineering Contracts*. In one passage, Hudson regarded such a clause as in the nature of a 'repair clause'. But Hudson was not dealing with the law of election when he was discussing a clause, such as we have in this case. We have to interpret this clause in the context of election law. Now the contract must be said to subsist if a portion of it is required to be performed at any time, because so long as the contract has not been discharged, by full performance, it must be taken to subsist. Mr. Narasaraju contends that the phrase "contract for the execution of the work" shows that it is the execution of the original work which is contemplated and not any condition of guarantee for repair. In our opinion, this argument, however, ingenious, is not acceptable because a similar point arose in the case to which we referred earlier. In *Chatturbhuj Vithaldas Jasani* case [(1954) SCR 817] Bose, J. dealt with a similar point in the following words:

It was argued that assuming that to be the case, then there were no longer any contracts for the "supply of goods" in existence, but only an obligation arising under the guarantee clause. We are unable to accept such a narrow construction. This term of the contract, whatever the parties may have chosen to call it, was a term in a contract for the supply of goods. When a contract consists of a number of terms and conditions, each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. It is not split up into several considerations apportioned between each term separately. But quite apart from that, the obligation, even under this term, was to supply fresh stocks for these three depots in exchange for the stocks which were returned and so even when regarded from that narrow angle it would be a contract for the supply of goods. It is true that they are replacements but a contract to replace goods is still one for supply of the goods which are sent as replacements.

Applying these observations in the context of construction of buildings and roads, it is obvious that if some part is found defective and has to be done again, the contract of execution as such is still to be fully performed. It is possible to describe the action taken as one to repair the defect, but in essence, it is a part of the contract of execution, because no execution can be said to be proper or complete till it is properly executed. Taking the fact that some portion of the original contracts remained to be performed with the fact that under the contracts the contractor was required not only to complete the original work but to repair defects or re-do something which he had not properly done, we think this matter must fall within Section 9A of the Representation of the People Act. This is not a case like the supply of a refrigerator, which after giving service for some time goes out of order and something has to be done to replace a part which is defective. The analogy is not quite apposite. Here the building was completed very recently and the flooring had to be re-done and various other things were left unfinished and these had to be completed by the contractor. Similarly in relation to the road, although the surface was prepared and the road was in actual use, under the contract, mile and hectometer stones had to be fixed and certain other stones fixed at curves and boundaries. This was not done. The two contracts therefore, were not fully performed and under clause 20 of the agreement, it was incumbent upon the contractor to complete this part of his obligation. In our opinion, the High Court was in error in holding that the contracts had been fully performed and therefore Section 9A did not apply.

13. Mr. Narasaraju raises three legal points. The first is that under Article 299, the contract had to be signed by the Secretary to the Government whereas the contract was signed by the Executive Engineer. This point was also considered in *Jasani* case [(1954) SCR 817] and it was held that it did not go to save the bar of the election law to the candidature. Next, it is argued that the section is applicable to a person whereas the contract was with a firm and therefore the first respondent was not barred from standing for the election. In our opinion, the High Court has taken the right view of the matter. The law requires that a candidate should not have any interest in any contract with Government and even a partner has an interest sufficient to attract the provisions of Section 9A. Lastly it is argued that the partnership itself had been dissolved. That would have no effect upon the relations between the first respondent and the Government. The first respondent could not by a private dissolution of the partnership escape his liability under the contract to the Government, and there was here notation, because notice of the dissolution was not given to Government and the Government had not accepted Hampanna, to whom the business was transferred in place of the firm. We view the transfer of the entire contracts to Hampanna with some suspicion. It appears that on the eve of the election, the first respondent who wished to contest the seat from Yadagiri, hurried through his contracts, managed to get a completion certificate which was not quite accurate, dissolved the partnership with a view to clear himself from all connections with the contracts so that he could stand for the election. In this effort, he has distinctly failed.

14. We are satisfied that this appeal must succeed and the appeal is therefore allowed, the election of the first respondent is declared void. In this view of the matter, the votes cast in favour of the first respondent must be treated as thrown away. As there was no other contesting candidate we declare the appellant (election petitioner) elected to the seat from the Yadagiri constituency.

K. Prabhakaran v. P. Jayarajan

(2005) 1 SCC 754

R.C. LAHOTI, C.J. –

Facts in C.A. No. 8213/2001:

1. Election to the 14, Kuthuparamba Assembly Constituency was held in the months of April-May, 2001. There were three candidates, including the appellant, K. Prabhakaran and the respondent, P. Jayarajan contesting the election. Nominations were filed on 24.4.2001. The poll was held on 10.5.2001. The result of the election was declared on 13.5.2001. The respondent was declared as elected.

2. In connection with an incident dated 9.12.1991, the respondent was facing trial, charged with several offences. On 9.4.1997, the Judicial Magistrate First Class, Kuthuparamba held the respondent guilty of the offences and sentenced him to undergo imprisonment as under:

<i>Offences</i>	<i>Sentence</i>
Under Section 143 read with Section 149 IPC	R.I. for a period of one month
Under Section 148 read with Section 149 IPC	R.I. for six months
Under Section 447 read with Section 149 IPC	R.I. for one month
Under Section 353 read with Section 149 IPC	R.I. for six months
Under Section 427 read with Section 149 IPC	R.I. for three months
Under Section 3(2) (e) under the P.D.P.P. Act read with Section 149 IPC	R.I. for one year

3. The sentences were directed to run *consecutively* (and *not concurrently*). Thus, the respondent was sentenced to undergo imprisonment for a total period of 2 years and 5 months. On 24.4.1997, the respondent filed Criminal Appeal No. 118/1997 before the Sessions Court, Thalassery. In exercise of the power conferred by Section 389 of the Code of Criminal Procedure, 1973 ('the Code') the Sessions Court directed the execution of the sentence of imprisonment to be suspended and the respondent to be released on bail during the hearing of the appeal.

4. The nomination paper filed by the respondent was objected to by the appellant on the ground that the respondent having been convicted and sentenced to imprisonment for a term exceeding 2 years was disqualified from contesting the election. However, the objection was overruled by the returning officer and the nomination of the respondent was accepted. The returning officer formed an opinion that the respondent was convicted for many offences and any of the terms of imprisonment for which he was sentenced was not 2 years, and therefore, the disqualification within the meaning of Section 8(3) of the Representation of the People Act, 1951 (hereinafter 'RPA', for short) was not attracted.

5. On 15.6.2001, the appellant filed an election petition under Chapter II of RPA mainly on the ground that the respondent was disqualified, and therefore, neither his nomination was valid nor could he have been declared elected.

6. On 25.7.2001, the Court of Sessions partly allowed the appeal filed by the respondent. The conviction of the accused and the sentences passed on him were maintained, subject to

the modification that the substantive sentences of imprisonment for the several offences for which the respondent was found guilty were made to run concurrently.

7. On 5.10.2001, a learned Designated Election Judge of the High Court decided the election petition by directing it to be dismissed. The learned Judge did not find any fault with the view taken by the returning officer that Section 8(3) of RPA was not attracted. The learned Judge also held that during the pendency of the election petition, the sentence passed by the trial court had stood modified by the appellate court which, while maintaining the conviction and different terms of imprisonment to which the respondent was sentenced, had directed the sentences to run concurrently. In the opinion of the High Court, the sentence, as modified by the appellate court, operated retrospectively from the date of the judgment of the trial court, and, therefore also the disqualification had in any case ceased to exist. The High Court placed reliance on two decisions of this Court namely *Shri Manni Lal v. Shri Parmai Lal* [(1970) 2 SCC 462] and *Vidya Charan Shukla v. Purshottam Lal Kaushik* [(1981) 2 SCC 84].

Facts in C.A.6691/2002:

8. On 18.9.1993, FIR No.386 for offences under Sections 148, 307, 323, 325, 326/149 of the Indian Penal Code and Sections 25 and 27 of the Arms Act 1959 was registered against Nafe Singh, respondent 1. One of the injured persons in the incident, died after the registration of the F.I.R. On 20.9.1993 the offence was converted into one of murder under Section 302 I.P.C. and other accused persons were arrested. Later on, Nafe Singh was released on bail. On 10.5.1996 while the charges against Nafe Singh and other accused persons were being tried, elections took place in the State of Haryana. Nafe Singh contested elections and on 10.5.1996 he was declared elected as a Member of Legislative Assembly from 37, Bahadurgarh Constituency.

9. On 17.5.1999, the Sessions Court trying the accused and others, held Nafe Singh guilty of an offence punishable under Section 302 I.P.C. and other offences. On 19.5.1999 he was sentenced to undergo imprisonment for life. On 25.5.1999 he filed an appeal in the High Court against his conviction. On 8.10.1999 the High Court directed the execution of sentence of imprisonment passed against Nafe Singh to be suspended and also directed him to be released on bail. Nafe Singh furnished bail bonds and was released on bail. By that time he had undergone imprisonment for four months and twenty one days.

10. On 14.12.1999, the Governor of the State of Haryana dissolved Haryana Assembly for mid term poll. In the first week of January 2000 the Election Commission notified the election programme for 37, Bahadurgarh Assembly Constituency, the last date for filing nominations was appointed as 3.2.2000. On 29.1.2000 Indian National Lok Dal, to which Nafe Singh belonged, released the first list of its official candidates wherein the name of Smt. Shiela Devi wife of Nafe Singh, respondent 1, was included. On 1.2.2000 Smt. Shiela Devi filed her nomination paper on Indian National Lok Dal ticket. On 2.2.2000 Nafe Singh also filed his nomination paper as a dummy candidate or an alternative to his wife Smt. Shiela. On the date of the scrutiny of nomination papers the appellant objected to the nomination of Nafe Singh submitting that the latter, in view of his conviction and sentence of life imprisonment passed under Section 302 I.P.C., was disqualified for being chosen as a member of Haryana

Assembly under Article 191 of the Constitution read with Section 8(3) of the RPA. The objection was overruled by the Returning Officer who accepted as valid the nomination paper filed by Nafe Singh. However, the nomination paper of Smt. Shiela, wife of Nafe Singh was not found to be in order and hence rejected. Indian National Lok Dal then nominated Nafe Singh as its candidate from Bahadurgarh Assembly Constituency. Polling was held on 22.2.2000. Results were declared on 25.2.2000 wherein Nafe Singh was declared elected over the appellant, the nearest rival, by a margin of 1,648 votes. There were, in all, eleven candidates in the election fray.

11. On 8.4.2000, the appellant filed an election petition under Chapter II of the RPA. One of the grounds taken in the election petition was of improper acceptance of the nomination paper of Nafe Singh by the Returning Officer. Nafe Singh contested the election petition. The learned Designated Election Judge of the High Court of Punjab and Haryana framed 13 issues arising from the pleadings of the parties. Issues no.1 to 7 were heard as preliminary issues not requiring any evidence.

12. Before we may proceed to notice the result of the election petition as determined by the High Court, a few more dates need to be noticed, as they are relevant. The hearing of the preliminary issues commenced on 12.2.2001 and continued for several dates of hearing. On 19.3.2001 Nafe Singh, in spite of the hearing on all the issues having been already concluded, made request to the High Court that the High Court may first decide his criminal appeal so that in the event of his being exonerated of the charges and being acquitted, he could gain the benefit of the decisions of this Court in *Shri Manni Lal v. Shri Parmai Lal* and *Vidya Charan Shukla v. Purshottam Lal Kaushik*. The prayer made by the respondent - Nafe Singh was opposed on behalf of the appellant. However, the learned Designated Election Judge adjourned the hearing to 27.4.2001 and then to 3.5.2001 on which date the judgment was reserved. When the judgment in the election petition was still awaited, on 1.8.2001, a Division Bench of the High Court decided the criminal appeal preferred by Nafe Singh, respondent 1. The appeal was allowed and respondent 1 was directed to be acquitted. Although the judgment of the Division Bench proceeds on its own merits but one thing which is noticeable from the judgment of the Division Bench of the High Court dated 1.8.2001 is that the complainant and the other injured persons had come to terms with the accused (respondent 1), settled their differences and compromised. 15 persons, who had as witnesses supported the prosecution case at trial, had now filed their affidavits before the Appellate Court disowning their statements earlier given by them in the trial court and stated (as the High Court has recorded in its decision), "that the parties had compromised their disputes and that the F.I.R. had been lodged on account of suspicion and at the instigation of certain persons and that no such occurrence had taken place."

13. On 21.8.2001 Nafe Singh, respondent 1, placed the appellate judgment of acquittal on record of the election petition by moving an application in that regard. On 20.12.2001 the appellant herein made a request to the Hon'ble Chief Justice of High Court requesting for his indulgence in getting the judgment in the election petition being pronounced. On 25.2.2002 the appellant moved an application before the learned Designated Election Judge praying for pronouncement of judgment at an early date. The judgment was pronounced on 5.7.2002. The

election petition was directed to be dismissed. Out of several findings recorded by the High Court the two which are relevant for the purpose of this appeal, are as under:

(i) in view of the appeal preferred by the respondent having been allowed, his conviction and sentence passed thereon respectively dated 17.5.1999 and 19.5.1999 stood wiped out as if no conviction had taken place as is the view taken by this Court in the cases of **Manni Lal** and **Vidya Charan Shukla**.

(ii) that on the date of his conviction Nafe Singh was a Member of Legislative Assembly and, therefore, in view of the provisions contained in sub-section (4) of Section 8 of the RPA, the conviction did not take effect for a period of three months, and as within that period an appeal was preferred which was pending and not disposed of on the date of nomination and election of Nafe Singh, he was protected by the said provision and the disqualification did not take effect.

Proceedings in the appeals

14. The election petitioners in both the cases have preferred these two statutory appeals under Section 116A of the RPA.

15. On 1.10.2002, C.A. no. 8213/2001 came up for hearing before a three-Judge Bench of this Court which expressed doubt about the correctness of the view taken in the cases of **Vidya Charan Shukla** and **Manni Lal**, the former being a three-Judge Bench decision, and, therefore, directed the matter to be placed for consideration by a Constitution Bench. The Bench also felt that the other issue arising for decision in the case as to whether the applicability of Section 8(3) of RPA would be attracted only when a person is sentenced to imprisonment for not less than 2 years for a single offence was also a question having far reaching implications and there being no decided case of this Court available on the issue, it would be in public interest to have an authoritative pronouncement by a Constitution Bench so as to settle the law, and hence directed such other question also to be placed for consideration by the Constitution Bench. The order of reference is reported as **K. Prabhakaran v. P. Jayarajan** [(2002) 8 SCC 79].

17. Three questions arise for decision:

(1) Whether an appellate judgment of a date subsequent to the date of election, and having a bearing on conviction of a candidate and sentence of imprisonment passed on him, would have the effect of wiping out disqualification from a back date if a person, consequent upon his conviction for any offence and sentenced to imprisonment for not less than 2 years, was disqualified from filing nomination and contesting the election on the dates of nomination and election ?

(2) What is the meaning to be assigned to the expression "A person convicted of any offence and sentenced to imprisonment for not less than 2 years" as employed in sub-section (3) of Section 8 of the Representation of the People Act, 1951? Is it necessary that the term of imprisonment for not less than 2 years must be in respect of one single offence to attract the disqualification?

(3) What is the purport of sub-section (4) of Section 8 of RPA? Whether the protection against disqualification conferred by sub-section (4) on a member of a House would continue

to apply, though the candidate had ceased to be a member of Parliament or Legislature of a State on the date of nomination or election?

Relevant Provisions

18. The relevant provisions of law may be set out as under:

Constitution of India

Article 191: *Disqualification for membership* (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

x x x

(e) if he is so disqualified by or under any law made by Parliament.

x x x

The Representation of the People Act, 1951

8. *Disqualification on conviction for certain offences-* x x x

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years, other than any offence referred to in sub-section (1) or sub-section (2), shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

100. *Grounds for declaring election to be void-*(1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act; or

xxx

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

19. We have briefly stated in the earlier part of the judgment such facts relating to both the cases which are not in dispute. Before dealing with the submissions made by the learned

counsel for the parties, it would be appropriate to set out briefly the relevant facts and the law laid down in the cases of *Manni Lal* and *Vidya Charan Shukla*.

***Manni Lal* case**

20. *Manni Lal* case is a two-Judge Bench decision of this Court. Parmai Lal, respondent 1 therein, filed his nomination on 9.1.1969. Two days later, on 11.1.1969, he was convicted for an offence under Section 304 I.P.C. and sentenced to 10 years R.I. On 16.1.1969 he filed an appeal against his conviction in the High Court. Polling took place on 9.2.1969. Parmai Lal was declared elected on 11.2.1969. On 30.9.1969 the appeal filed by Parmai Lal was allowed by the High Court and his conviction and sentence was set aside. At that point of time, an election petition laying challenge to the election of Parmai Lal was pending which was decided by the judgment delivered on 27.10.1969. The High Court refused to hold Parmai Lal as disqualified under Section 8(2) of RPA. Manni Lal filed an appeal in this Court. This Court held that in a criminal case, acquittal in appeal does not take effect merely from the date of the appellate order setting aside the conviction; it has the effect of retrospectively wiping out the conviction and the sentence awarded by the lower court.

21. Bhargava, J., speaking for the Bench, observed:

It is true that the opinion has to be formed as to whether the successful candidate was disqualified on the date of his election; but this opinion is to be formed by the High Court at the time of pronouncing the judgment in the election petition. In this case, the High Court proceeded to pronounce the judgment on 27th October, 1969. The High Court had before it the order of acquittal which had taken effect retrospectively from 11th January, 1969. It was, therefore, impossible for the High Court to arrive at the opinion that on 9th or 11th February, 1969, respondent 1 was disqualified. The conviction and sentence had been retrospectively wiped out, so that the opinion required to be formed by the High Court to declare the election void could not be formed.

In the opinion of Bhargava, J. the effect of acquittal by the appellate court was similar to the effect of repeal of an enactment. To quote His Lordship:

The situation is similar to one that could have come into existence if Parliament itself had chosen to repeal Section 8(2) of the Act retrospectively with effect from 11th January, 1969 (the day of conviction of Parmai Lal). Learned counsel conceded that, if a law had been passed repealing Section 8(2) of the Act and the law had been deemed to come into effect from 11th January, 1969, he could not have possibly urged thereafter, when the point came up before the High Court, that respondent 1 was disqualified on 9th or 11th February, 1969. The setting aside of the conviction and sentence in appeal has a similar effect of wiping out retrospectively the disqualification. The High Court was, therefore, right in holding that respondent 1 was not disqualified and that his election was not void on that ground.

On this reasoning this Court upheld the judgment of the High Court that the election of Parmai Lal was not void on the ground of his conviction on the date of the poll and the declaration of the result.

Vidya Charan Shukla case

22. ***Vidya Charan Shukla*** case is a three-Judge Bench decision of this Court. Vidya Charan Shukla was convicted and sentenced to imprisonment exceeding two years by the Sessions Court on the date of filing of nomination. Such conviction and sentence were effective on the date of election as also on the date of declaration of result. However, the execution of sentence was stayed by the High Court. The unsuccessful candidate filed an election petition and by the time the election petition came to be decided, the criminal appeal filed by Vidya Charan Shukla was allowed by the High Court and his conviction and sentence were set aside. Reliance was placed on ***Manni Lal*** case and the narrow question which arose for decision before this Court was whether the case fell within the ratio of ***Manni Lal*** case if the challenge was considered to be one under clause (d)(i) and (iv) of Section 100.

The Court noticed the principle laid down in ***Dilip Kumar Sharma v. State of M.P.***, [(1976) 1 SCC 560] to hold that an order of acquittal, particularly one passed on merits, wipes off the conviction and sentence for all purposes and as effectively as it had never been passed and an order of acquittal annulling or voiding a conviction operates from nativity. The conviction for the offence having been quashed by the High Court in appeal it "killed the conviction not then, but performed the formal obsequies of the order which had died at birth."

23. Thereafter, this Court referred to the case of ***Manni Lal*** and expressed agreement with the view taken therein, that, once the disqualification of the returned candidate incurred on account of his conviction and sentence exceeding two years' imprisonment which existed as a fact at the date of the election, is subsequently set aside by the High Court prior to the date of decision in the election petition laying challenge to the validity of election under Section 100(1)(a) of RPA, the election petition must fail because the acquittal had the effect of retrospectively wiping out the disqualification as completely and effectively as if it never had existed. It did not make much difference that the candidate stood convicted on the date of filing nomination as also on the date of election and earned acquittal after the election so long as it was before the date of pronouncement of judgment in the election petition by the High Court.

24. The emphasis in ***Manni Lal*** case, that the opinion on the question of disqualification had to be formed by the High Court at the time it proceeds to pronounce the judgment in the election petition and, therefore, it was by reference to the date of judgment in election petition by the High Court that the factum of disqualification was to be decided, was reiterated in ***Vidya Charan Shukla*** case. The acquittal had retrospective effect of making the disqualification non-existent even at the time of scrutiny of the nominations.

25. However, it is pertinent to notice the dilemma which the Court faced while dealing with an argument advanced before it and dealt in paragraphs 39 and 40 of the judgment. A submission was made-what would happen if nomination of a candidate was rejected on account of his disqualification incurred by his conviction and sentence exceeding two years' imprisonment and existing as a fact on the date of scrutiny of nomination and he brought an election petition to challenge the election of the returned candidate on the ground that his nomination was improperly rejected and if by the time the election petition came to be heard and decided, the conviction of the election petitioner was set aside in criminal appeal then, as

a result of his subsequent acquittal, his conviction and sentence would stand annulled and obliterated with retrospective force and he would be justified in submitting that his nomination was illegally rejected and, therefore, the result of the election was materially affected and was liable to be set aside. The Court branded the said submission as 'hypothetical' requiring an academic exercise which was not necessary to indulge in. It would be note-worthy, as recorded vide para 40 of the judgment in *Vidya Charan Shukla* case, that correctness of the decision in *Manni Lal* case was not disputed and there was no prayer made for reconsideration of the ratio of *Manni Lal* case by a larger bench. The only submission made before the Court in *Vidya Charan Shukla* case was that the ratio in *Manni Lal* case was distinguishable and hence inapplicable to the facts of *Vidya Charan Shukla* case. In such circumstances, the Court held "we would abide by the principle of stare decisis and follow the ratio of *Manni Lal's* case."

26. It is writ large that the position of law may have been different and the three-Judge bench which decided *Vidya Charan Shukla* case could have gone into the question of examining the correctness of the view taken in *Manni Lal* case, if only that submission would have been made. Now we proceed to deal with the three issues posed for resolution before us.

QUESTION (1):

28. Under clause (a) of sub-section (1) of Section 100 of the RPA, the High Court is called upon to decide whether on the date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Constitution or the RPA. If the answer be in the affirmative, the High Court is mandated to declare the election of the returned candidate to be void. The focal point by reference to which the question of disqualification shall be determined is the date of election.

29. It is trite that the right to contest an election is a statutory right. In order to be eligible for exercising such right the person should be qualified in terms of the statute. He should also not be subject to any disqualification as may be imposed by the statute making provision for the elective office. Thus, the Legislature creating the office is well within its power to prescribe qualifications and disqualifications subject to which the eligibility of any candidate for contesting for or holding the office shall be determined. Article 191 of the Constitution itself lays down certain disqualifications prescribed by clauses (a) to (d) of sub-Article (1) thereof. In addition, it permits, vide clause (e), any other disqualifications being provided for by or under any law made by Parliament. The Representation of the People Act, 1951 is one such legislation. It provides for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State and the qualifications and the disqualifications for membership of those Houses.

30. Under sub-clause (i) of clause (d) of sub-section (1) of Section 100 of the RPA, the improper acceptance of any nomination is a ground for declaring the election of the returned candidate to be void. This provision is to be read with Section 36(2)(a) which casts an obligation on the returning officer to examine the nomination papers and decide all objections to any nomination made, or on his own motion, by reference to the date fixed for the scrutiny of the nominations. Whether a candidate is qualified or not qualified or is disqualified for being chosen to fill the seat, has to be determined by reference to the date fixed for the

scrutiny of nomination. That is the focal point. The names and number of candidates who will be in the fray is determined on the date of the scrutiny of the nomination papers and the constituency goes to polls. Obviously, the decision by the returning officer has to be taken on the facts as they exist on that day. The decision must be accompanied by certainty. The returning officer cannot postpone his decision nor make it conditional upon what may happen subsequent to that date. Under Section 100(1)(d)(i) of the Act the High Court has to test the correctness of the decision taken by the returning officer and the fact whether any nomination was improperly accepted by reference to the date of scrutiny of the nomination as defined in Section 36(2)(a). An election petition is heard and tried by a court of law. The proceedings in election petition are independent of the election proceedings which are held by the Executive. By no stretch of imagination the proceedings in election petition can be called or termed as continuation of election proceedings. The High Court trying an election petition is not hearing an appeal against the decision of the returning officer or declaration of result of a candidate.

31. With respect to the learned judges who decided *Manni Lal* case, the fallacy with which the judgment suffers is presumably an assumption as if the election petition proceedings are the continuation of the election proceedings. Yet, another fallacy with which the judgment, in our humble opinion, suffers is as if the High Court has to form opinion on the disqualification of a candidate at the time of pronouncing the judgment in the election petition. That is not correct. Undoubtedly, the High Court is forming an opinion on the date of judgment in election petition but that opinion has to be formed by reference to the date of scrutiny, based not on such facts as can be fictionally deemed to have existed on a back date dictated by some subsequent event, but based on the facts as they had actually existed then, so as to find out whether the returning officer was right or wrong in his decision on scrutiny of nomination on that date, i.e., the date of scrutiny. The correctness or otherwise of such decision by the returning officer cannot be left to be determined by any event which may have happened between the date of scrutiny and the date of pronouncement of the judgment by the High Court.

32. It is rather unfortunate that the correctness of the view taken in *Manni Lal* case was not questioned in *Vidya Charan Shukla* case and an attempt was made only to distinguish the case of *Manni Lal*. While interpreting a provision of law and pronouncing upon the construction of a statutory provision, the Court has to keep in mind that the view of the law taken by it would be applied to myriad situations which are likely to arise. It is also well-settled that such interpretation has to be avoided as would result in creating confusion, anomaly, uncertainty and practical difficulties in the working of any system. A submission based on this principle was advanced before the three-Judge Bench in *Vidya Charan Shukla* case, but unfortunately did not receive the attention of the Court forming an opinion that dealing with that submission (though forceful) would amount to indulging in a 'hypothetical and academic exercise'.

33. We may just illustrate what anomalies and absurdities would result if the view of the law taken in *Manni Lal* case and *Vidya Charan Shukla* case were to hold the field. One such situation is to be found noted in para 39 of *Vidya Charan Shukla* case. A candidate's nomination may be rejected on account of his having been convicted and sentenced to imprisonment for a term exceeding two years prior to the date of scrutiny of nomination.

During the hearing of election petition if such candidate is exonerated in appeal and earns acquittal, his nomination would be deemed to have been improperly rejected and the election would be liable to be set aside without regard to the fact whether the result of the election was materially affected or not. Take another case. Two out of the several candidates in the election fray may have been convicted before the date of nomination. By the time the election petition comes to be decided, one may have been acquitted in appeal and the conviction of other may have been upheld and by the time an appeal under Section 116A of the RPA preferred in this Court comes to be decided, the conviction of one may have been set aside and, at the same time, the acquittal of the other may also have been set aside. Then the decision of the High Court in election petition would be liable to be reversed not because it was incorrect, but because something has happened thereafter. Thus, the result of election would be liable to be avoided or upheld not because a particular candidate was qualified or disqualified on the date of scrutiny of nominations or on the date of his election, but because of acquittal or conviction much after those dates. Such could not have been the intendment of the law.

34. We are also of the opinion that the learned judges deciding *Manni Lal* case were not right in equating the case of appellate acquittal with the retrospective repeal of a disqualification by statutory amendment.

35. In *Vidya Charan Shukla* case, *Dilip Kumar Sharma* case has been relied upon which, in our opinion, cannot be applied to a case of election and election petition.

36. *Dilip Kumar Sharma* case is a case of conviction under Section 303 I.P.C. One P was murdered on 24.10.1971. The accused was sentenced to life imprisonment on 18.5.1972. On 20.6.1973 the accused committed the murder of A and was convicted for such murder on 24.1.1974 and sentenced to death under Section 303 I.P.C. In appeal against conviction for the murder of P, the accused was acquitted on 27.2.1974. On the same day the High Court confirmed the death sentence of the accused under Section 303 I.P.C. holding that on the date on which the accused had committed the murder of A he was undergoing sentence of life imprisonment for the murder of P. In appeal preferred before this Court, it was held that the death sentence could not be upheld inasmuch as the accused had stood acquitted from the offence of the first murder and the acquittal in an appeal had the effect of wiping out the conviction in the first murder. The mandatory sentence of death by reference to Section 303 I.P.C. for the second offence could not be maintained.

37. Four factors are relevant. Firstly, the sentence of death was passed in judicial proceedings and the appeal against the judgment of the trial court being a continuation of those judicial proceedings, the court was not powerless to take note of subsequent events. The sentence of death was passed based on an event which had ceased to exist during the pendency of the appeal. The court was, not only, not powerless but was rather obliged to take note of such subsequent event, failing which a grave injustice would have been done to the accused. Secondly, the court interpreted Section 303 I.P.C. which speaks of a person "under sentence of imprisonment for life" as meaning a person under an operative, executable sentence of imprisonment for life. A sentence once imposed but later set aside is not executable and, therefore, ceases to be relevant for the purpose of Section 303 I.P.C. Thirdly, the focal point was the date of conviction when the court is called upon to pronounce the sentence. Fourthly, it is pertinent to note that the well established proposition which the court

pressed into service was that "a court seized of a proceeding must take note of events subsequent to the inception of that proceeding", which position, the court held, is applicable to civil as well as criminal proceedings with appropriate modifications. The emphasis is on the events happening subsequent to the inception of that proceeding. In the cases at hand, the principle laid down in *Dilip Kumar Sharma* case will have no application inasmuch as the validity of nomination paper is to be tested by deciding qualification or disqualification of the candidate on the date of scrutiny and not by reference to any event subsequent thereto.

38. The decision of this Court in *Amrit Lal Ambalal Patel v. Himathbhai Gomanbhai Patel* [AIR 1968 SC 1455] lends support to the principle that the crucial date for determining whether a candidate is not qualified or is disqualified is the date of scrutiny of nominations and a subsequent event which has the effect of wiping out the disqualification has to be ignored.

39. That an appellate judgment in a criminal case, exonerating the accused-appellant, has the effect of wiping out the conviction as recorded by the Trial Court and the sentence passed thereon is a legal fiction. While pressing into service a legal fiction it should not be forgotten that legal fictions are created only for some definite purpose and the fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. A legal fiction pre-supposes the existence of the state of facts which may not exist and then works out the consequences which flow from that state of facts. Such consequences have got to be worked out only to their logical extent having due regard to the purpose for which the legal fiction has been created. Stretching the consequences beyond what logically flows amounts to an illegitimate extension of the purpose of the legal fiction. [See, the majority opinion in *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661]. P.N. Bhagwati, J., as his Lordship then was, in his separate opinion concurring with the majority and dealing with the legal fiction contained in the Explanation to Article 286 (1) (a) of the Constitution (as it stood prior to Sixth Amendment) observed:

Due regard must be had in this behalf to the purpose for which the legal fiction has been created. If the purpose of this legal fiction contained in the Explanation to Article 286 (1) (a) is solely for the purpose of sub- clause (a) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be. The legal fiction which was created here was only for the purpose of determining whether a particular sale was an outside sale or one which could be deemed to have taken place inside the State and that was the only scope of the provision. It would be an illegitimate extension of the purpose of the legal fiction to say that it was also created for the purpose of converting the inter-state character of the transaction into an intra-state one.

His Lordship opined that this type of conversion would be contrary to the express purpose for which the legal fiction was created. These observations are useful for the purpose of dealing the issue in our hands. Fictionally, an appellate acquittal wipes out the trial court conviction; yet, to hold on the strength of such legal fiction that a candidate though convicted and sentenced to imprisonment for two years or more was not disqualified on the date of scrutiny of the nomination, consequent upon his acquittal on a much later date, would be an illegitimate extension of the purpose of the legal fiction. However, we hasten to add that in

the present case the issue is not so much as to the applicability of the legal fiction; the issue concerns more about the power of the Designated Election Judge to take note of a subsequent event and apply it to an event which had happened much before the commencement of that proceeding in which the subsequent event is brought to the notice of the Court. An election petition is not a continuation of election proceedings.

40. We are clearly of the opinion that *Manni Lal* case and *Vidya Charan Shukla* case do not lay down the correct law. Both the decisions are, therefore, overruled.

41. The correct position of law is that nomination of a person disqualified within the meaning of sub-section (3) of Section 8 of the RPA on the date of scrutiny of nominations under Section 36(2)(a) shall be liable to be rejected as invalid and such decision of the returning officer cannot be held to be illegal or ignored merely because the conviction is set aside or so altered as to go out of the ambit of Section 8(3) of the RPA consequent upon a decision of a subsequent date in a criminal appeal or revision.

42. What is relevant for the purpose of Section 8(3) is the actual period of imprisonment which any person convicted shall have to undergo or would have undergone consequent upon the sentence of imprisonment pronounced by the Court and that has to be seen by reference to the date of scrutiny of nominations or date of election. All other factors are irrelevant. A person convicted may have filed an appeal. He may also have secured an order suspending execution of the sentence or the order appealed against under Section 389 of the Code of Criminal Procedure 1973. But that again would be of no consequence. A court of appeal is empowered under Section 389 to order that pending an appeal by a convicted person the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or bond. What is suspended is not the conviction or sentence; it is only the execution of the sentence or order which is suspended. It is suspended and not obliterated. It will be useful to refer in this context to a Constitution Bench judgment of this Court in *Sarat Chandra Rabha v. Khagendranath Nath* [(1961)2 SCR 133]. The convict had earned a remission and the period of imprisonment reduced by the period of remission would have had the effect of removing disqualification as the period of actual imprisonment would have been reduced to a period of less than two years. The Constitution Bench held that

The remission of sentence under Section 401 of the Criminal Procedure Code (old) and his release from jail before two years of actual imprisonment would not reduce the sentence into one of a period of less than two years and save him from incurring the disqualification. An order of remission does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court.

43. In *B.R. Kapur v. State of T.N.* [(2001) 7 SCC 231] a similar question, though in a little different context, had arisen for the consideration of the Constitution Bench. Vide para 44, the Court did make a reference to *Vidya Charan Shukla* case but observed that it was a case of an election petition and, therefore, did not have a bearing on the construction of Article 164 of the Constitution which was in issue before the Constitution Bench. Obviously the consideration of the correctness of the law laid down in *Vidya Charan Shukla* case was not called for. However, still the Constitution Bench has made a significant observation which is very relevant for our purpose. The Constitution Bench observes (vide SCC p. 298 para 44):

There can be no doubt that in a criminal case acquittal in appeal takes effect retrospectively and wipes out the sentence awarded by the lower court. This implies that the stigma attached to the conviction and the rigour of the sentence are completely obliterated, but that does not mean that the fact of the conviction and sentence by the lower court is obliterated until the conviction and sentence are set aside by an appellate court. The conviction and sentence stand pending the decision in the appeal and for the purposes of a provision such as Section 8 of the Representation of the People Act are determinative of the disqualifications provided for therein.

To the same effect are observations contain in para 40 also.

44. We are, therefore, of the opinion that an appellate judgment of a date subsequent to the date of nomination or election (as the case may be) and having a bearing on conviction of a candidate or sentence of imprisonment passed on him would not have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was actually and as a fact disqualified from filing nomination and contesting the election on the date of nomination or election (as the case may be).

Question (2):

45. What is the meaning to be assigned to the expression “sentenced to imprisonment for not less than 2 years” as occurring in Section 8(3) of the RPA? In a trial a person may be charged for several offences and held guilty. He may be sentenced to different terms of imprisonment for such different offences. Individually the term of imprisonment may be less than 2 years for each of the offences, but collectively or taken together or added to each other the total term of imprisonment may exceed 2 years. Whether the applicability of Section 8(3) above said would be attracted to such a situation.

46. Section 31 of the Code of Criminal Procedure, 1973 is relevant to find an answer for this. It provides as under:

31. Sentence in cases of conviction of several offences at one trial:

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments, prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that-(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(4) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

47. It is competent for a criminal court to pass several punishments for the several offences of which the accused has been held guilty. The several terms of imprisonment to which the accused has been sentenced commence one after the other and in such order as the court may direct, unless the court directs that such punishments shall run concurrently. Each of the terms of imprisonment to which the accused has been sentenced for the several offences has to be within the power of the court and the term of imprisonment is not rendered illegal or beyond the power of the court merely because the total term of imprisonment in the case of consecutive sentences is in excess of the punishment within the competency of the court. For the purpose of appeal by a convicted person it is the aggregate of the consecutive sentences passed against him which shall be deemed to be a single sentence. The same principle can be held good and applied to determining disqualification. Under sub-section (3) of Section 8 of the RPA the period of disqualification commences from the date of such conviction. The disqualification continues to operate for a further period of six years calculated from the date of his release from imprisonment. Thus, the disqualification commences from the date of conviction whether or not the person has been taken into custody to undergo the sentence of imprisonment. He cannot escape the effect of disqualification merely because he has not been taken into custody because he was on bail or was absconding. Once taken into custody he shall remain disqualified during the period of imprisonment. On the date of his release would commence the period of continued disqualification for a further period of six years. It is clear from a bare reading of sub-section (3) of Section 8 of the RPA that the actual period of imprisonment is relevant. The provisions of Section 8 of the Representation of People Act, 1951 have to be construed in harmony with the provisions of the Code of Criminal Procedure, 1973 and in such manner as to give effect to the provisions contained in both the legislations. In the case of consecutive sentences the aggregate period of imprisonment awarded as punishment for the several offences and in the case of punishments consisting of several terms of imprisonment made to run concurrently, the longest of the several terms of imprisonment would be relevant to be taken into consideration for the purpose of deciding whether the sentence of imprisonment is for less than 2 years or not.

48. It was submitted by Shri K.K. Venugopal, the learned Senior Counsel for the respondent in C.A. no. 8213/2001, that the phrase "any offence" as occurring in Section 8(3) of the RPA should be interpreted to mean a single offence and unless and until the term of imprisonment for any one of the offences, out of the several offences for which the accused

has been convicted and sentenced is 2 years or more, the disqualification enacted under Section 8(3) would not be attracted. We are not impressed.

49. In *Shri Balaganesan Metals v. M.N. Shanmugham Chetty* [(1987) 2 SCC 707] the word "any" came up for consideration of this Court. It was held that the word "any" indicates "all" or "every" as well as "some" or "one" depending on the context and the subject matter of the statute. **Black's Law Dictionary** was cited with approval. In **Black's Law Dictionary** (sixth edition) the word 'any' is defined (at p.94) as under:

Any- Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity one or some (indefinitely).

"Any" does not necessarily mean only one person, but may have reference to more than one or to many.

Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.

It is often synonymous with "either", "every", or "all". Its generality may be restricted by the context; thus, the giving of a right to do some act "at any time" is commonly construed as meaning within a reasonable time; and the words "any other" following the enumeration of particular classes are to be read as "other such like," and include only others of like kind or character.

51. The word 'any' may have one of the several meanings, according to the context and the circumstances. It may mean 'all'; 'each'; 'every'; 'some'; or 'one or many out of several'. The word 'any' may be used to indicate the quantity such as 'some', 'out of many', 'an infinite number'. It may also be used to indicate quality or nature of the noun which it qualifies as an adjective such as 'all' or 'every'. *Principles of Statutory Interpretation* by Justice G.P. Singh (9th Edition, 2004) states (at p.302)

When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of a word, regard must always be had to the context as it is a fundamental rule that "the meanings of words and expressions used in an Act must take their colour from the context in which they appear.

Therefore, "when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers".

52. In Section 8(3) of the RPA, the word 'any' has been used as an adjective qualifying the word 'offence' to suggest not the number of offences but the nature of the offence. A bare reading of sub-section (3) shows that the nature of the offence included in sub-section (3) is 'any offence other than any offence referred to in sub-section (1) or sub-section (2) of Section 8'. The use of adjective 'any' qualifying the noun 'offence' cannot be pressed in service to countenance the submission that the sentence of imprisonment for not less than two years must be in respect of a single offence.

53. Sub-section (3) in its present form was introduced in the body of the RPA by Act no.1 of 1989 w.e.f. 15.3.1989. The same Act made a few changes in the text of sub-Section (4) also. The Statement of Objects and Reasons accompanying Bill no.128 of 1988 stated, *inter alia*, "Section 8 of the Representation of the People Act, 1951 deals with disqualification on the ground of conviction for certain offences. It is proposed to include more offences in this section so as to prevent persons having criminal record enter into public life". (See the Gazette of India Extraordinary, Part II, Section 2, pp.105, 114). The intention of Parliament is writ large; it is to widen the arena of Section 8 in the interest of purity and probity in public life.

54. The purpose of enacting disqualification under Section 8(3) of the RPA is to prevent criminalization of politics. Those who break the law should not make the law. Generally speaking, the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics, and the House, a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred and have no reservation from indulging into criminality to win success at an election. Thus, Section 8 seeks to promote freedom and fairness at elections, as also law and order being maintained while the elections are being held. The provision has to be so meaningfully construed as to effectively prevent the mischief sought to be prevented. The expression "a person convicted of any offence" has to be construed as all offences of which a person has been charged and held guilty at one trial. The applicability of the expression "sentenced to imprisonment for not less than 2 years" would be decided by calculating the total term of imprisonment for which the person has been sentenced.

55. Shri K.K. Venugopal, learned senior counsel appearing for respondent in one of the appeals, submitted that Section 8 of the RPA is a penal provision and, therefore, should be construed strictly. We find it difficult to countenance the submission. Contesting an election is a statutory right and qualifications and disqualifications for holding the office can be statutorily prescribed. A provision for disqualification cannot be termed a penal provision and certainly cannot be equated with a penal provision contained in a criminal law. If any authority is needed for the proposition the same is to be found in *Jalan v. Bombay Gas Co. Ltd.* [(2003) 6 SCC 107] which has held Section 630 of the Companies Act, 1956 not to be a penal provision. The Court has gone on to say, "the principle that statute enacting an offence or imposing a penalty is to be strictly construed is not of universal application which must necessarily be observed in every case."

56. In the case of respondent P. Jayarajan the sentences of imprisonment were to run consecutively in terms of the judgment of the trial court. The periods of sentences of imprisonment for different offences shall have to be totalled up. On such totalling, the total term for which P. Jayarajan would have remained in jail did exceed a period of 2 years and consequently attracted the applicability of Section 8(3) of the RPA which cast a disqualification upon P. Jayarajan on the date of scrutiny of the nomination papers. His nomination could not have been accepted by the returning officer and he was not right in holding him not disqualified. In the light of the view of the law taken by us on Question-1 above, the subsequent event of the several terms of imprisonment having been directed by the

appellate court to run concurrently on a date subsequent to the date of scrutiny is irrelevant and liable to be ignored.

Question (3):

57. A comparative reading of sub-sections (3) and (4) of Section 8 of the RPA shows that Parliament has chosen to classify candidates at an election into two classes for the purpose of enacting disqualification. These two classes are: (i) a person who on the date of conviction is a member of Parliament or Legislature of a State, and (ii) a person who is not such a member. The persons falling in the two groups are well defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved.

58. Once the elections have been held and a House has come into existence, it may be that a member of the House is convicted and sentenced. Such a situation needs to be dealt with on a different footing. Here the stress is not merely on the right of an individual to contest an election or to continue as a member of a House, but the very existence and continuity of a House democratically constituted. If a member of the House was debarred from sitting in the House and participating in the proceedings, no sooner the conviction was pronounced followed by sentence of imprisonment, entailing forfeiture of his membership, then two consequences would follow. First, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted member may belong. The Government in power may be surviving on a razor edge thin majority where each member counts significantly and disqualification of even one member may have a deleterious effect on the functioning of the Government. Secondly, bye-election shall have to be held which exercise may prove to be futile, also resulting in complications in the event of the convicted member being acquitted by a superior criminal court. Such reasons seem to have persuaded the Parliament to classify the sitting members of a House into a separate category. Sub-section (4) of Section 8, therefore, provides that if on the date of incurring disqualification a person is a member of a House, such disqualification shall not take effect for a period of 3 months from the date of such disqualification. The period of 3 months is provided for the purpose of enabling the convicted member to file an appeal or revision. If an appeal or revision has been filed putting in issue the conviction and/or the sentence which is the foundation of disqualification, then the applicability of the disqualification shall stand deferred until such appeal or application is disposed of by the court in appeal or revision.

59. In *Shibu Soren v. Dayanand Sahay* [(2001) 7 SCC 425] a three-Judge Bench of this Court was seized of the question of examining a disqualification on account of the person at that time holding an office of profit. The Court held that such a provision is required to be interpreted in a realistic manner having regard to the facts and circumstances of each case and the relevant statutory provisions. While "a strict and narrow construction" may not be adopted which may have the effect of "shutting of many prominent and other eligible persons to contest elections" but at the same time "in dealing with a statutory provision which imposes a disqualification on a citizen, it would not be unreasonable to take merely a broad and general view and ignore the essential points". What is at stake is the right to contest an election and

hold office. "A practical view, not pedantic basket of tests" must, therefore, guide courts to arrive at appropriate conclusion. The disqualification provision must have a substantial and reasonable nexus with the object sought to be achieved and the provision should be interpreted with the flavour of reality bearing in mind the object for enactment.

60. Sub-section (4) operates as an exception carved out from sub-sections (1), (2) and (3) of Section 8 of the RPA. Clearly the saving from the operation of sub-sections (1), (2) and (3) is founded on the factum of membership of a House. The purpose of carving out such an exception is not to confer an advantage on any person; the purpose is to protect the House. Therefore, sub-section (4) would cease to apply no sooner the House is dissolved or the person has ceased to be a member of that House. Any other interpretation would render sub-section (4) liable to be annulled as unconstitutional. Once a House has been dissolved and the person has ceased to be a member, on the date of filing the nomination there is no difference between him and any other candidate who was not such a member. Treating such two persons differently would be arbitrary and discriminatory and incur the wrath of Article 14. A departure from the view so taken by us would also result in anomalous consequences not intended by the Parliament.

Conclusion

61. To sum up, our findings on the questions arising for decision in these appeals are as under:-

1. The question of qualification or disqualification of a returned candidate within the meaning of Section 100(1)(a) of the Representation of the People Act, 1951 (RPA, for short) has to be determined by reference to the date of his election which date, as defined in Section 67A of the Act, shall be the date on which the candidate is declared by the returning officer to be elected. Whether a nomination was improperly accepted shall have to be determined for the purpose of Section 100(1)(d)(i) by reference to the date fixed for the scrutiny of nomination, the expression, as occurring in Section 36(2)(a) of the Act. Such dates are the focal point for the purpose of determining whether the candidate is not qualified or is disqualified for being chosen to fill the seat in a House. It is by reference to such focal point dates that the question of disqualification under sub-sections (1), (2) and (3) of Section 8 shall have to be determined. The factum of pendency of an appeal against conviction is irrelevant and inconsequential. So also a subsequent decision in appeal or revision setting aside the conviction or sentence or reduction in sentence would not have the effect of wiping out the disqualification which did exist on the focal point dates referred to hereinabove. The decisive dates are the date of election and the date of scrutiny of nomination and not the date of judgment in an election petition or in an appeal there against.

2. For the purpose of attracting applicability of disqualification within the meaning of "a person convicted of any offence and sentenced to imprisonment for not less than two years" - the expression as occurring in Section 8(3) of the RPA, what has to be seen is the total length of time for which a person has been ordered to remain in prison consequent upon the conviction and sentence pronounced at a trial. The word 'any' qualifying the word

'offence' should be understood as meaning the nature of offence and not the number of offence/offences.

3. Sub-section(4) of Section 8 of the RPA is an exception carved out from sub-sections (1), (2) and (3). The saving from disqualification is preconditioned by the person convicted being a Member of a House on the date of the conviction. The benefit of such saving is available only so long as the House continues to exist and the person continues to be a Member of a House. The saving ceases to apply if the House is dissolved or the person ceases to be a Member of the House.

Result

62. For the foregoing reasons, Civil Appeal No. 8213 of 2001, **K. Prabhakaran v. P. Jayarajan** is allowed. The judgment of the High Court dated 5.10.2001 is set aside. The election petition filed by the appellant is allowed. The election of the respondent P. Jayarajan from 14, Kuthuparamba Assembly Constituency to the Kerala State Legislative Assembly, which was declared on 13.5.2001, is set aside. The respondent no.1 shall bear the costs of the appellant throughout.

63. Civil Appeal No.6691 of 2002 is also allowed. The judgment of the High Court dated 5.7.2002 is set aside. The election petition filed by the appellant shall stand allowed. The election of the respondent Nafe Singh from 37, Bahadurgarh Assembly Constituency is declared void as he was disqualified from being a candidate under Section 8(3) of the Representation of the People Act, 1951.

* * * * *

Lily Thomas v. Union of India
(2013) 7 SCC 653

A.K. PATNAIK, J.— These two writ petitions have been filed as public interest litigations for mainly declaring sub-section (4) of Section 8 of the Representation of the People Act, 1951 as ultra vires the Constitution.

The background facts

2. The background facts relevant for appreciating the challenge to sub-section (4) of Section 8 of the Act are that the Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for being, a Member of either House of Parliament as well as a Member of the Legislative Assembly or Legislative Council of the State. Accordingly, in the Constitution which was finally adopted by the Constituent Assembly, Article 102(1) laid down the disqualifications for membership of either House of Parliament and Article 191(1) laid down the disqualifications for membership of the Legislative Assembly or Legislative Council of the State. These two articles are extracted hereinbelow:

“102. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a Member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

191. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a Member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.”

3. A reading of the aforesaid constitutional provisions will show that besides the disqualifications laid down in clauses (a), (b), (c) and (d), Parliament could lay down by law other disqualifications for membership of either House of Parliament or of Legislative Assembly or Legislative Council of the State. In exercise of this power conferred under Article 102(1)(e) and under Article 191(1)(e) of the Constitution, Parliament provided in Chapter III of the Representation of the People Act, 1951 (for short “the Act”), the disqualifications for membership of Parliament and State Legislatures. Sections 7 and 8 in Chapter III of the Act, with which we are concerned in these writ petitions, are extracted hereinbelow:

“**7. Definitions.**—In this Chapter—

(a) ‘**appropriate Government**’ means in relation to any disqualification for being chosen as or for being a Member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a Member of the Legislative Assembly or Legislative Council of a State, the State Government;

(b) ‘**disqualified**’ means disqualified for being chosen as, and for being, a Member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.

8. Disqualification on conviction for certain offences—(1) A person convicted of an offence punishable under—

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly

engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of ‘untouchability’, and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a Member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991, or

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971), or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002),

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961), and sentenced to imprisonment for not less than six months shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a Member of Parliament or the legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) ‘law providing for the prevention of hoarding or profiteering’ means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be bought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) ‘drug’ has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) ‘essential commodity’ has the meaning assigned to it in the Essential Commodity Act, 1955 (10 of 1955);

(d) ‘food’ has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).”

4. Clause (b) of Section 7 of the Act quoted above defines the word “disqualified” to mean disqualified for being chosen as, and for being, a Member of either House of Parliament or of the Legislative Assembly or of Legislative Council of a State. Sub-sections (1), (2) and (3) of Section 8 of the Act provide that a person convicted of an offence mentioned in any of these sub-sections shall stand disqualified from the date of conviction and the disqualification was to continue for the specific period mentioned in the sub-section. However, sub-section (4) of Section 8 of the Act provides that notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) in Section 8 of the Act, a disqualification under either sub-section shall not,

in the case of a person who on the date of the conviction is a Member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. It is this saving or protection provided in sub-section (4) of Section 8 of the Act for a Member of Parliament or the Legislature of a State which is challenged in these writ petitions as ultra vires the Constitution.

Contentions on behalf of the petitioners

5. Mr Fali S. Nariman, learned Senior Counsel appearing for the petitioner in Writ Petition No. 490 of 2005 and Mr S.N. Shukla, the General Secretary of the petitioner in Writ Petition No. 231 of 2005, submitted that the opening words of clause (1) of Articles 102 and 191 of the Constitution make it clear that the same disqualifications are provided for a person being chosen as a Member of either House of Parliament, or the State Assembly or Legislative Council of the State and for a person being a Member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State and therefore the disqualifications for a person to be elected as a Member of either House of Parliament or of the Legislative Assembly or Legislative Council of the State and for a person to continue as a Member of either House of Parliament or of the Legislative Assembly or Legislative Council of the State cannot be different. In support of this submission, Mr Nariman cited a Constitution Bench judgment of this Court in ***Election Commission v. Saka Venkata Rao*** [AIR 1953 SC 210] in which it has been held that Article 191 lays down the same set of disqualifications for election as well as for continuing as a Member.

6. Mr Nariman and Mr Shukla submitted that sub-section (4) of Section 8 of the Act, insofar as it provides that the disqualification under sub-sections (1), (2) and (3) of Section 8 for being elected as a Member of either House of Parliament or the Legislative Assembly or Legislative Council of State shall not take effect in the case of a person who is already a Member of Parliament or Legislature of a State on the date of the conviction if he files an appeal or a revision in respect of the conviction or the sentence within three months till the appeal or revision is disposed of by the court, is in contravention of the provisions of clause (1) of Articles 102 and 191 of the Constitution.

7. Mr Shukla referred to the debates of the Constituent Assembly on Article 83 of the Draft Constitution, which corresponds to Article 102 of the Constitution. In these debates, Mr Shibban Lal Saksena, a Member of the Constituent Assembly moved Amendment No. 1590 on 19-5-1949 to provide that when a person who, by virtue of conviction becomes disqualified and is on the date of disqualification a Member of Parliament, his seat shall,

notwithstanding anything in this article, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this provision, he shall not sit or vote. Mr Shukla submitted that this amendment to Article 83 of the Draft Constitution was not adopted in the Constituent Assembly. Instead, in sub-clause (e) of clause (1) of Articles 102 and 191 of the Constitution, it was provided that Parliament may make a law providing disqualifications besides those mentioned in sub-clauses (a), (b), (c) and (d) for a person being chosen as, and for being, a Member of either House of Parliament and of the Legislative Assembly or Legislative Council of a State. Mr Shukla submitted that despite the fact that a provision similar to sub-section (4) of Section 8 of the Act was not incorporated in the Constitution by the Constituent Assembly, Parliament has enacted sub-section (4) of Section 8 of the Act.

8. According to Mr Nariman and Mr Shukla, in the absence of a provision in Articles 102 and 191 of the Constitution conferring power on Parliament to make a provision protecting sitting Members of either House of Parliament or the Legislative Assembly or the Legislative Council of a State, from the disqualifications it lays down for a person being chosen as a Member of Parliament or a State Legislature, Parliament lacks legislative powers to enact sub-section (4) of Section 8 of the Act and sub-section (4) of Section 8 of the Act is therefore ultra vires the Constitution.

9. Mr Nariman next submitted that the legal basis of sub-section (4) of Section 8 of the Act is based on an earlier judicial view in the judgment of a Division Bench of this Court in *Manni Lal v. Parmai Lal* [(1970) 2 SCC 462] that when a conviction is set aside by an appellate order of acquittal, the acquittal takes effect retrospectively and the conviction and the sentence are deemed to be set aside from the date they are recorded. He submitted that in *B.R. Kapur v. State of T.N.* [(2001) 7 SCC 231] a Constitution Bench of this Court reversed the aforesaid judicial view and held: (SCC p. 297, para 40)

“40. ... That conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well.”

He submitted that this latter view has been reiterated by a Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan* [(2005) 1 SCC 754].

10. Mr Nariman argued that thus as soon as a person is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act, he becomes disqualified

from continuing as a Member of Parliament or of a State Legislature notwithstanding the fact that he has filed an appeal or a revision against the conviction and there is no legal basis for providing in sub-section (4) of Section 8 of the Act that his disqualification will not take effect if he files an appeal or revision within three months against the order of conviction. He submitted that in case a sitting Member of Parliament or State Legislature feels aggrieved by the conviction and wants to continue as a Member notwithstanding the conviction, his remedy is to move the appellate court for stay of the order of conviction.

11. Mr Nariman cited the decision in *Navjot Singh Sidhu v. State of Punjab* [(2007) 2 SCC 574] in which this Court has clarified that under sub-section (1) of Section 389 of the Code of Criminal Procedure, 1973 power has been conferred on the appellate court not only to suspend the execution of the sentence and to grant bail, but also to suspend the operation of the order appealed against, which means the order of conviction. He submitted that in appropriate cases, the appellate court may stay the order of conviction of a sitting Member of Parliament or State Legislature and allow him to continue as a Member notwithstanding the conviction by the trial court, but a blanket provision like sub-section (4) of Section 8 of the Act cannot be made to keep the disqualification pursuant to conviction in abeyance till the appeal or revision is decided by the appellate or revisional court.

12. Mr Nariman and Mr Shukla submitted that in *K. Prabhakaran v. P. Jayarajan* [(2005) 1 SCC 754] the validity of sub-section (4) of Section 8 of the Act was not under challenge and only a reference was made to the Constitution Bench of this Court on certain questions which arose in the civil appeals against the judgments delivered by the High Court in election cases under the Act. They submitted that the Constitution Bench of this Court framed three questions with regard to disqualification of a candidate under Section 8 of the Act and while answering Question 3, the Constitution Bench indicated reasons which seem to have persuaded Parliament to classify sitting Members of the House into a separate category and to provide in sub-section (4) of Section 8 of the Act that if such sitting Members file appeal or revision against the conviction within three months, then the disqualification on account of their conviction will not take effect until the appeal or revision is decided by the appropriate court. They submitted that the opinion expressed by the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan* [(2005) 1 SCC 754] regarding the purpose for which Parliament classified sitting Members of Parliament and State Legislatures into a separate category and protected them from the disqualifications by the saving provision in sub-section (4) of Section 8 of the Act are obiter dicta and are not binding ratio on the issue of the validity of sub-section (4) of Section 8 of the Act.

13. Mr Nariman and Mr Shukla submitted that sub-section (4) of Section 8 of the Act, insofar as it does not provide a rationale for making an exception in the case of Members of

Parliament or a Legislature of a State is arbitrary and discriminatory and is violative of Article 14 of the Constitution. They submitted that persons to be elected as Members of Parliament or a State Legislature stand on the same footing as sitting Members of Parliament and State Legislatures so far as disqualifications are concerned and sitting Members of Parliament and State Legislatures cannot enjoy the special privilege of continuing as Members even though they are convicted of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act.

Contentions on behalf of the respondents

14. Mr Sidharth Luthra, learned ASG appearing for the Union of India in Writ Petition (C) No. 231 of 2005, submitted that the validity of sub-section (4) of Section 8 of the Act has been upheld by the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan* [(2005) 1 SCC 754]. He submitted that while answering Question 3, the Constitution Bench has held in *Prabhakaran case* that the purpose of carving out a saving in sub-section (4) of Section 8 of the Act is not to confer an advantage on sitting Members of Parliament or of a State Legislature but to protect the House. He submitted that in para 58 of the judgment the Constitution Bench has explained that if a Member of the House was debarred from sitting in the House and participating in the proceedings, no sooner the conviction was pronounced followed by sentence of imprisonment, entailing forfeiture of his membership, then two consequences would follow: first, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted Member may belong and the Government in power may be surviving on a razor-edge thin majority where each Member counts significantly and disqualification of even one Member may have a deleterious effect on the functioning of the Government; second, a by-election shall have to be held which exercise may prove to be futile, also resulting in complications in the event of the convicted Member being acquitted by a superior criminal court.

15. Mr Luthra submitted that for the aforesaid two reasons, Parliament has classified the sitting Members of Parliament or a State Legislature in a separate category and provided in sub-section (4) of Section 8 of the Act that if on the date of incurring disqualification, a person is a Member of Parliament or of a State Legislature, such disqualification shall not take effect for a period of three months from the date of such disqualification to enable the sitting Member to file appeal or revision challenging his conviction, and sentence and if such an appeal or revision is filed, then applicability of the disqualification shall stand deferred until such appeal or revision is disposed of by the appropriate court.

16. Mr Luthra next submitted that the reality of the Indian judicial system is that acquittals in the levels of the appellate court such as the High Court are very high and it is for this reason

that Parliament has provided in sub-section (4) of Section 8 of the Act that disqualification pursuant to conviction or sentence in the case of sitting Members should stand deferred till the appeal or revision is decided by the appellate or the revisional court. He submitted that the power to legislate on disqualification of Members of Parliament and the State Legislature conferred on Parliament carries with it the incidental power to say when the disqualification will take effect. He submitted that the source of legislative power for enacting sub-section (4) of Section 8 of the Act is, therefore, very much there in Articles 101(1)(e) and 191(1)(e) of the Constitution and if not in these articles of the Constitution, in Article 246(1) read with Schedule VII List I Entry 97 of the Constitution and Article 248 of the Constitution, which confer powers on Parliament to legislate on any matter not enumerated in List II and List III of the Seventh Schedule to the Constitution.

17. Mr Paras Kuhad, learned ASG, appearing for the Union of India in Writ Petition (C) No. 490 of 2005 also relied on the judgment of the Constitution Bench of this Court in **K. Prabhakaran v. P. Jayarajan** [(2005) 1 SCC 754] on the validity of sub-section (4) of Section 8 of the Act and the reasoning given in the answer to Question 3 in the aforesaid judgment of this Court. He further submitted that sub-section (4) of Section 8 of the Act does not lay down disqualifications for Members of Parliament and the State Legislatures different from the disqualifications laid down for persons to be chosen as Members of Parliament and the State Legislatures in sub-sections (1), (2) and (3) of Section 8 of the Act. He submitted that sub-section (4) of Section 8 of the Act merely provides that the very same disqualifications laid down in sub-sections (1), (2) and (3) of Section 8 of the Act shall in the case of sitting Members of Parliament and State Legislatures take effect only after the appeal or revision is disposed of by the appellate or revisional court as the case may be if an appeal or revision is filed against the conviction.

18. Mr Paras Kuhad submitted that Parliament has power under Article 102(1)(e) and Article 191(1)(e) of the Constitution to prescribe when exactly the disqualification will become effective in the case of sitting Members of Parliament or the State Legislature with a view to protect the House. He also referred to the provisions of Articles 101(3)(a) and 190(3)(a) of the Constitution to argue that a Member of Parliament or a State Legislature will vacate a seat only when he becomes subject to any disqualification mentioned in clause (1) of Article 102 or clause (1) of Article 191, as the case may be, and this will happen only after a decision is taken by the President or the Governor that the Member has become disqualified in accordance with the mechanism provided in Article 103 or Article 192 of the Constitution.

19. Mr Kuhad further submitted that Mr Nariman is not right in his submission that the remedy of a sitting Member who is convicted or sentenced and gets disqualified under sub-sections (1), (2) or (3) of Section 8 of the Act is to move the appellate court under Section 389

of the Code of Criminal Procedure for stay of his conviction. He submitted that the appellate court does not have any power under Section 389 CrPC to stay the disqualification which would take effect from the date of conviction and therefore a safeguard had to be provided in sub-section (4) of Section 8 of the Act that the disqualification, despite the conviction or sentence, will not have effect until the appeal or revision is decided by the appellate or the revisional court. He submitted that there is, therefore, a rationale for enacting sub-section (4) of Section 8 of the Act.

Findings of the Court

20. We will first decide the issue raised before us in these writ petitions that Parliament lacked the legislative power to enact sub-section (4) of Section 8 of the Act as this issue was not at all considered by the Constitution Bench of this Court in the aforesaid case of **K. Prabhakaran**.

21. In **R. v. Burah** [(1877-78) 5 IA 178 : (1878) 3 AC 889] the Privy Council speaking through Selborne, J. laid down the following fundamental principles for interpretation of a written Constitution laying down the powers of the Indian Legislature: (IA pp. 193-94)

“... The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions.”

22. The correctness of the aforesaid principles with regard to interpretation of a written Constitution has been reaffirmed by the majority of Judges in **Kesavananda Bharati v. State of Kerala** [(1973) 4 SCC 225] (see the **Constitutional Law of India**, H.M. Seervai, 4th Edn., Vol. 1, Para 2.4 at p. 174). Hence, when a question is raised whether Parliament has exceeded the limits of its powers, courts have to decide the question by looking to the terms of the

instrument by which affirmatively, the legislative powers were created, and by which negatively, they are restricted.

23. We must first consider the argument of Mr Luthra, learned Additional Solicitor General, that the legislative power to enact sub-section (4) of Section 8 of the Act is located in Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution.

24. Articles 246 and 248 of the Constitution are placed in Chapter I of Part XI of the Constitution of India. Part XI is titled “Relations between the Union and the States” and Chapter I of Part XI is titled “Legislative Relations”. In Chapter I of Part XI, under the heading “Distribution of Legislative Powers” Articles 245 to 255 have been placed. A reading of Articles 245 to 255 would show that these relate to distribution of legislative powers between the Union and the Legislatures of the States. Article 246(1) provides that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule of the Constitution and under Schedule VII List I Entry 97 of the Constitution, Parliament has exclusive power to make law with respect to any other matter not enumerated in List II or List III. Article 248 similarly provides that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List (List III) or State List (List II) of the Seventh Schedule to the Constitution. Therefore, Article 246(1) read with Entry 97 and Article 248 only provide that in residuary matters (other than matters enumerated in List II and List III) Parliament will have power to make law.

25. To quote from *Commentary on the Constitution of India* by Durga Das Basu (8th Edn.) Vol. 8 at p. 8988:

“In short, the principle underlying Article 248, read with Entry 97 of List I, is that a written Constitution, which divides legislative power as between two legislatures in a federation, cannot intend that neither of such legislatures shall go without power to legislate with respect of any subject simply because that subject has not been specifically mentioned nor can be reasonably comprehended by judicial interpretation to be included in any of the entries in the Legislative Lists. To meet such a situation, a residuary power is provided, and in the Indian Constitution, this residuary power is vested in the Union Legislature. Once, therefore, it is found that a particular subject-matter has not been assigned to the competence of the State Legislature, ‘it leads to the irresistible inference that (the Union) Parliament would have legislative competence to deal with the subject-matter in question.’”

26. Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. We may note that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in Parliament to make law laying down disqualifications also in respect of Members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr. Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution.

27. Articles 102(1)(e) and 191(1)(e) of the Constitution, which contain the only source of legislative power to lay down disqualifications for membership of either House of Parliament and Legislative Assembly or Legislative Council of a State, provide as follows:

“102. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a Member of either House of Parliament—

(e) if he is so disqualified by or under any law made by Parliament.

191. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a Member of the Legislative Assembly or Legislative Council of a State—

(e) if he is so disqualified by or under any law made by Parliament.”

28. A reading of the aforesaid two provisions in Articles 102(1)(e) and 191(1)(e) of the Constitution would make it abundantly clear that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a Member of either House of Parliament or Legislative Assembly or Legislative Council of the State. In the language of the Constitution Bench of this Court in *Election Commission v. Saka Venkata Rao* [AIR 1953 SC 210] Article 191(1) [which is identically worded as Article 102(1)] lays down “the same set of disqualifications for election as well as for continuing as a Member”. Parliament thus

does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a Member and for a person to be disqualified for continuing as a Member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a Member of Parliament or State Legislature, for the same disqualification, he cannot continue as a Member of Parliament or the State Legislature. This is so because the language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a Member of a House of Parliament or the State Legislature or for a person to continue as a Member of Parliament or the State Legislature has to be the same.

29. Mr Luthra and Mr Kuhad, however, contended that the disqualifications laid down in sub-sections (1), (2) and (3) of Section 8 of the Act are the same for persons who are to continue as Members of Parliament or a State Legislature and sub-section (4) of Section 8 of the Act does not lay down a different set of disqualifications for sitting Members but merely states that the same disqualifications will have effect only after the appeal or revision, as the case may be, against the conviction is decided by the appellate or the revisional court if such appeal or revision is filed within three months from the date of conviction. We cannot accept this contention also because of the provisions of Articles 101(3)(a) and 190(3)(a) of the Constitution which are quoted hereinbelow:

“101. Vacation of seats.—(1)-(2) ***

(3) If a Member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 102;

his seat shall thereupon become vacant:

190. Vacation of seats.—(1)-(2) ***

(3) If a Member of a House of the legislature of a State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 191;

his seat shall thereupon become vacant.”

30. Thus, Article 101(3)(a) provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant and similarly Article 190(3)(a) provides that if a Member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant. This is the effect of a disqualification under Articles 102(1) and 190(1) incurred by a Member of either House of Parliament or a House of the State Legislature. Accordingly, once a person who was a Member of either House of

Parliament or House of the State Legislature becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a sitting Member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e) or Article 191(1)(e) of the Constitution.

31. We cannot also accept the submission of Mr Kuhad that until the decision is taken by the President or Governor on whether a Member of Parliament or State Legislature has become subject to any of the disqualifications mentioned in clause (1) of Article 102 and Article 191 of the Constitution, the seat of the Member alleged to have been disqualified will not become vacant under Articles 101(3)(a) and 190(3)(a) of the Constitution. Articles 101(3)(a) and 190(3)(a) of the Constitution provide that if a Member of the House becomes subject to any of the disqualifications mentioned in clause (1), “his seat shall *thereupon* become vacant”. Hence, the seat of a Member who becomes subject to any of the disqualifications mentioned in clause (1) will fall vacant on the date on which the Member incurs the disqualification and cannot await the decision of the President or the Governor, as the case may be, under Articles 103 and 192 respectively of the Constitution. The filling of the seat which falls vacant, however, may await the decision of the President or the Governor under Articles 103 and 192 respectively of the Constitution and if the President or the Governor takes a view that the Member has not become subject to any of the disqualifications mentioned in clause (1) of Articles 102 and 191 respectively of the Constitution, it has to be held that the seat of the Member so held not to be disqualified did not become vacant on the date on which the Member was alleged to have been subject to the disqualification.

32. The result of our aforesaid discussion is that the affirmative words used in Articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as Member of either House of Parliament or as a Member of the Legislative Assembly or Legislative Council of a State and for a person who is a sitting Member of a House of Parliament or a House of the State Legislature and the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of Parliament to defer the date on which the disqualifications would have effect. Accordingly, sub-section (4) of Section 8 of the Act which carves out a saving in the case of sitting Members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting Member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution.

33. Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a Member of Parliament or a State Legislature and for a sitting Member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting Member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is ultra vires the Constitution.

34. We do not also find merit in the submission of Mr Luthra and Mr Kuhad that if a sitting Member of Parliament or the State Legislature suffers from a frivolous conviction by the trial court for an offence given under sub-sections (1), (2) or (3) of Section 8 of the Act, he will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of sub-section (4) of Section 8 of the Act. A three-Judge Bench of this Court in *Rama Narang v. Ramesh Narang* [(1995) 2 SCC 513] has held that when an appeal is preferred under Section 374 of the Code of Criminal Procedure (for short “the Code”) the appeal is against both the conviction and sentence and, therefore, the appellate court in exercise of its power under Section 389(1) of the Code can also stay the order of conviction and the High Court in exercise of its inherent jurisdiction under Section 482 of the Code can also stay the conviction if the power was not to be found in Section 389(1) of the Code.

35. In *Ravikant S. Patil v. Sarvabhoutma S. Bagali* [(2007) 1 SCC 673] a three-Judge Bench of this Court, however, observed: (SCC p. 679, para 15)

“15. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.”

In the aforesaid case, a contention was raised by the respondents that the appellant was disqualified from contesting the election to the Legislative Assembly under sub-section (3) of Section 8 of the Act as he had been convicted for an offence punishable under Sections 366 and 376 of the Penal Code and it was held by the three-Judge Bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification under sub-sections (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the appellate court under Section 389 of the Code or the High Court under Section 482 of the Code.

36. As we have held that Parliament had no power to enact sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution, it is not necessary for us to go into the other issue raised in these writ petitions that sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution. It would have been necessary for us to go into this question only if sub-section (4) of Section 8 of the Act was held to be within the powers of Parliament. In other words, as we can declare sub-section (4) of Section 8 of the Act as *ultra vires* the Constitution without going into the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution, we do not think it is necessary to decide the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution.

37. The only question that remains to be decided is whether our declaration in this judgment that sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution should affect disqualifications already incurred under sub-sections (1), (2) and (3) of Section 8 of the Act by sitting Members of Parliament and State Legislatures who have filed appeals or revisions against their conviction within a period of three months and their appeals and revisions are still pending before the court concerned.

38. Under sub-sections (1), (2) and (3) of Section 8 of the Act, the disqualification takes effect from the date of conviction for any of the offences mentioned in the sub-sections and remains in force for the periods mentioned in the sub-sections. Thus, there may be several sitting Members of Parliament and State Legislatures who have already incurred disqualification by virtue of a conviction covered under sub-section (1), or sub-section (2) or sub-section (3) of Section 8 of the Act. In *Golak Nath v. State of Punjab* [AIR 1967 SC 1643], Subba Rao, C.J. speaking on behalf of himself, Shah, Sikri, Shelat and Vaidialingam, JJ. has held that Articles 32, 141, 142 of the Constitution are couched in such a wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice and has further held that this Court has the power not only to declare the law but also to restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise, that

were effected on the basis of the earlier law. The sitting Members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of sub-section (4) of Section 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in this judgment. This is because the knowledge that sitting Members of Parliament or State Legislatures will no longer be protected by sub-section (4) of Section 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this Court. As has been observed by this Court in *Harla v. State of Rajasthan* [AIR 1951 SC 467, p. 468, para 8)

“8. ... it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge.”

However, if any sitting Member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by sub-section (4) of Section 8 of the Act which we have by this judgment declared as *ultra vires* the Constitution notwithstanding that he files the appeal or revision against the conviction and/or sentence.

39. With the aforesaid declaration, the writ petitions are allowed. No costs.

WP (C) No. 694 of 2004

40. The petitioner is a practising advocate in the Patna High Court and has filed this writ petition as a public interest litigation challenging sub-section (4) of Section 8 of the Representation of the People Act, 1951 (for short “the Act”), as *ultra vires* the Constitution.

41. This writ petition was heard along with WP (C) No. 490 of 2005 and WP (C) No. 231 of 2005 in which sub-section (4) of Section 8 of the Act is also challenged as *ultra vires* the Constitution. We have today delivered the judgment in *Lily Thomas v. Union of India*, WP (C) No. 490 of 2005 [**Ed.**: I.e. the judgment contained in paras 1 to 39, above.] . Hence, this writ petition is disposed of in terms of the aforesaid judgment in WP (C) No. 490 of 2005 and WP (C) No. 231 of 2005. No costs.

Ravi S. Naik v. Union of India

AIR 1994 SC 1558

S.C. AGRAWAL, J. - These appeals are directed against the judgment of the High Court of Bombay, Panaji Bench dated May 14, 1993 in Writ Petition Nos. 48 of 1991 and 321 of 1990. They raise questions relating to disqualification of a Member of the State Legislature under Article 191(2) read with Tenth Schedule to the Constitution.

2. Elections for the Goa Legislative Assembly were held in November 1989. The Assembly is composed of 40 members. After the elections the position of the parties was as under: Congress (I) – 20; Maharashtrawadi Gomantak Party (MGP) – 18; Independents – 2.

3. With the support of one independent member, the Congress (I) formed the Government. After a short time seven members left the Congress (I) and formed the Goan People's Party (GPP). GPP and MGP formed a coalition Government under the banner of Progressive Democratic Front (PDF). At first Churchill Alemao became the Chief Minister but later on Dr Luis Proto Barbosa was sworn in as the Chief Minister. On December 4, 1990, MGP withdrew its support to the PDF Government and thereupon on December 6, 1990, a notification was issued summoning the Assembly on December 10, 1990 and the Chief Minister Dr Barbosa, was required to seek a vote of confidence. Before the Assembly could meet Dr Barbosa tendered his resignation as the Chief Minister on December 10, 1990 and the same was accepted. On December 10, 1990, Dr. Wilfred D'Souza, leader of the Congress (I) Legislature Party staked his claim to form the Government. He claimed the support of 20 members consisting of 13 members of the Congress (I), 4 members of GPP and 2 members of MGP, who would form a common front known as the Congress Democratic Front (CDF). Two members of MGP, who were included in the CDF, were Sanjay Bandekar and Ratnakar Chopdekar, appellants in CA No. 3309 of 1993. Ramakant Khalap, who was the leader of the PDF claimed support of 16 members of MGP and three members who were formerly with GPP. The Governor submitted his report dated December 11, 1990 and taking into consideration the said report as well as other information received by him, the President of India issued a Proclamation dated December 14, 1990 under Article 356 of the Constitution whereby President's rule was imposed in the State and the Legislative Assembly was suspended.

4. In the meanwhile, on December 10, 1990, Ramakant Khalap filed two separate petitions under Article 191(2) of the Constitution before the Speaker of the State Legislative Assembly whereby he sought that both Bandekar and Chopdekar be disqualified as members of the State Legislature on the ground of defection under Article 191(2) read with paragraph 2(1)(a) and 2(1)(b) of the Tenth Schedule to the Constitution. By order dated December 13, 1990, the Speaker Shri Surendra Vir Sirsat, declared both these appellants as disqualified from being members of the Goa Legislative Assembly under Article 191(2) of the Constitution on the ground of defection as set out in paragraph 2(1)(a) and 2(1)(b) of the Tenth Schedule to the Constitution. Both these members filed a writ petition (Writ Petition No. 321 of 1990) in the High Court on December 13, 1990. The said writ petition was amended on December 14, 1990 to incorporate a challenge to the order dated December 13, 1990 passed by the Speaker. In the said petition an interim order was passed by the High

Court staying the operation of the order dated December 13, 1990 with regard to disqualification of the said members.

5. On January 25, 1991, the Proclamation with regard to the President's rule was revoked and Ravi S. Naik, appellant in CA No. 2904 of 1993, was sworn in as the Chief Minister. On January 25, 1991 one Dr Kashinath G. Jhalmi belonging to the MGP filed a petition before the Speaker for disqualification of Naik on the ground of defection under Article 191(2) read with para 2(1)(a) of the Tenth Schedule to the Constitution. On the said petition the Speaker, Shri Sirsat, passed an order dated February 15, 1991 declaring Naik as disqualified from being a member of the Goa Legislative Assembly under Article 191(2) of the Constitution on the ground of defection as set out in paragraph 2(1)(a) of the Tenth Schedule to the Constitution. Naik filed a writ petition (Writ Petition No. 48 of 1991) in the Bombay High Court, Panaji Bench to challenge the said order of disqualification dated February 15, 1991.

6. While the aforesaid writ petitions were pending in the High Court, Shri Sirsat was removed from the office of Speaker and the Dy. Speaker began functioning as the Speaker in his place. Bandekar and Chopdekar filed applications for review of the order dated December 13, 1990 with regard to their disqualification and the said review applications were allowed by the Dy. Speaker functioning as Speaker by his order dated March 7, 1991 and order dated December 13, 1990 disqualifying Bandekar and Chopdekar was set aside. Ramakant D. Khalap filed a writ petition (Writ Petition No. 8 of 1992) before the High Court of Bombay, Panaji Bench, Goa challenging the said order of review dated March 7, 1991. The said writ petition was dismissed on the ground of laches by the High Court on February 4, 1992. CA No. 1095 of 1991 was filed in this Court against the said judgment of the High Court. Similarly Naik filed an application for review of the order dated February 15, 1991 which was allowed by the Dy. Speaker functioning as Speaker by order dated March 8, 1991. Writ Petition No. 11 of 1992 was filed by Dr Jhalmi and Ramakant Khalap in the High Court challenging the said order of review dated March 8, 1991 passed by the Acting Speaker and the said writ petition was dismissed by the High Court on the ground of laches by order dated February 4, 1992. CA No. 1094 of 1992 was filed in this Court against the said order of the High Court. Another Writ Petition (No. 70 of 1992) was filed by Churchill Alemao against the said order of the Acting Speaker dated March 8, 1991 which was also dismissed by the High Court by order dated February 15, 1991 on the ground of laches and CA No. 1096 of 1992 was filed by Churchill Alemao in this Court against the said order of the High Court. All the three appeals (CA No. 1094-96 of 1992) were allowed by this Court by judgment dated March 31, 1993 [*Dr Kashinath G. Jhalmi v. Speaker* (1993) 2 SCC 703]. By the said judgment, this Court set aside the impugned orders of the High Court dated February 4, 1992, dismissing Writ Petition Nos. 11 and 8 of 1992 and the order of the High Court dated February 24, 1992, dismissing Writ Petition no. 70 of 1992 and allowing the said writ petitions this Court has declared that orders dated March 7, 1992 and March 8, 1992 made by the Acting Speaker in purported exercise of the power of review are a nullity and liable to be ignored. It was held that the orders dated December 13, 1990 passed by the Speaker disqualifying Chopdekar and Bandekar and the order dated February 15, 1991 passed by the Speaker disqualifying Naik continue to operate and that Writ Petition no. 321 of 1990 filed by Bandekar and Chopdekar and Writ Petition no. 48 of 1991 filed by Naik would stand revived

and the same would be disposed of by the High Court on merits. Thereafter the High Court heard the two writ petitions on merits and by judgment dated May 14, 1993 both the writ petitions have been dismissed.

7. We propose to deal with the appeals separately because the questions involved are not identical, but before we do so, we will briefly refer to the provisions of the Tenth Schedule to the Constitution and the decision of this Court in **Kihoto Hollohan v. Zachillhu** [1992 Supp (2) SCC 651]. The Tenth Schedule was introduced in the Constitution by the Constitution (Fifty-second Amendment) Act, 1985. As stated in the Statement of Objects and Reasons, the said amendment was introduced to combat the evil of political defections. It has been stated:

The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.

8. The provisions of the Tenth Schedule apply to members of either House of Parliament or the State Legislative Assembly or, as the case may be, either House of the Legislature of a State. Paragraph 2 of the Tenth Schedule makes provision for disqualification on the ground of defection. Sub-paragraph (1) deals with a member belonging to a political party. It provides for disqualification in two situations, viz., (i) if he has voluntarily given up his membership of such political party; and (ii) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority, and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. Paragraph 3 removes the bar of disqualification in case of a split in a political party provided the group representing a faction which has arisen as a result of split consists of not less than one-third of the members of such legislature party. Paragraph 4 removes the bar of disqualification on the ground of defection in case of merger of a political party with another political party. In sub-paragraph (1) of paragraph 6 the question as to whether a member of a House has become subject to disqualification under the Schedule is required to be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final. Under sub-paragraph (2) of paragraph 6, all proceedings under sub-paragraph (1) of paragraph 6 in relation to any question as to disqualification of a member of a House under the Schedule are to be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212. Paragraph 7 bars the jurisdiction of all courts in respect of any matter connected with the disqualification of a member of a House under the Schedule. Paragraph 8 empowers the Chairman or the Speaker of a House to make rules for giving effect to the provisions of the Schedule and such rules may provide for matters specified in clauses (a) to (d) of sub-para(1).

9. The constitutional validity of the provisions contained in the Tenth Schedule came up for consideration before a Constitution Bench of this Court in **Kihoto Hollohan v. Zachillhu**.

The Court was unanimous in holding that paragraph 7 completely excludes jurisdiction of all courts including the Supreme Court under Article 136 and High Courts under Articles 226 and 227 in respect of any matter connected with the disqualification of the member of a House and the Bill introducing the said amendment required ratification by the State Legislatures under the proviso to Article 368(2) of the Constitution and that no such ratification was obtained for the Bill. There was, however, difference of opinion on the effect of such non-ratification of the Bill. The majority view was that paragraph 7 alone attracts the proviso to Article 368 and the rest of the provisions of the Bill do not require such ratification and since paragraph 7 is severable from the rest of the provisions, paragraph 7 only was unconstitutional and that the rest of the provisions of the Tenth Schedule cannot be struck down as unconstitutional on the ground that the Bill had not been ratified by one-half of the State Legislatures before it was presented to the President for his assent. The minority view, however, was that the entire Bill required prior ratification by State Legislatures without which the assent of the President became non est and that the question of severability of paragraph 7 from the rest of the provisions does not arise and further that paragraph 7 was not severable from the rest of the provisions of the Bill. Since the validity of the rest of the provisions, excluding paragraph 7, have been upheld by the majority, the provisions of paragraph 6 have been construed in the majority judgment and it has been held: (SCC pp. 711-712, para 111)

That the Tenth Schedule does not, in providing for an additional grant (sic ground) for disqualification and for adjudication of disputed disqualifications, seek to create a non-justiciable constitutional area. The power to resolve such disputes vested in the Speaker or Chairman is a judicial power.

That paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen is valid. But the concept of statutory finality embodied in paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, *mala fides*, non-compliance with rules of natural justice and perversity, are concerned.

That the deeming provision in paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in *Keshav Singh* case [*Special Reference No. 1 of 1964*, (1965) 1 SCR 413: AIR 1965 SC 745] to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words 'be deemed to be proceedings in Parliament' or 'proceedings in the Legislature of a State' confines the scope of the fiction accordingly.

The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Scheme in the Tenth Schedule, judicial- review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intentment and the status of the repository of the adjudicatory power, no *quia timet* actions are permissible, the

only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

CA No. 3309 of 1993

11. This appeal has been filed by Bandekar and Chopdekar who were elected to the Goa Legislative Assembly under the ticket of MGP. They have been disqualified from membership of the Assembly under order of the Speaker dated December 13, 1992 on the ground of defection under paragraph 2(1)(a) and 2(1)(b) of the Tenth Schedule. From the judgment of the High Court it appears that disqualification on the ground of paragraph 2(1)(b) was not pressed on behalf of the contesting respondent and disqualification was sought on the ground of paragraph 2(1)(a) only. The said paragraph provides for disqualification of a member of a House belonging to a political party "if he has voluntarily given up his membership of such political party". The words voluntarily given up his membership" are not synonymous with "resignation and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of that party. Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs.

12. The petitions that were filed by Ramakant D. Khalap for disqualification of both these appellants are identical. The following averments were made with regard to disqualification on ground of defection under paragraph 2(1)(a) of the Tenth Schedule as contained in paragraph 11 of the said petitions:

The petitioner says and submits that both before the Assembly session and also after the Assembly session, the respondent has voluntarily accompanied Dr Luis Proto Barbosa to the Governor and has told the Governor that he does not support the MGP any longer. He had also made it known to the public that he has voluntarily resigned from the membership of the MGP. The respondent has thereby voluntarily given up the membership of the MGP. He has in the circumstances for that reason also incurred disqualification under Article 191(2) read with para 2(1)(a) of the Tenth Schedule of the Constitution of India.

13. The replies that were filed by both the appellants were also identical. In the said replies it was stated:

Factually I have not given up the membership of the MGP voluntarily or otherwise. I still continue to be a member of the said party and in fact no document has been produced by the complainant and nothing has been disclosed to show that I have resigned from the membership of the party.

The reply to para 11 is as follows:

The mere fact that I am accompanying Mr Barbosa does not entail my disqualification, which I do not accept that I told His Excellency the Governor that I do not support the Maharashtrawadi Gomantak Party and perhaps much more devoted than Mr Khalap. I also deny emphatically that I made it known to anybody that I had

voluntarily resigned from the membership of the Maharashtrawadi Gomantak Party. You know very well Sir, that I have been allotted a seating as a member of the Maharashtrawadi Gomantak Party and I have not asked for any change in the seating on account of the fact that I have resigned from the party.

In fact the complainant has not produced as he could not produce any documents to establish the facts that I have resigned, resignation from the membership could only be evidenced by a written document. The burden is on the part of the complainant to establish this fact. In the absence of it the complaint should be summarily dismissed. Contents of para 11 which are not specifically admitted are denied.

14. The Speaker, in his order dated December 13, 1990, has observed:

Dr Jhalmi produced before me copies of several newspapers showing photos of the two MLAs with Congress (1) MLA and Dr Barbosa etc. when they had met the Governor, with Dr Wilfred D'Souza who had taken them to show that he had the support of 20 MLAs. This fact is well known in Goa and the Governor himself has admitted it. Dr Jhalmi said that both the MLAs have given up the membership of their political party and have said so openly to him and others.

The reply filed by the two MLAs does not deny the fact that they went to the Governor against the Maharashtrawadi Gomantak Party. The advocate appearing for the MLAs said that he wanted to lead evidence. But, although both the MLAs were present before me, their advocate did not make them give evidence. They did not deny that they supported Dr Wilfred D'Souza in his effort to form Congress (1) Govt. and went with him to the Governor as part of the 20 MLAs. They could not do so because it is a fact of common knowledge all over Goa that these two MLAs have left their political party.

I am satisfied that by their conduct, actions and speech they have voluntarily given up the membership of the MGP.

15. The High Court was of the view that in view of their conduct the appellants were not entitled to invoke the discretionary remedy of writ of *certiorari*. In this regard the High Court has pointed out that the assertion by the appellants in the writ petition that they were in Bombay on December 9, 1990 is a brazen lie since the report of the Governor dated December 11, 1990 made to the President of India (which has been placed on record by Khalap with his affidavit) refers to the formation of the Congress Democratic Front by a resolution adopted at Panaji on December 9, 1990 and the said resolution which was Annexure 1 to the said report contained the signatures of the appellants. The High Court has also observed that the statement in the petition that the appellants are still members of the parent party is false and suppression of truth in as much as they allowed this assertion to continue when, in effect, as from January 1991, they joined the faction of Naik and became Ministers in his Cabinet and they continue to be Ministers.

16. The High Court has also examined the matter on merits and has found that the order dated December 13, 1990 passed by the Speaker does not suffer from any infirmity which may justify limited judicial review in accordance with the decision in *Kihoto Hollohan* case. The High Court has rejected the contention that the said order was passed in breach of the

constitutional mandate for the reason that there was contravention of the Goa Legislative Assembly (Disqualification on Grounds of Defection) Rules, 1986, hereinafter referred to as 'the Disqualification Rules', made by the Speaker under paragraph 8 of the Tenth Schedule. The High Court was also of the view that the Disqualification Rules made by the Speaker could not be held to be a part of constitutional mandate and that they are only to regulate the procedure and that the substantive power or authority is given in paragraph 6 of the Tenth Schedule. According to the High Court violation of Disqualification Rules would only constitute an irregularity in procedure which is protected by paragraph 6(2) of the Tenth Schedule. The High Court also rejected the contention that there was violation of the principles of natural justice on account of extraneous materials or circumstances, namely, the newspapers showing photographs of the appellants with Congress (1) MLAs and Dr Barbosa when they had met the Governor with Dr. Wilfred D'Souza who had taken them to show that he had the support of 20 MLAs and the observation in the order passed by the Speaker that the Governor had told the Speaker that the appellants belonging to the MGP had approached him under the leadership of Dr Wilfred D'Souza for staking claim to form Government on December 10, 1990, being considered by the Speaker in the impugned order. The High Court has observed that the Speaker has only relied upon the photos of the MLAs published in the newspaper reports which fact was undeniable inasmuch as the appellants have nowhere in their replies and even in the writ petition denied that they had met the Governor in the company of 18 other MLAs under the leadership of Dr Wilfred D'Souza representing the Congress (1) and splinter group of GPP led by Dr Barbosa. According to the High Court, when, as a fact, the appellants have admitted of having gone to the Governor to stake the claim in the afternoon of December 10, 1990, it was impossible to hold that the order be held as suffering from the vice of the order being based upon extraneous material and circumstances. Dealing with the grievance of the appellants that no opportunity was given to them to lead evidence, the High Court has held that the said submission was baseless since the Speaker in his order had recorded that although both the appellants were present before him their advocate did not make them give evidence. The High Court has observed that nothing prevented the appellants from leading their own evidence when it was their case that they wanted to lead evidence. In this context the High Court also pointed out that neither in their reply nor in the arguments before the Speaker the appellants had indicated whose evidence they wanted to lead and record or what sort of evidence they wanted to bring. The High Court has also mentioned that when Dr Jhalmi made a statement before the Speaker that the appellants had given up their membership of their political party and had said so openly to him and to others, neither the appellants nor their advocate sought to cross-examine Dr Jhalmi on this statement.

17. Shri A.K. Sen, the learned Senior Counsel appearing for the appellants in support of the appeal, has assailed the order of the Speaker dated December 13, 1990 on the same grounds which were urged on behalf of the appellants before the High Court. He has invited our attention to sub-rules (5) and (6) of Rule 6 and sub-rules (2) and (3) of Rule 7 of the Disqualification Rules which provide as under:

6. Reference to be by petitions - (5) Every petition -

(a) shall contain a concise statement of the material facts on which the petitioner relies; and

(b) shall be accompanied by copies of the documentary evidence, if any, on which the petitioner relies and where the petitioner relies on any information furnished to him by any person, a statement containing the names and addresses of such persons and the list of such information as furnished by each such person.

(6) Every petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings.

7. Procedure - (2) If the petition does not comply with the requirements of Rule 6, the Speaker shall dismiss the petition and intimate the petitioner accordingly.

(3) If the petition complies with the requirements of Rule 6, the Speaker shall cause copies of the petition and of the annexures thereto to be forwarded,-

(a) to the member in relation to whom the petition has been made; and

(b) where such member belongs to any legislature party and such petition has not been made by the leader thereof, also to such leader, and such member or leader shall within seven days of the receipt of such copies, or within such further period as the Speaker may for sufficient cause allow, forward his comments in writing thereon to the Speaker.

18. The submission of Shri Sen is that the petitions that were filed by Khalap before the Speaker did not fulfill the requirements of clause (a) of subrule (5) of Rule 6 inasmuch as the said petition did not contain a concise statement of the material facts on which the petitioner (Khalap) was relying and further that the provisions of clause (b) of sub-rule (5) of Rule 6 were also not complied with inasmuch as the petitions were not accompanied by copies of the documentary evidence on which the petitioner was relying and the names and addresses of the persons and the list of such information as furnished by each such person. It was also submitted that the petitions were also not verified in the manner laid down in the Code of Civil Procedure for the verification of pleadings and thus there was non-compliance of sub-rule (6) of Rule 6 also and that in view of the said infirmities the petitions were liable to be dismissed in view of sub-rule (2) of Rule 7. We are unable to accept the said contention of Shri Sen. The Disqualification Rules have been framed to regulate the procedure that is to be followed by the Speaker for exercising the power conferred on him under sub-paragraph (1) of paragraph 6 of the Tenth Schedule to the Constitution. The Disqualification Rules are, therefore, procedural in nature and any violation of the same would amount to an irregularity in procedure which is immune from judicial scrutiny in view of sub-paragraph (2) of paragraph 6 as construed by this Court in *Kihoto Hollohan* case. Moreover, the field of judicial review in respect of the orders passed by the Speaker under sub-paragraph (1) of paragraph 6 as construed by this Court in *Kihoto Hollohan* case is confined to breaches of the constitutional mandates, *malafides*, non-compliance with rules of natural justice and perversity. We are unable to uphold the contention of Shri Sen that the violation of the Disqualification Rules amounts to violation of constitutional mandates. By doing so we would be elevating the rules to the status of the provisions of the Constitution which is impermissible. Since the Disqualification Rules have been framed by the Speaker in exercise of the power conferred under paragraph 8 of the Tenth Schedule they have a status

subordinate to the Constitution and cannot be equated with the provisions of the Constitution. They cannot, therefore, be regarded as constitutional mandates and any violation of the Disqualification Rules does not afford a ground for judicial review of the order of the Speaker in view of the finality clause contained in sub-paragraph (1) of paragraph 6 of the Tenth Schedule as construed by this Court in *Kihoto Hollohan* case.

19. Shri Sen has next contended that there has been violation of principles of natural justice inasmuch as, in disregard of the provisions of Rule 7(3)(b) of the Disqualification Rules, which provides for the comments being forwarded by the member concerned to the Speaker within a period of seven days of the receipt of the copy of the petition and annexures thereto, the appellants were given only two days' time to file their reply to the petition. Shri Sen has urged that there has been violation of the principles of natural justice also for the reason that in the impugned order the Speaker has referred to certain extraneous materials and circumstances, namely, the copies of the newspapers that were produced by Dr Jhalmi at the time of hearing and the talks which the Speaker had with the Governor. Another grievance raised by Shri Sen was that the appellants were denied the opportunity to adduce their evidence before the Speaker passed the impugned order.

20. Principles of natural justice have an important place in modern Administrative Law. They have been defined to mean "fair play in action". As laid down by this Court "they constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. An order of an authority exercising judicial or quasi-judicial functions passed in violation of the principles of natural justice is procedurally *ultra vires* and, therefore, suffers from a jurisdictional error. That is the reason why in spite of the finality imparted to the decision of the Speakers/Chairmen by paragraph 6(1) of the Tenth Schedule such a decision is subject to judicial review on the ground of non-compliance with rules of natural justice. But while applying the principles of natural justice, it must be borne in mind that "they are not immutable but flexible" and they are not cast in a rigid mould and they cannot be put in a legal strait-jacket. Whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case.

21. The approach of the English courts has been thus summed up by Prof. Wade:

The judges, anxious as always to preserve some freedom of manoeuvre, emphasise that 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. Everything depends on the subject-matter'. The so-called rules of natural justice are not engraved on tablets of stone. Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice. (H.W.R. Wade: *Administrative Law*, 6th Edn., p. 530)

22. Similarly Clive Lewis has stated:

The fact that the applicant has suffered no prejudice as a result of the error complained of may be a reason for refusing him relief. It is necessary to keep in mind the purpose of the public law principle that has technically been violated, and ask whether that underlying purpose has in any event been achieved in the circumstances of the case. If so, the courts may decide that the breach has caused no injustice or prejudice and there is no need to grant relief. The courts may, for example, refuse relief if there has been a breach of natural justice but where the breach has in fact not prevented the individual from having a fair hearing. [Clive Lewis: *Judicial Remedies in Public Law* (1992) p. 290]

23. In the words of Lord Wilberforce:

A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain. [*Malloch v. Aberdeen Corpn.* (1971) 2 All ER 1278]

24. The approach of the courts in India is no different. In *A.M. Allison v. B.L. Sen* [AIR 1957 SC 227] it has been laid down that while exercising the jurisdiction under Article 226 of the Constitution the High Court has the power to refuse the writs if it was satisfied that there has been no failure of justice.

25. The grievance of the appellants regarding violation of the principles of natural justice has to be considered in this light.

26. It is no doubt true that under Rule 7(3)(b) of the Disqualification Rules, it has been provided that the members concerned can forward their comments in writing on the petitions within seven days of the receipt of the copies of the petition and the annexures thereto and in the instant case the appellants were given only two days' time for submitting their replies. The appellants, however, did submit their replies to the petitions within the said period and the said replies were quite detailed. Having regard to the fact that there was no denial by the appellants of the allegation in paragraph 11 of the petitions about their having met the Governor on December 10, 1990 in the company of Dr Barbosa and Dr Wilfred D'Souza and other Congress (1) MLAs and the only dispute was whether from the said conduct of the appellants an inference could be drawn that the appellants had voluntarily given up their membership of the MGP, it cannot be said that the insufficient time given for submitting the reply has resulted in denial of adequate opportunity to the appellants to controvert the allegations contained in the petitions seeking disqualification of the appellants.

27. As regards the reference to the newspapers in the impugned order passed by the Speaker it appears that the Speaker, in his order, has only referred to the photographs as printed in the newspapers showing the appellants with the Congress (1) MLAs and Dr Barbosa, etc. when they had met the Governor with Dr Wilfred D'Souza who had taken them to show that he had the support of 20 MLAs. The High Court has rightly pointed out that the Speaker, in referring to the photographs, was drawing an inference about a fact which had not been denied by the appellants themselves, viz., that they had met the Governor along with Dr Wilfred D'Souza and Dr Barbosa on December 10, 1990 in the company of Congress (1) MLAs, etc. The talk between the Speaker and the Governor also refers to the same fact. In

view of the absence of a denial by the appellants of the averment that they had met the Governor on December 10, 1990 accompanied by Dr Barbosa and Dr Wilfred D'Souza and Congress MLAs the controversy was confined to the question whether from the said conduct of the appellants an inference could be drawn that they had voluntarily given up the membership of the MGP. The reference to the newspaper reports and to the talk which the Speaker had with the Governor in the impugned order of disqualification does not, in these circumstances, introduce an infirmity which would vitiate the said order as being passed in violation of the principles of natural justice.

28. The grievance that the appellants have been denied the opportunity to adduce the evidence is also without substance. The appellants were the best persons who could refute the allegations made in the petitions. In the impugned order the Speaker has mentioned that the appellants were present before him but they did not come forward to give evidence. Moreover, they could have sought permission to cross-examine Dr Jhalmi in respect of the statement made by him before the Speaker that the appellants had given up their membership of their political party and had said so openly to him and to others, in order to refute the correctness of the said statement. They, however, failed to do so.

29. In the light of the aforesaid facts and circumstances we are unable to hold that the impugned order of disqualification was passed by the Speaker in violation of the principles of natural justice. Since we are of the view that the appellants have failed to make out a case for interference with the order dated December 13, 1990 passed by the Speaker disqualifying the appellants, we do not consider it necessary to go into the question about the appellants having disentitled themselves from invoking the jurisdiction of the High Court under Article 226 of the Constitution. The judgment of the High Court dismissing the writ petition of the appellants must be upheld and CA No. 3309 of 1993 filed by the said appellants must be dismissed.

C. A. No. 2904 of 1993

30. This appeal relates to the disqualification of Ravi Naik under order of the Speaker dated February 15, 1991. As mentioned earlier, Naik was sworn in as Chief Minister of Goa on January 25, 1991. On the same day Dr Kashinath Jhalmi filed a petition before the Speaker of the Goa Legislative Assembly under Article 191(2) read with para 2(a) of the Tenth Schedule to the Constitution wherein it was stated that Naik was elected to the Goa Legislative Assembly on the ticket and symbol of the MGP at the last assembly election and he had also given a declaration in accordance with the Disqualification Rules that he belongs to the MGP. In the said petition, it was further stated that Naik had sworn himself as Chief Minister of Goa by voluntarily giving up the membership of the MGP and that he has claimed that he has given up membership of his original party, the MGP, and that by his said action Naik has incurred disqualification for being a member of the House under the provision of Article 191(2) of the Constitution of India read with paragraph 2(a) of the Tenth Schedule of the Constitution. After receipt of the said petition, the Speaker issued a notice on January 29, 1991, which was received by Naik on the same day, whereby Naik was required to submit his reply to the said petition by February 5, 1991. After receipt of the said notice Naik submitted an application dated February 5, 1991 whereby he sought time of one month to file his reply to the petition on the ground that he has been advised bed-rest in hospital for fifteen days and

he was unable to apply his mind to give instructions to his lawyers. In the said application Naik further indicated that his case was going to be that he and several others members of Legislative Assembly belonging to the MGP along with him constitute a group which has arisen on account of the split in the original political party. The Speaker, by his letter dated February 6, 1991, granted extension of time till February 11, 1991 for Naik to forward his comments. On February 11, 1991, Naik sent another letter requesting for further time of three weeks to forward his comments. The said request of Naik was refused by the Speaker and on February 11, 1991 he sent a letter informing Naik to appear before him for personal hearing on February 13, 1991 at 4.00 p.m. On February 13, 1991, Naik did not appear but an advocate appeared on his behalf and submitted his reply in writing. In the said reply Naik stated:

(i) On the 24th of December, 1990, in the meeting held at Ponda, Goa, there was a split in the original Maharashtrawadi Gomantak Party. The meeting was attended, among others, by office-bearers namely Executive President, Shri Gurudas Malik, Joint Secretary, Shri Avinash Bhonsla, various executive members and workers of Maharashtrawadi Gomantak Party. It was decided that MGP (Ravi Naik Group) under my leadership be constituted. A resolution to that effect was passed.

(ii) Consequent upon the split, the following members of the Legislative Assembly of the original MG Party have joined the group representing the MGP (Ravi Naik Group) and constitute the group representing the faction which has arisen as a result of the said split in the original MGP and there are signatures to the declaration to that effect:

- | | |
|-------------------------------|-------------------------------|
| 1. Shri Ravi S. Naik | 2. Shri Ashok T.N. Salgaonkar |
| 3. Shri Shankar Salgaonkar | 4. Shri Pandurang Raut |
| 5. Shri Vinaykumar Usagaonkar | 6. Shri Ratnakar Chopdekar |
| 7. Shri Sanjoy Bendekar | 8. Shri Dharma Chodankar |

31. Along with the said reply, Naik submitted Xerox copies of the resolution referred to above as well as the declaration bearing signatures of eight MLAs. In the said reply Naik stated that given time, he would procure the necessary evidence to be adduced to substantiate the averments contained in the reply. He prayed for fifteen days' time to produce his affidavit and witnesses. In the writ petition filed in the High Court, it has been stated by Naik that the original resolution as well as the declaration bearing signatures of eight MLAs were shown to the Speaker at the time of hearing by the advocate for Naik on February 13, 1991.

32. The Speaker, in his order dated February 15, 1991, has posed two questions-(1) Whether the alleged split is proved; and (2) Whether the group of MLAs who have disassociated from the party constitute one-third of MLAs of original party. Both the questions were answered in the negative. The Speaker has observed that if there was really a split in the party and a separate group of MLAs of old MGP was formed, it was incumbent upon the leader of the group to give information of the split to the Speaker as required by Rule 3 of the Disqualification Rules in Form 1 but no such information had been furnished till the date of the order and that under Rule 4 of the Disqualification Rules each of the members of the group had to give a certificate to that effect by filling Form III and this also had not been done till the date of the order. The Speaker, in his order, has also mentioned that two MLAs of the alleged group had already been disqualified by him. Referring to the contention

urged by the advocate appearing for Naik that there was a stay by the High Court against the disqualification of these two MLAs, the Speaker has observed:

This argument cannot help the disqualified MLAs, as stay from the court came after the order of disqualification was issued by me. Besides recently Parliament has held that the Speaker's order cannot be a subject-matter of court proceedings and his decision is final as far as Tenth Schedule of Constitution of India is concerned.

33. The Speaker has also mentioned that Dharma Chodankar had intimated to him on January 14, 1991 that Naik and others had obtained his signatures forcibly without his consent and against his will on a paper and that even on February 13, 1991 he had addressed a letter to the Speaker regarding seating arrangements that he had no connection whatsoever with the Naik group and that he continues to be with the original political party. As regards the resolution and the declaration on which reliance was placed by Naik, the Speaker has observed that on the reverse of the typed sheet of paper which purports to be a resolution passed on December 24, 1990 there are some signatures and that in the typed portion there are six names of which four are of MLAs including Naik and two are disqualified MLAs and that the name of Dharma Chodankar is not there. The Speaker has also observed that if he had been shown the notice calling the meeting at Ponda showing its exact venue and the time, and the signatures of the persons who attended that meeting and minutes of that meeting, there could be some evidence to show that such meeting had been actually held and that in the absence of any such proof the holding of the meeting cannot be accepted. The Speaker was also of the view that not only the split has to be proved but it has to be proved by conforming to the rules and in the face of the doubtful evidence represented by a typed sheet resolution it could not be accepted and as no information as prescribed by the rules was given, the split in the party was not proved. In his order the Speaker has further stated that he had suggested that Naik should produce the affidavits or the members in person to support his case and he could have brought the six members in person or six affidavits of the erstwhile MGP MLAs who had joined his group after the so-called split but he did not produce a single affidavit nor the persons and that out of eight signatures supposed to have been taken by Naik at Ponda on December 24, 1990, two were already disqualified and one Dharma Chodankar has stated in clear terms that he does not belong to the group. The Speaker, therefore, held that there was no group of one-third erstwhile MGP MLAs including Naik, and he declared Naik as disqualified from being a member of Goa Legislative Assembly under Article 191(2) read with para 2(a) of the Tenth Schedule to the Constitution.

34. Before the High Court it was urged on behalf of Naik that in view of the stay order passed by the High Court on December 14, 1990 in Writ Petition No. 321 of 1990 filed by Bandekar and Chopdekar whereby the operation of the order dated December 13, 1990 regarding disqualification of Bandekar and Chopdekar had been stayed, the Speaker was not right in excluding the said two members from the group of Naik on the ground that they were disqualified members of Goa Legislative Assembly. Rejecting the said contention, the High Court has observed:

It is true that the Speaker in the impugned order held that he is not bound by the stay order granted by the High Court as he had already made the disqualification orders earlier to the stay order granted by the High Court. The Speaker indeed further

mentioned that recently Parliament has held that the Speaker's orders cannot be subject-matter of Court proceedings and his decision is final so far as the Tenth Schedule of the Constitution of India is concerned. The fact remains that when the Speaker made the orders of disqualification on 13th December, 1990 the Division Bench had stayed the same on 14th December, 1990 in the petition filed by Bandekar and Chopdekar. The conclusions in *Kihoto* case were pronounced by the Supreme Court in November 1992 whereby para 7 of the Tenth Schedule ousting the jurisdiction of the courts were held to be invalid and ultra vires the Constitution. The Speaker clearly mentioned that the decision rendered by the Speaker under the Tenth Schedule disqualifying a Member cannot be a subject-matter of Court proceedings. Admittedly on the date on which he made the present impugned order, para 7 of the Tenth Schedule was not held invalid by the Apex Court and the invalidity came much later. On his interpretation of paras 6 and 7 of the Tenth Schedule, the Speaker held that the stay order granted by a Division Bench of this Court is not binding upon him. In such circumstances, it cannot be held that the action of the Speaker was perverse or *malafide*. Had it been a fact that the Speaker was to make such order after the pronouncement of the conclusion in *Kihoto* case i.e., after November 1991, the story would have been different. We do agree with Shri Ashok Desai, learned counsel, that propriety demanded that the Speaker should have respected the order of the High Court but nothing turns on the same as by this judgment the disqualification of Bandekar and Chopdekar is upheld which takes effect as from November 1990.

35. Another contention that was urged before the High Court on behalf of Naik was that the Speaker in his order dated February 15, 1991, has referred to letters dated January 14, 1991 and February 13, 1991 received by him from Dharma Chodankar and that the said letters were not disclosed to Naik earlier and Naik had no opportunity of producing evidence in rebuttal. The High Court has rejected the said contention with the observation:

It must be seen that when for the first time the Legislative Assembly met on February 13, 1991 Dharma Chodankar admittedly sat in the Assembly at the seating arrangement allotted to the original Maharashtrawadi Gomantak Party and Chodankar was not allotted a seat in the House with the so-called breakaway group under the leadership of Ravi Naik. Though Ravi Naik, at some stage, had informed the Speaker of allotment of seating arrangement for his group separately from the original Maharashtrawadi Gomantak Party, the Speaker did not accede to that request insofar as MLA Dharma Chodankar is concerned. Ravi Naik remained content with such seating arrangement with Dharma Chodankar sitting with the original party and it is not possible to accept that Ravi Naik had not noticed it when the Assembly session had taken place in the morning of that day. The inference that can be drawn from this is that Ravi Naik knew that Chodankar was not with him much before the hearing took place before the Speaker. In the circumstances, in our view, even the non-disclosure of letters of Chodankar cannot be said to have made any difference and in that way caused any prejudice to the petitioner Ravi Naik. Upon reading the impugned order it also does not give an impression to this Court that the order of disqualification had been based solely upon this so-called extraneous material. On the contrary, the order of disqualification is solely and mainly based upon the failure of

Ravi Naik to adduce evidence to prove the split as required under para 3 of Tenth Schedule.

36. The High Court has laid emphasis on the point that in para 3 of the Tenth Schedule the burden of proof is on the member who claims that he and other members of his Legislature Party constitute a group representing a faction which has arisen as a result of a split in his original political party and such a group consists not less than one-third of the members of such Legislature Party. According to the High Court since Naik had made a claim that there had been a split, the burden of proof to establish that there was a split was on Naik.

37. Shri Soli Sorabjee, learned Senior Counsel appearing for Naik, assailing the findings recorded by the High Court, has, in the first place, contended that in view of the stay order passed by the High Court on December 14, 1990 in Writ Petition No. 321 of 1990 filed by Bandekar and Chopdekar the Speaker could not have proceeded on the basis that Bandekar and Chopdekar stood disqualified as members of the Legislative Assembly on December 24, 1990, when there was a split, as claimed by Naik. As regards letters dated January 14, 1991 and February 13, 1991 received by the Speaker from Dharma Chodankar, Shri Sorabjee has urged that the said letters were never disclosed to Naik earlier and that the said documents could not be relied upon by the Speaker without affording an opportunity to Naik to adduce evidence in rebuttal and, moreover, in these letters Dharma Chodankar has not denied his signatures on the declaration dated December 24, 1990 which has been produced by the appellant and has only claimed that the signatures had been obtained forcibly which means that he had actually signed the said declaration. Shri Sorabjee has urged that the question whether the signatures of Dharma Chodankar had been obtained forcibly on the said declaration could be proved only by evidence produced in the presence of the parties and that no evidence was adduced in support of the said allegation and in that view of the matter the Speaker could not ignore the signatures of Dharma Chodankar on the declaration dated December 24, 1990 and it could not be held that the members in the group formed by Naik were less than one-third of the members of the Legislature Party of Naik, namely, MGP.

38. As noticed earlier, paragraph 2 of the Tenth Schedule provides for disqualification on the ground of defection if the conditions laid down therein are fulfilled and paragraph 3 of the said Schedule avoids such disqualification in case of split. Paragraph 3 proceeds on the assumption that but for the applicability of the said provision the disqualification under paragraph 2 would be attracted. The burden to prove the requirements of paragraph 2 is on the person who claims that a member has incurred the disqualification and the burden to prove the requirements of paragraph 3 is on the member who claims that there has been a split in his original political party and by virtue of the said split the disqualification under paragraph 2 is not attracted. In the present case Naik has not disputed that he has given up his membership of his original political party but he has claimed that there has been a split in the said party. The burden, therefore, lay on Naik to prove that the alleged split satisfies the requirements of paragraph 3. The said requirements are:

- (i) The member of a House should make a claim that he and other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original party; and

(ii) Such group must consist of not less than one-third of the members of such legislature party.

39. In the present case the first requirement was satisfied because Naik has made such a claim. The only question is, whether the second requirement was fulfilled. The total number of members in the legislature party of the MGP (the original political party) was eighteen. In order to fulfill the requirements of paragraph 3 Naik's group should consist of not less than 6 members of the legislature party of the MGP. Naik has claimed that at the time of split on December 24, 1990 his group consisted of eight members whose signatures are contained in the declaration, a copy of which was filed with the reply dated February 13, 1991.

40. The Speaker has held that the split had not been proved because no intimation about the split has been given to him in accordance with Rules 3 and 4 of the Disqualification Rules. We find it difficult to endorse this view. Rule 3 requires the information in respect of matters specified in clauses (a), (b) and (c) of sub-rule (1) to be furnished in the prescribed Form (Form 1) to the Speaker by the leader of the legislature party within 30 days after the first sitting of the House or where such legislature is formed after the first sitting, within 30 days after its formation. Rule 4 relates to information to be furnished by every member to the Secretary of the Assembly in the prescribed form (Form III). In respect of a member who has taken his seat in the House before the date of commencement of the Disqualification Rules, the information is required to be furnished within 30 days from such date. In respect of a member who takes his seat in the House after the commencement of the Disqualification Rules such information has to be furnished before making and subscribing an oath or affirmation under Article 188 of the Constitution and taking his seat in the House. Rule 4 has no application in the present case because the stage for furnishing the required information had passed long back when the members made and subscribed to oath and affirmation after their election in 1989. Rule 3 also comes into play after the split and the failure on the part of the leader of the group that has been constituted as a result of the split does not mean that there has been no split. As to whether there was a split or not has to be determined by the Speaker on the basis of the material placed before him. In the present case the split was sought to be proved by the declaration dated December 24, 1990 whereby eight MLAs belonging to the MGP declared that they had constituted themselves into a group known as Maharashtrawadi Gomantak Party (Ravi Naik Group). A Xerox copy of the said declaration was submitted along with the reply filed by Naik on February 13, 1991 and the original declaration bearing the signatures of the eight MLAs was produced by the advocate for Naik during the course of the hearing before the Speaker on February 13, 1991. The genuineness of the signatures on the said declaration was not disputed before the Speaker. One of the signatories of the declaration, namely, Dharma Chodankar, had written to the Speaker that his signatures were obtained forcibly. That may have a bearing on the number of members constituting the group. But the fact that a group was constituted is established by the said declaration.

41. The question that requires consideration is whether as a result of the said group being constituted there was a split in the MGP as contemplated by paragraph 3 of the Tenth Schedule. The Speaker has held that the requirements of paragraph 3 were not fulfilled for the reason that the number of members of the group was less than one-third of the members of the

legislature party of the MGP. For coming to the conclusion the Speaker has excluded Bandekar and Chopdekar on the ground that they stood disqualified under order dated December 13, 1990 passed by him and Dharma Chodankar was excluded on the ground that he had disowned his signatures on the declaration. The said view of the Speaker has been assailed before us.

42. We will first examine whether Bandekar and Chopdekar could be excluded from the group on the basis of order dated December 13, 1990 holding that they stood disqualified as members of the Goa Legislative Assembly. The said two members had filed Writ Petition no. 321 of 1990 in the Bombay High Court wherein they challenged the validity of the said order of disqualification and by order dated December 14, 1990 passed in the said writ petition the High Court had stayed the operation of the said order of disqualification dated December 13, 1990 passed by the Speaker. The effect of the stay of the operation of the order of disqualification dated December 13, 1990 was that, with effect from December 14, 1990 the declaration that Bandekar and Chopdekar were disqualified from being members of Goa Legislative Assembly under order dated December 13, 1991 was not operative and on December 24, 1990, the date of the alleged split, it could not be said that they were not members of Goa Legislative Assembly. One of the reasons given by the Speaker for not giving effect to the stay order passed by the High Court on December 14, 1990, was that the said order came after the order of disqualification was issued by him. We are unable to appreciate this reason. Since the said order was passed in a writ petition challenging the validity of the order dated December 13, 1990 passed by the Speaker it, obviously, had to come after the order of disqualification was issued by the Speaker. The other reason given by the Speaker was that Parliament had held that the Speaker's order cannot be a subject-matter of court proceedings and his decision is final as far as Tenth Schedule of the Constitution is concerned. The said reason is also unsustainable in law. As to whether the order of the Speaker could be a subject-matter of court proceedings and whether his decision was final were questions involving the interpretation of the provisions contained in Tenth Schedule to the Constitution. On the date of the passing of the stay order dated December 14, 1990, the said questions were pending consideration before this Court. In the absence of an authoritative pronouncement by this Court the stay order passed by the High Court could not be ignored by the Speaker on the view that his order could not be a subject-matter of court proceedings and his decision was final. It is settled law that an order, even though interim in nature, is binding till it is set aside by a competent court and it cannot be ignored on the ground that the court which passed the order had no jurisdiction to pass the same. Moreover the stay order was passed by the High Court which is a superior Court of Record and "in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction." [See: *Special Reference No. 1 of 1964*, AIR 1965 SC 745 at p. 789]

43. The said question relating to the jurisdiction of the High Court to entertain the writ petitions challenging the order of the Speaker now stands concluded by the judgment of this Court in *Kihoto Hollohan* case wherein the provisions of para 7 of the Tenth Schedule have been held to be unconstitutional and para 6 has been construed and it has been held that the

Speaker, while passing an order in exercise of his powers under sub-para (1) of para 6 of the Tenth Schedule functions as a tribunal and the order passed by him is subject to judicial review under Articles 32, 136, 226 and 227 of the Constitution.

44. In **Mulraj v. Murti Raghonathji Maharaj** [AIR 1967 SC 1386], this Court has dealt with effect of a stay order passed by a court and has laid down:

In effect therefore a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts. It is well-settled that in such a case the party must have knowledge of the injunction order before it could be penalised for disobeying it. Further it is equally well-settled that the injunction order not being addressed to the court, if the court proceeds in contravention of the injunction order, the proceedings are not a nullity. In the case of a stay order, as it is addressed to the court and prohibits it from proceeding further, as soon as the court has knowledge of the order, it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. That in our opinion is the only difference between an order of injunction to a party and an order of stay to a court.

This would mean that the Speaker was bound by the stay order passed by the High Court on December 14, 1990 and any action taken by him in disregard of the said stay order was a nullity. In the instant case the Speaker, in passing the order dated February 15, 1991 relating to disqualification, treated Bandekar and Chopdekar as disqualified members. This action of the Speaker was in disregard of the stay order dated December 14, 1990 passed by the Bombay High Court.

45. The High Court has upheld the order of the Speaker, even though he had disregarded the stay order passed by the High Court, on the basis that on the date on which the Speaker had made the impugned order, paragraph 7 of the Tenth Schedule had not been held to be invalid by this Court and the invalidity came much later. The High Court has observed that on his interpretation of paragraphs 6 and 7 of the Tenth Schedule, the Speaker held that the stay order by the Division Bench was (not?) binding upon him and in such circumstances it could not be held that the action taken by the Speaker was perverse or *mala fide*. According to the High Court, the position would have been different if the Speaker was to make the order after the decision of the court. We are unable to agree with this view of the High Court. The decision of this Court in **Kihoto Hollohan** case declares the law as it was on the date of the coming into force of the Constitution (Fifty-second) Amendment Act, 1985. The action of the Speaker in ignoring the stay order passed by the High Court while passing the order dated February 15, 1991 cannot be condoned on the view that in the absence of the decision of this Court, it was open for the Speaker to proceed on his own interpretation of paragraphs 6 and 7 of the Tenth Schedule and ignore the stay order passed by the High Court.

46. Relying upon the decision in **State of Orissa v. Madan Gopal Rungta** [1952 SCR 28: AIR 1952 SC 12] Shri R.K. Garg, learned Senior Counsel appearing for Respondent 5, has submitted that the interim order could only be issued in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or

proceeding and not in derogation of the main relief and that it was open to the High Court, to pass an appropriate order while finally disposing of the writ petition. Shri Garg has contended that the High Court while finally disposing of Writ Petition No. 321 of 1990 filed by Bandekar and Chopdekar upheld the order dated January 13, 1990 passed by the Speaker regarding disqualification of Bandekar and Chopdekar and in these circumstances it cannot be said that disregard of the interim order passed by the High Court on December 14, 1990 by the Speaker had the effect of rendering the subsequent order dated February 15, 1991 illegal. We are unable to agree with this contention. It is true that an interim order is issued in aid of or ancillary to the main relief and not in derogation of the main relief. The stay order passed by the High Court on December 14, 1990 staying the operation of the order dated December 13, 1990 passed by the Speaker had been issued in aid of and ancillary to the main relief in Writ Petition No. 321 of 1990 which was for quashing of the said order dated December 13, 1990. The fact that the writ petition was ultimately dismissed and the impugned order dated December 13, 1990 passed by the Speaker was upheld by the High Court does not mean that the High Court had committed any error in passing the interim order for stay of operation of the order under challenge in the writ petition on December 14, 1990. The dismissal of the writ petition at the final stage does not, in our view, confer validity on the action which was taken by the Speaker on February 15, 1991 in passing the order disqualifying Naik in disregard of the stay order passed by the High Court on December 14, 1990. In the circumstances, it must be held that in view of the stay order passed by the High Court on December 14, 1990 in Writ Petition No. 321 of 1990, the Speaker while passing the order dated February 15, 1991, could not have proceeded on the basis that Bandekar and Chopdekar stood disqualified under his order dated December 13, 1990 and they could not be included in the group of Naik for the purpose of ascertaining whether the said group consisted of one-third members of the legislature party of MGP, the original political party. If the above two members are included within the group of Naik then it is not disputed that the number of members in the group was more than one-third of the legislature party of MGP. This would be so even if Dharma Chodankar was excluded because the total number of members in the group of Naik would be seven and the number of members of the legislature party of MGP required for the purpose of a split under paragraph 3 of the Tenth Schedule was six. The order dated February 15, 1991, passed by the Speaker was, therefore, in violation of the constitutional mandate contained in paragraph 3 of the Tenth Schedule to the Constitution and is liable to be quashed on the basis of the law laid down by this Court in *Kihoto Hollohan* case.

47. In that view of the matter we do not consider it necessary to deal with the submission of Shri Sorabjee that the action of the Speaker in excluding Dharma Chodankar from the group of Naik was in violation of the principles of natural justice.

48. In the result, while CA No. 3309 of 1993 filed by Bandekar and Chopdekar is dismissed, CA No. 2904 of 1993 filed by Naik is allowed. The order dated May 14, 1993 passed by the High Court in Writ Petition No. 48 of 1991 is set aside and the said writ petition is allowed and the order dated February 15, 1991 passed by the Speaker, Goa Legislative Assembly declaring Naik as disqualified for being a member of the Goa Legislative Assembly is quashed.

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Rangilal Choudhury v. Dahu Sao

AIR 1962 SC 1248

WANCHOO, J. - This is an appeal by special leave against the judgment of the Patna High Court in an election matter. The brief facts necessary for present purposes are these: There was a bye-election held on December 21 and 22, 1958, to fill up a vacancy in the Bihar Legislative Assembly from Dhanbad constituency. Nomination papers for the same were to be filed on or before November 8, 1958. A large number of persons filed their nomination papers on or before that date and among them were the appellant Rangilal Choudhury and the respondent Dahu Sao. In the present appeal we are only concerned with these two. The nomination paper of the respondent was rejected by the returning officer after scrutiny on November 11, 1958. The bye-election was duly held and the appellant was declared elected by a majority of votes. Thereafter the respondent filed an election petition challenging the election of the appellant on a large number of grounds. In the present appeal we are only concerned with one of the grounds that the nomination paper of the respondent was improperly rejected. The appellant's contention in this connection was that the nomination paper was rightly rejected. The election tribunal held that the nomination paper was rightly rejected and thereafter dismissed the petition. The respondent went in appeal to the High Court, and the main point pressed in appeal was that the election tribunal was wrong in holding that the nomination paper of the respondent was rightly rejected. The High Court agreed with the contention of the respondent that his nomination paper was improperly rejected and therefore allowed the appeal and set aside the election of the appellant. The appellant's application for leave to appeal to this Court having been rejected by the High Court, he applied for and obtained special leave from this Court; and that is how the matter has come up before us.

2. The only ground on which the nomination paper was rejected by the returning officer was that the proposer had nominated the candidate for election from Bihar and not Dhanbad assembly constituency. The nomination was made on a Hindi form printed for the purpose by the Government. Unfortunately, the printed form did not exactly conform to the Hindi printed form in the Rules framed under the Representation of the People Act, 1951 ('the Act'). The heading in the specimen printed form in the Rules requires the name of the State in which the election is held, to be filled in the blank space there; but in the printed form supplied to the respondent the name of the State was already printed in the heading and therefore the blank space had to be filled in with the name of the constituency. The candidate therefore filled in the name of the constituency in the blank space in the heading of the specimen printed form. Thereafter, the proposer filled in the next part of the form which has five columns, after the main part which says that the proposer nominates so and so for such and such constituency. In this main part, the name of the candidate and the name of the constituency have to be filled in by the proposer. In the particular form with which we are concerned now the name of the candidate was rightly filled in but the proposer instead of putting down the name of the constituency, namely Dhanbad, put down the name Bihar there. So the proposal read as if the candidate was being nominated for the Bihar Assembly constituency. The only objection taken before the returning officer was that the proposer had not mentioned the constituency for which he was proposing the candidate for election and therefore the nomination form was

defective and should be rejected. This found favour with the returning officer, who rejected the nomination paper as already said, on the ground that the proposer had nominated the candidate for election for Bihar assembly constituency and not Dhanbad assembly constituency. It may be mentioned that it is no one's case that there is any constituency like Bihar assembly constituency. It may also be mentioned that this was a bye-election and not a general election; and the question whether the nomination paper was rightly rejected will have to be considered in this background.

3. Now Section 33(1) of the Act requires that a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer shall be filed on or before the date appointed for the nomination. Section 33(4) lays down that on the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls; provided that the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them into conformity with the corresponding entries in the electoral roll; and where necessary, direct that any clerical or printing error in the said entries shall be overlooked. Section 36 then prescribes for the scrutiny of nomination papers and sub-section (2) (b) thereof lays down that the nomination paper shall be rejected if there has been a failure to comply with any of the provisions of Section 33. But sub-section (4) lays down that the returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. The result of these provisions is that the proposer and the candidate are expected to file the nomination papers complete in all respects in accordance with the prescribed form; but even if there is some defect in the nomination paper in regard to either the names or the electoral roll numbers, it is the duty of the returning officer to satisfy himself at the time of the presentation of the nomination paper about them and if necessary to allow them to be corrected, in order to bring them into conformity with the corresponding entries in the electoral roll. Thereafter on scrutiny the returning officer has the power to reject the nomination paper on the ground of failure to comply with any of the provisions of Section 33 subject however to this that no nomination paper shall be rejected on the ground of any defect which is not of a substantial character.

4. The main dispute in the High Court centered on the question whether the defect in this case on the ground of which the returning officer rejected the nomination paper was of a substantial character or not. Generally speaking if the nomination paper does not disclose at all the name of the constituency for which the nomination has been made, the defect would be of a substantial character, for there would then be no way of knowing the constituency for which a candidate is being nominated. But there may be cases where the nomination form shows the constituency for which the nomination is being made though there may be some defect in filling up the form. In such a case it seems to us that if the nomination form discloses the constituency for which the nomination is being made even though the form may not have been properly filled in that respect, the defect in filling the form would not be of a substantial character. It is true that in this case there was a defect in filling up the blank by the proposer inasmuch as he wrote the word "Bihar" before the words "assembly constituency" instead of the word "Dhanbad", which he should have done; and if there were nothing else in

the form to disclose the constituency for which the nomination was being made there would have been a substantial defect in the nomination form which would justify the returning officer in rejecting the same. But the circumstances of the present case are rather peculiar. We have already mentioned that the printed Hindi form which was used in this case printed the heading wrongly inasmuch as the heading was not in accordance with the heading prescribed under the Rules. In the specimen form in the Rules, the blank space is meant for the State in which the election is being held; but because of the mistake in printing the heading in this case, the blank space could only be filled up with the name of the constituency, and that was what was done. This name was filled in apparently by the candidate himself and not by the proposer. But equally clearly the name of the constituency was there when the proposer in his turn came to fill up that part of the form which he had to fill. It seems that the proposer was thus misled, as the name of the constituency was already there in the heading, to write the word "Bihar" in the second blank space in his proposal instead of the word "Dhanbad" to indicate the constituency. That was undoubtedly a defect in the form as filled in by the proposer. The question however is whether in these circumstances it can be called a defect of a substantial character which would justify the rejection of the nomination paper. It seems to us that the defect appeared partly because of the mistake in the printing of the Hindi form which was supplied to the candidates for the purposes of the nomination to this bye election. The form however as put in clearly shows in the heading the particular assembly constituency for which the election was being held. Then follows the part which has to be filled in by the proposer and there the proposer made a mistake in filling the word "Bihar" instead of the word "Dhanbad" in the blank space relating to the constituency. Considering however that the name of the constituency was already there in the heading, it would in our opinion be not improper in the circumstances of this case to say that the proposer was nominating the candidate for the constituency which was already mentioned in the heading. It seems to us therefore that in view of the mistake that occurred in the printing of the form and in view of the fact that the name of the constituency for which the election was being held was already in the heading, the mistake of the proposer in putting in the word "Bihar" instead of the "Dhanbad", which resulted in a defect in the filling up of the form was not of a substantial character and that it was quite clear on the form in this case that the nomination was for the Dhanbad assembly constituency. The returning officer does not seem to have attached any importance to the name of the constituency in the heading in this case and also seems to have ignored the fact that this was a bye election to one constituency, when he came to consider the defect which undoubtedly was there in this respect in the nomination paper. We therefore agree with the High Court that in the peculiar circumstances created by the mistake in printing the Hindi nomination form by the Government, the defect which has occurred in this case is not of a substantial character and it was quite clear that the nomination paper was for the Dhanbad assembly constituency and was in consequence improperly rejected by the returning officer.

5. As we have already said, this was the only ground on which the nomination paper was challenged as defective before the returning officer; but before the election tribunal the appellant also contended that the nomination paper was defective as columns 2 and 5 of the part which has to be filled in by the proposer were not properly filled in and were defective; and it was urged that the defect there was substantial and therefore even if the reason for the

rejection of the nomination paper as given by the returning officer was not substantial, these defects were substantial and the rejection should be upheld on the ground of these defects. Column 2 requires the electoral roll number of the proposer and column 5 of the candidate to be filled in there. Further according to the directions given in the form columns 2 and 5 should contain the name of the constituency, the part of the electoral roll and the serial number in that part. The purpose of this provision is that the returning officer should be able readily to check that the proposer and the candidate are voters on the electoral roll. In the present case only the serial number and the house number are mentioned in columns 2 and 5 and not the name of the constituency and the number of the part. Undoubtedly therefore there was a defect in these two columns. Apparently the constituency was the same, viz., Dhanbad, as will appear from the address given in column 4. No part number could be given as the electoral roll in this particular case was not numbered by Parts. The question is whether in these circumstances this defect can be called a defect of a substantial character. In this connection we cannot ignore the provisions of Section 33(4) of the Act, which casts a duty on the returning officer to satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral roll and gives him the power to permit the removal of any defect in this connection. The returning officer does not seem to have noted this defect in the form for if he had done so he would have given an opportunity to the proposer to make the corrections. It is true that the failure of the returning officer to give this opportunity for correction does not mean that the defect can be ignored, if it is of a substantial character. But considering the purpose for which the electoral roll numbers are given, it seems that the returning-officer found no difficulty in checking that the proposer as well as the candidate was a voter on the electoral rolls. The High Court in this connection referred to the evidence of the respondent who stated that when his nomination paper was taken up for scrutiny, the returning officer compared the names in the nomination paper with those in the electoral rolls. It seems therefore that in this case the returning officer found no difficulty in tracing the names of the proposer and the candidate in the electoral rolls and that is why no objection was raised before him as to the defect in columns 2 and 5. In the circumstances it must be held that the defect was of an unsubstantial character and would not result in the rejection of the nomination paper. We may in this connection refer to *Karnail Singh v. Election Tribunal, Hissar* [(1951)10 ELR 189] where this Court observed that it was quite clear on the evidence that there was no difficulty in identifying the candidate and the candidate himself pointed out to the returning officer his own name in the electoral rolls. Therefore the defect in columns 2 and 5 was in the circumstances held to be a technical one and not of a substantial character. The principle of that case in our opinion applies to the present case also, for there is no doubt here that the returning officer found no difficulty in identifying the proposer as well as the candidate and as a matter of fact the evidence is that the candidate himself pointed out the place in the electoral rolls where his name was entered. We therefore agree with the High Court that in the circumstances of this case the defects in columns 2 and 5 were of an unsubstantial character and the rejection of the nomination paper cannot be upheld on this further ground, which was not even urged before the returning officer.

6. We, therefore, dismiss the appeal.

N. T. Veluswami Thevar v. G. Raja Nainar

AIR 1959 SC 422

VENKATARAMA AIYER, J. - These appeals raise a question of considerable importance as to the scope of an enquiry in an election petition wherein election is called in question under Section 100(1)(c) of the Representation of the People Act, 1951, on the ground that a nomination paper had been improperly rejected.

2. The facts are that during the general elections which were held in 1957 six persons including the, appellant, Veluswami Thevar, the second respondent Chellapandian, and the fourth respondent, Arunachalam, were nominated for election to the Legislative Assembly of the State of Madras from Alangulam Constituency in the District of Tirunelveli. At the time of the scrutiny which was on February 1, 1957, Chellapandian raised an objection to the nomination of Arunachalam on the ground that he was the Head Master of the National Training School, Tiruchendur, which was a Government-aided school, and that he was therefore disqualified under Section 7, clauses. (d) and (e) of the Representation of the People Act, 1951 (hereinafter referred to as the Act), as holding an office of profit under the Government. In upholding this objection, the returning officer observed:

Sri S. Arunachalam is not present at the time of scrutiny of nominations nor any authorised agent of his could take notice of the objection and file a reply. In view of the objection which has not been cleared by Sri S. Arunachalam by satisfying me that he is not holding an office of profit in a concern in which the State Government has financial interest, the objection is upheld and Sri S. Arunachalam is disqualified under Sections 7(d) and (e) of Act 43 of 1951. Accordingly his nomination is rejected.

3. The five nomination papers were accepted; two of the candidates subsequently withdrew from the election; the other three went to the polls, and on March 10, 1957, the appellant who secured the largest number of votes was declared elected.

4. On April 18, 1957, Raja Nainar, the first respondent, who was not a candidate but a voter filed E. P. No. 109 of 1957 praying that the election of the appellant be declared void on the ground that the rejection of the nomination paper of Arunachalam was improper, because he had ceased to be a Head Master at the time of his nomination, and that further the institution was a private one. The appellant filed a written statement in which he pleaded that Arunachalam was not qualified to be chosen not merely on the ground put forward by Chellapandian before the returning officer but also on the grounds that he was interested as a partner in contracts for the execution of works for the Government, and that further he had entered into an agreement with the District Board, Chittoor, to serve as a teacher in that Board, and that his nomination paper was therefore rightly rejected. Raja Nainar then came out with the application, I. A. No. 5 of 1957, out of which the present proceedings arise, to strike out the additional grounds of disqualification raised in the statement of the appellant on the ground that the Tribunal had no jurisdiction to enquire into any ground of disqualification which was not taken before the returning officer, and that accordingly the new grounds put forward by the appellant should be struck out.

5. By its order dated August 17, 1957, the Tribunal held that the question to be decided by it was whether there was a valid nomination paper, and that to decide that, it could go into grounds other than those which were put forward before the returning officer, and, in that view, dismissed the application. The correctness of this order was challenged by Raja Nainar in two Writ Petitions Nos. 675 and 676 of 1957, preferred under Article 226. Therein, he repeated his contention that it was not competent to the Tribunal to enquire into any but the grounds which had been put forward before the returning officer, and prayed that a writ of certiorari be issued to quash the order in I.A. No. 5 of 1957 and a writ of prohibition, to restrain the Tribunal from enquiring into the new grounds raised by the appellant.

6. These applications were heard by a Bench of the Madras High Court consisting of Rajagopalan and Rajagopals Ayyangar, JJ., who upheld the contention of the petitioner, and stated their conclusion in these terms:

We are clearly of opinion that the enquiry before the Tribunal must be restricted to the objections which the returning officer had to consider and decide, but not necessarily to the material placed before the returning officer at the stage of the summary enquiry. The Tribunal has jurisdiction to adjudicate upon the truth and validity of those objections on relevant material, even if that material be other than that placed before the returning officer. The Tribunal has no jurisdiction to investigate the truth or validity of the objections which were not put forward before the returning officer, and which he had therefore no occasion to consider. Once again we have to point out that we are discussing only the position of a candidate whose nomination was rejected, and not, for instance, that of a returned candidate.

A further objection was also taken before the learned judges that as the decision of the Election Tribunal was open to appeal under Section 116-A of the Act, the court should, in exercise of its discretion under Article 226, decline to entertain writ petitions against interlocutory orders. But the learned judge held that as the Tribunal had no jurisdiction to entertain grounds other than those which were put forward before the returning officer, writs could issue under Article 226. In the result, they quashed the order of the Election Tribunal in I.A. No. 5 of 1957, and issued a writ of mandamus directing it to dispose of the application afresh in accordance with law as laid down in the judgment. It is against this judgment that the present appeals have been preferred on leave granted by this Court under Article 136, and the point that arises for decision is whether in an election petition questioning the propriety of the rejection of a nomination paper under Section 100(1)(c) of the Act, it is open to the parties to raise grounds of disqualification other than those put forward before the returning officer.

7. It will be convenient at this stage to refer to the provisions of the Act bearing on this question. Section 32 of the Act provides that,

Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act.

Under Section 33(1), the candidate is to deliver to the returning officer a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer. Section 33 (4) enacts that:

On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls.

Provided that the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them into conformity with the corresponding entries in the electoral rolls; and where necessary, direct that any clerical or printing error in the said entries shall be overlooked.

Section 35 provides *inter alia* that the returning officer shall cause to be affixed in some conspicuous place in his office a notice of the nomination containing descriptions similar to those contained in the nomination paper both of the candidate and of the proposer. Section 36, omitting what is not material, is as follows:

36. (1) On the date fixed for the scrutiny of nominations under Section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a) that the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may, be applicable, namely Articles 84, 102, 173 and 191, Part II of this Act, or

(b) that there has been a failure to comply with any of the provisions of Section 33 or Section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of Section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is made the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

Then, we have Section 100(1)(c), the construction of which is the main point for determination. It is as follows:

100. (1) Subject to the provisions of sub-Section (2), if the Tribunal is of opinion-
(c) that any nomination has been improperly rejected;...
the Tribunal shall declare the election of the returned candidate to be void.

8. Now, the whole controversy between the parties is as to what the expression "improperly rejected" in Section 100(1)(c) means. According to the appellant, when the nomination paper of a candidate who is under no such disqualification as is mentioned in Section 36(2) has been rejected, that is improper rejection within Section 100(1)(c). According to the respondent, when the nomination paper of a candidate is rejected by the returning officer on the ground that he is subject to a specified disqualification, the rejection is improper, if it is found that that disqualification does not exist. If the former view is correct, then the scope of an enquiry before the Tribunal must extend to all matters which are mentioned in Section 36(2), and if the latter, then it must be limited to determining whether the ground on which the returning officer has rejected the nomination is well-founded. Now, to decide what the expression "improperly rejected" in Section 100(1)(c) precisely imports, it is necessary to examine the relevant provisions of the Act bearing on the question and the setting of the above Section therein. Under Section 32 of the Act, any person may be nominated as a candidate for election if he is duly qualified under the provisions of the Constitution and the Act. Section 36(2) authorises the returning officer to reject any nomination paper on the ground that he is either not qualified, that is, under Sections 3 to 7 of the Act, or is disqualified under the provisions referred to therein. If there are no grounds for rejecting a nomination paper under Section 36(2), then it has to be accepted, and the name of the candidate is to be included in a list *vide* Section 36(8). Then, we come to Section 100(1)(c) and Section 100(1)(d)(i), which provide a remedy to persons who are aggrieved by an order improperly rejecting or improperly accepting any nomination. In the context, it appears to us that the improper rejection or acceptance must have reference to Section 36(2), and that the rejection of a nomination paper of a candidate who is qualified to be chosen for election and who does not suffer from any of the disqualifications mentioned in Section 36(2) would be improper within Section 100(1)(c), and that, likewise, acceptance of a nomination paper of a candidate who is not qualified or who is disqualified will equally be improper under Section 100(1)(d)(i). Section 32 confers a substantive right on a candidate to be chosen to the legislature subject only to the limitations enacted in Articles 84, 102, 173 and 191 of the Constitution and Sections 3 to 7 of the Act, and Sections 36 and 100 provide the machinery for the exercise and enforcement of that right. It is a sound rule of construction that procedural enactments should be construed liberally and in such manner as to render the enforcement of substantive rights effective. Reading Section 100(1)(c) in the context of the whole enactment, we think that an enquiry before the Tribunal must embrace all the matters as to qualification and disqualification mentioned in Section 36(2), and that it cannot be limited to the particular ground of disqualification which was taken before the Returning Officer.

9. It was contended for the respondent that the proceedings before the Tribunal are really by way of appeal against the decision of the returning officer, and that, therefore, the scope of

the enquiry in the election petition must be co-extensive with that before the returning officer, and must be limited to the ground taken before him. It was argued that a decision could be said to be improper only with reference to a ground which was put forward and decided in a particular manner by the returning officer, and that therefore the expression "improperly rejected" would, in its true connotation, restrict the scope of the enquiry before the Tribunal to the ground taken before the returning officer. We are unable to agree with this contention. The jurisdiction which a Tribunal exercises in hearing an election petition even when it raises a question under Section 100(1)(c) is not in the nature of an appeal against the decision of the returning officer. An election petition is an original proceeding instituted by the presentation of a petition under Section 81 of the Act. The respondents have a right to file written statements by way of reply to it; issues have to be framed, and subject to the provisions of the Act, the provisions of the Code of Civil Procedure regulate the trial of the petition. All the parties have the right to adduce evidence, and that is of the essence of an original proceeding as contrasted with a proceeding by way of appeal. That being the character of the proceedings, the rule applicable is that which governs the trial of all original proceedings; that is, it is open to a party to put forward all grounds in support of or negation of the claim, subject only to such limitations as may be found in the Act.

10. It should be noted in this connection that if a petition to set aside an election on the ground of improper rejection of a nomination paper is in the nature of an appeal against the decision, of the returning officer, then logically speaking, the decision of the Tribunal must be based only on the materials placed before the returning officer given with respect to the ground which was urged before him, and no fresh evidence could be admitted before the Tribunal except in accordance with Order 41, Rule 27. The learned judges in the court below, however, observe that though the enquiry before the Tribunal is restricted to the particular ground put forward before the returning officer, it is not restricted to the material placed before him, and that all evidence bearing on that ground could be adduced before the Tribunal. This, in our view, is quite correct. The enquiry which a returning officer has to make under Section 36 is summary in character. He may make "such summary enquiry, if any, as he thinks necessary"; he can act *suo motu*. Such being the nature of the enquiry, the right which is given to a party under Section 100(1)(c) and Section 100(1)(d)(i) to challenge the propriety of an order of rejection or acceptance of a nomination paper would become illusory, if the Tribunal is to base its decision only on the materials placed before the returning officer.

11. It was contended for the respondent that even with reference to the ground taken before the returning officer, no evidence other than what was placed before him could be brought before the Tribunal, and he relied on the following observations of the learned judges in **Charanjit Lal v. Lehri Singh** [AIR 1958 Punj. 433 at 435]:

Whether a nomination has been improperly rejected or not, has to be considered in relation to the state of evidence before the returning officer at the time of the scrutiny. The testimony of the returning officer shows that he rejected the nomination, because it did not appear to him that on the question of age the candidate Shri Pirthi was qualified to stand for election.

There, a nomination paper had been rejected by the returning officer on the ground that the candidate did not appear to possess the age qualification required by Article 173. The correctness of this order was challenged in an election petition. Evidence was taken as to the age of the candidate in this petition, and eventually it was held that the order of the returning officer was right. In the order of rejection, the returning officer also stated:

The nomination is rejected as the age is not mentioned in the nomination paper.

Neither the candidate nor the proposer or any person duly authorised on his behalf is present to testify to his age.

Now, the argument before the High Court was that the failure to mention the age in the nomination paper was a formal defect which should have been condoned under Section 36(4) of the Act. The learned judges held that the defect was not merely one of failure to mention the age but of want of the requisite qualification in age, and that that could not be cured under Section 36(4). In this context, the observations relied on could not be read as meaning that no evidence could be adduced even in respect of a ground which was urged before the returning officer, as, in fact, evidence was taken before the Tribunal and a finding given, and if they meant what the respondent suggests they do, we do not agree with them. It is to be noted that in many of the cases which came before this Court, as for example, *Durga Shankar v. Raghuraj Singh* [(1955)1 SCR 267] the finding of the Tribunal was based on fresh evidence admitted before it, and the propriety of such admission was never questioned. And if the true position is, as we have held it is, that it is open to the parties to adduce fresh evidence on the matter in issue, it is difficult to imagine how the proceedings before the Tribunal can be regarded as in the nature of appeal against the decision of the Returning Officer.

12. In support of his contention that it is only the ground that is urged before the returning officer that can be raised before the Tribunal, Mr. Sinha, learned counsel for the respondent, relies on the provision in Section 36(6) that when a nomination paper is rejected, the returning officer should record his reasons therefor. The object of this provision, it is argued, is to enable the Tribunal to decide whether the order of the returning officer is right or not, and by implication it confines the scope of the enquiry before the Tribunal to the ground put forward before the returning officer. This contention is, in our opinion, unsound. Now, when a nomination paper is accepted, Section 36(6) does not require that any reason should be recorded therefor. If the contention of the respondent is right, it would follow that acceptance of a nomination paper can never be questioned. But that would be against Section 100(1)(d)(i), and it must therefore be held that an acceptance can be questioned on all the grounds available under Section 36(2). Section 100(1)(d)(i) deals with improper acceptance of a nomination paper, and if the word "improper" in that provision has reference to the matters mentioned in Section 36(2), it must have the same connotation in Section 100(1)(c) as well. The word "improper" which occurs in both Section 100(1)(c) and Section 100(1)(d)(i) must bear the same meaning in both the provisions, unless there is something in the context to the contrary, and none such has been shown.

13. There is another difficulty in the way of accepting this argument of the respondent. A candidate may be subject to more than one disqualification, and his nomination paper may be questioned on all those grounds. Supposing that the returning officer upholds one objection and rejects the nomination paper on the basis of that objection without going into other

objections, notwithstanding that under Section 36(2) he has to decide all the objections, is it open to the respondents in the election petition to adduce evidence on those objections? According to the respondent, it is not so that if the decision of the returning officer on the objection on which he rejected the nomination paper is held to be bad, the Tribunal has no option but to set aside the election under Section 100(1)(c), even though the candidate was, in fact disqualified and his nomination paper was rightly rejected. Mr. Sinha for the respondent concedes that the result would be anomalous, but he says that the Law of Election is full of anomalies, and this is one of them, and that is no reason for not interpreting the law on its own terms. It is no doubt true that if on its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the legislature to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies. Anomalies will disappear, and the law will be found to be simple and logical, if it is understood that when a question is raised in an election petition as to the propriety of the rejection of a nomination paper, the point to be decided is about the propriety of the nomination and not the decision of the returning officer on the materials placed before him, and that decision must depend on whether the candidate is duly qualified and is not subject to any disqualifications as provided in Section 36(2).

14. It remains to deal with one more contention advanced on behalf of the respondent, and that is based on the following observations in *Hari Vishnu Kamath v. Syed Ahmad Ishaque* [(1955)1 SCR 1104, 1132]:

Under this provision Rule 47(4), the Tribunal is constituted as a court of appeal against the decision of the returning officer, and as such its jurisdiction must be co-extensive with that of the returning officer and cannot extend further.

The argument is that if the jurisdiction of the Tribunal is co-extensive with that of the returning officer, then the enquiry before it must be confined to the grounds which were urged before the returning officer. Now, the observations quoted above were made statedly with reference to Rule 47, and assuming that they apply to an enquiry under Section 100(1)(c), the question still remains, what is the jurisdiction of the returning officer in hearing objections to nomination papers? His jurisdiction is defined in Section 36(2), and the Tribunal must therefore have jurisdiction to decide all the questions which can be raised under that Section. The fact that a particular ground which could have been raised was not, in fact, raised before the returning officer does not put an end to his jurisdiction to decide it, and what he could have decided if it had been raised, could be decided by the Tribunal, when raised.

15. Mr. Ganapathy Iyer, learned counsel for the appellant, invited our attention to the decisions of the Election Tribunals on the question whether grounds other than those raised before the returning officer could be put forward in an enquiry in an election petition. They held, with one solitary exception, that it is permissible, and indeed, it is stated in *Megh Raj v. Bhimandas* [(1952) 2 ELR 301, 310] as settled law that the rejection of a nomination paper can be sustained on grounds not raised before the returning officer. If the legislature which must be taken to have knowledge of the law as interpreted in those decisions wanted to make a departure from it, it would have said so in clear terms, and in the absence of such an

expression, it would be right to interpret Section 100(1)(c) as not intended to alter the law as laid down in those decisions.

16. It is now necessary to refer to the decisions which have been cited before us. In **Durga Shankar Mehta** case [(1955)1 SCR 267] the election was to a double-member constituency. The appellant who obtained the largest number of votes was declared elected to the general seat and one Vasantarao, to the reserved seat. The validity of the election was challenged on the ground that Vasantarao was below the age of 25 years, and was, therefore, disqualified to stand. The Election Tribunal upheld that objection, and set aside the entire election. The decision was taken in appeal to this Court, and the point for determination was whether the election of the appellant was liable to be set aside on account of the disqualification of Vasantarao. It was held that the matter fell within Section 100(2)(c) as it then stood and not under Section 100(1)(c), and that the election of the appellant could not be declared void. This is not a direct pronouncement on the point now in controversy, and that is conceded. In **Vashist Narain Sharma v. Dev Chandra** [(1955) 1 SCR 509] a question was raised as to what would be "improper acceptance" within the meaning of Section 100; but in the view taken by this Court, no opinion was expressed thereon.

17. The question now under consideration came up directly for decision before the High Court of Rajasthan in **Tej Singh v. Election Tribunal, Jaipur** [(1954) 9 ELR 193] and it was held that the respondent to an election petition was entitled to raise a plea that the nomination of the petitioner rejected on one ground by the returning officer was defective on one or more of the other grounds mentioned in Section 36(2) of the Act, and that such a plea, if taken, must be enquired into by the Election Tribunal. In **Dhanraj Deshlehra v. Vishwanath Y. Tamaskar** [(1958) 15 ELR 260] it was observed by a Bench of the Madhya Pradesh High Court that in determining whether a nomination was improperly rejected, the Election Tribunal was not bound to confine its enquiry to the ground on which the returning officer rejected it, and that even if the ground on which the returning officer rejected the nomination could not be sustained, the rejection could not, be held to be improper if the Tribunal found other fatal defects in the nomination. An unreported judgment of the Andhra Pradesh High Court in **Badrivishal Pitti v. J. V. Narsing Rao** [Special Appeal No. 1 of 1957] has been cited before us, and that also takes the view that in an enquiry before the Election Tribunal, it is open to the parties to support an order of rejection of a nomination paper on grounds other than those which were put forward before the returning officer. We are in agreement with these decisions.

19. In the result, we allow the appeals, set aside the orders of the court below, and dismiss the writ petitions filed by the respondent, with costs here and in the court below.

* * * * *

Vashist Narain Sharma v. Dev Chandra

AIR 1954 SC 513

GHULAM HASAN, J. - This appeal preferred under Article 136 of the Constitution against the order, dated May 4, 1951, of the Election Tribunal, Allahabad, setting aside the election of Sri Vashist Narain Sharma to the Uttar Pradesh Legislative Assembly, raises two questions for consideration. The first question is whether the nomination of one of the rival candidates, Dudh Nath, was improperly accepted by the Returning Officer and the second, whether the result of the election was thereby materially affected.

2. Eight candidates filed nominations to the Uttar Pradesh Legislative Assembly from Ghazipur (South East) Constituency No. 345, three withdrew their candidature and the contest was confined to the remaining five. The votes secured by these candidates were as follows

1.	Vashist Narain Sharma	12868
2.	Vireshwar Nath Rai	10996
3.	Mahadeo	3950
4.	Dudh Nath	1983
5.	Gulab Chand	1768

They were arrayed in the election petition as respondents Nos. 1 to 5 respectively. The first respondent having secured the highest number of votes was declared duly elected. Three electors filed a petition under Section 81 of the Representation of the People Act, 1951 praying that the election of the returned candidate be declared void and that respondent no. 2 be declared to have been duly elected; in the alternative, that the election be declared wholly void. The election was sought to be set aside on the grounds, *inter alia*, that the nomination of respondent no. 4 was improperly accepted by the Election Officer and that the result of the election was thereby materially affected.

The Tribunal found that respondent no.4, whose name was entered on the electoral roll of Gahmar Constituency Ghazipur (South East) 'personated' (meaning passed himself off as) Dudh Nath Kahar and used the entries of his electoral roll of Baruin Constituency Ghazipur (South West), that the Returning Officer had improperly accepted his nomination, and that the result of the election was thereby materially affected. Allegations of major and minor corrupt practices and non-compliance with certain statutory rules were made but the Tribunal found in favour of the returned candidate on those points.

3. Dudh Nath, respondent no. 4, is Rajput by caste. His permanent or ancestral home is Gahmar but since 1943 he had been employed as a teacher in the Hindu Higher Secondary School at Zamania-a town 10 or 12 miles away-and he had been actually residing at village Baruin which is quite close to Zamania. The person for whom Dudh Nath 'personated' is Dudh Nath Kahar whose permanent house is at Jamuan, but his father lives at Baruin. Dudh Nath Kahar used to visit Baruin off and on but he was employed at Calcutta. The nomination paper filed by Dudh Nath gave his parentage and age which more properly applied to Dudh Nath Kahar.

He gave his father's name as Shiv Deni alias Ram Krit. Ram Krit is the name of Dudh Nath Kahar's father. The electoral roll (Exhibit-K) of Gahmar gives Dudh Nath's father's

name as Shio Deni with no alias and his age as 39, while the electoral roll of Pargana Zamania Monza Baruin (Exhibit C) gives Dudh Nath's father's name as Ram Krit and his age as 31. In the electoral roll of Jamuan Dudh Nath's age is entered as 34 but in the supplementary list it is mentioned as 30. When the nomination paper was filed on November 24, 1951, at 2.20 p.m. it was challenged by Vireshwar Nath Rai on the ground that Dudh Nath's father's name was Shivadeni and not Ram Krit but no proof was given in support of the objection and it was overruled on November 27. This order was passed at 1 p.m. One of the candidates, who later withdrew, filed an application at 3.25 p.m. before the Returning Officer offering to substantiate the objection which the objector had not pressed. This application was rejected on the ground that the nomination had already been declared as valid.

In point of fact no evidence was adduced. This acceptance of the nomination on the part of the Returning Officer is challenged as being improper under Section 36(6) of the Representation of the People Act and as the result of the election according to the objector has been materially affected by the improper acceptance of this nomination, the Tribunal is bound to declare the election to be wholly void under Section 100(1) (c) of the Act.

Mr. Daphtary on behalf of the appellant has argued before us with reference to the provisions of Sections 33 and 36 that this is not a case of improper acceptance of the nomination paper, because prima facie the nomination paper was valid and an objection having been raised but not pressed or substantiated, the Returning Officer had no option but to accept it. There was, as he says, nothing improper in the action of the, Returning Officer.

On the contrary, it may, according to him, be more appropriately described as a case of an acceptance of an improper nomination paper by the Returning Officer, in as much as the nomination paper contained an inherent defect which was not discernible ex facie and could be disclosed only upon an enquiry and upon the taking of evidence as to the identity which was not then forthcoming. Such a case, it is argued, is not covered by Section 100(1)(c) but by Section 100(2)(c) in which case the election of the returned candidate is alone to be declared void, whereas in the former case the election is wholly void. We do not propose to express any opinion upon this aspect of the matter, as in our view the appeal can be disposed of on the second question.

4. Section 33 of the Representation of the People Act, 1951, deals with the presentation of nomination paper and lays down the requirements for a valid nomination, On the date fixed for scrutiny of the nominations the Returning Officer is required to examine the nomination paper and decide all objections which may be made to any nomination, and after a summary enquiry, if any, as he thinks necessary, he is entitled to refuse nomination on certain grounds mentioned in sub-section (2) of Section 36.

Sub-section (6) lays down that the Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection. This sub-section shows that where the nomination paper is accepted, no reasons are required to be given. Section 100 gives the grounds for declaring an election to be void. The material portion is as follows:-

- (1) If the Tribunal is of opinion- (a) x x x (b) x x x

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination, the Tribunal shall declare the election to be wholly void.

It is under this sub-section that the election was sought to be set aside.

5. Before an election can be declared to be wholly void under Section 100(1) (c), the Tribunal must find that "the result of the election has been materially affected". These words have been the subject of much controversy before the Election Tribunals and it is agreed that the opinions expressed have not always been uniform or consistent.

These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate.

The next question that arises is whether the burden of proving this lies upon the petitioner who objects to the validity of the election. It appears to us that the volume of opinion preponderates in favour of the view that the burden lies upon the objector. It would be useful to refer to the corresponding provision in the English Ballot Act, 1872, Section 13 of which is as follows:-

No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the Tribunal having cognizance of the question 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.

This section indicates that an election is not to be declared invalid if it appears to the Tribunal that non-compliance with statutory rules or any mistake in the use of such forms did not affect the result of the election. This throws the onus on the person who seeks to uphold the election. The language of Section 100(1)(c), however, clearly places a burden upon the objector to substantiate the objection that the result of the election has been materially affected. On the contrary under the English Act the burden is placed upon the respondent to show the negative, viz., that the result of the election has not been affected.

This view was expressed in *Rai Bahadur Surendra Narayan Sinha v. Amulyadhane Roy* [*Indian Election cases* by Sen and Poddar, p. 188] by a Tribunal presided over by Mr. (later Mr. Justice) Roxburgh. The contention advanced in that case was that the petitioner having established an irregularity it was the duty of the respondent to show that the result of the election had not been materially affected thereby. The Tribunal referred to the provisions of Section 13 of the Ballot Act and drew a distinction between that section and the provisions of paragraph 7(1)(c) of Corrupt Practices Order which was more or less on the same lines as Section 100(1)(c).

They held that the onus is differently placed by the two provisions. While under the English Act the Tribunal hearing an election petition is enjoined not to interfere with an election if it appears to it that non-compliance with the rules or mistake in the use of forms

did not affect the result of the election, the provision of paragraph 7(1)(e) placed the burden on the petitioner. The Tribunal recognized the difficulty of offering positive proof in such circumstances but expressed the view that they had to interpret and follow the rule as it stood.

9. The learned counsel for the respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but he argues that the question can arise in one of three ways:

- (1) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,
- (2) where the person referred to above secured more votes, and
- (3) where the person whose nomination has been improperly accepted is the returned candidate himself.

It is agreed that in the first case the result of the election is not materially affected because if all the wasted votes are added to the votes of the candidate securing the (next) highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases it is contended that the result is materially affected. So far as the third case is concerned it may be readily conceded that such would be the conclusion.

But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate.

The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1) (c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere, in his favour and would allow the election to stand.

10. In two cases [*Lakhan Lal Mishra v. Tribeni Kumar*. (*Gazette of India (Extry.*) Feb. 2, 1953) and *Mandal Sumitra Devi v. Sri Surajnarain Singh* (*Gazette of India (Extry.*) February 26, 1953)] the Election Tribunal, Bhagalpur, had to consider the question of improper acceptance of the nomination paper. They agreed that the question whether the result of election had been materially affected must be proved by affirmative evidence. They laid down the following test:

If the number of votes secured by the candidate, whose nomination paper has been improperly accepted, is lower than the difference between the number of votes secured by the successful candidate and the candidate who has secured the next highest number of votes, it is easy to find that the result has not been materially affected. If, however, the number of votes secured by such a candidate is higher than

the difference just mentioned, it is impossible to foresee what the result would have been if that candidate had not been in the field. It will neither be possible to say that the result would actually have been the same or different nor that it would have been in all probability the same or different.

In both the cases the margin of votes between the successful candidates and the next highest candidate was less than the number of votes secured by the candidate whose nomination was improperly accepted. They held that the result was materially affected. We are unable to accept the soundness of this view. It seems to us that where the margin of votes is greater than the votes secured by the candidate whose nomination paper had been improperly accepted, the result is not only materially not affected but not affected at all; but where it is not possible to anticipate the result as in the above mentioned cases, we think that the petitioner must discharge the burden of proving that fact and on his failure to do so, the election must be allowed to stand.

11. The Tribunal in the present case rightly took the view that they were not impressed with the oral evidence about the probable fate of votes wasted on Dudh Nath Singh, but they went on to observe:

Considering that Dudh Nath respondent no. 4 received more votes than the margin of votes by which respondent no. 1 was returned we are constrained to hold that there was reasonable possibility of respondent no. 2 being elected in place of respondent no. 1, had Dudh Nath not been in the field.

We are of opinion that the language of Section 100(1) (c) is too clear too any speculation about possibilities. The section clearly lays down that improper acceptance is not to be regarded as fatal to the election unless the Tribunal is of opinion that the result has been materially affected. The number of wasted votes was 111. It is impossible to accept the *ipse dixit* of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the Legislature to consider.

13. The Tribunal misdirected itself in not comprehending what they had to find and proceeded merely upon a mere possibility. Their finding upon the matter is speculative and conjectural. The result is that we set aside the order of the Tribunal and hold that it is not proved that the result of the election has been materially affected by an improper acceptance of the nomination, assuming that the case falls within the purview of Section 36(6) and that finding is correct.

* * * * *

Chhedi Ram v. Jhilmit Ram

(1984) 2 SCC 281

CHINNAPPA REDDY, J. - At the General Election to the Uttar Pradesh Vidhan Sabha held in 1979, Jhilmit Ram was elected from the Jakhsuie Constituency reserved for the Scheduled Castes. He secured 17,822 votes, Chhedi Ram, the runner-up secured 17,449 votes. Thus, the difference between the successful candidate and the candidate who secured the next highest number of votes was 373 votes. There were four other candidates of whom Moti Ram secured 6710 votes. Chhedi Ram challenged the election of Jhilmit Ram on the ground that Moti Ram was a Kahar by caste, not entitled to seek election from the reserved constituency, that his nomination had been improperly accepted and that the result of the election was materially affected. The Election Tribunal found that Moti Ram was a Kahar by caste and not a member of the Scheduled Castes. It rejected the evidence offered on behalf of Moti Ram that he was a Gond and not a Kahar and recorded a finding that deliberate attempts had been made to manufacture evidence to show that Moti Ram was a Gond. The Tribunal also noticed that Moti Ram himself was not prepared to enter the witness box to give evidence. Having arrived at the finding that Moti Ram's nomination had been improperly accepted, however, the Tribunal was not prepared to set aside the election of Jhilmit Ram as it took the view that the result of the election had not been shown to have been materially affected as a result of the improper acceptance of the nomination. The election petition was, therefore, dismissed. Chhedi Ram has preferred this appeal.

2. We are afraid the appeal has to be allowed. Under Section 100(1)(d) of the Representation of the People Act, 1951, the election of a returned candidate shall be declared to be void if the High Court is of opinion that the result of the election, in so far as it concerns the returned candidate, has been materially affected by the improper acceptance of any nomination. True, the burden of establishing that the result of the election has been materially affected as a result of the improper acceptance of a nomination is on the person impeaching the election. The burden is readily discharged if the nomination which has been improperly accepted was that of the successful candidate himself. On the other hand, the burden is wholly incapable of being discharged if the candidate whose nomination was improperly accepted obtained a 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 both these situations, the answers are obvious. The complication arises only in cases where the candidate, whose nomination was improperly accepted, has secured a larger number of votes than the difference between the number of votes secured by the successful candidate and the number of votes got by the candidate securing the next highest number of votes. The complication is because of the possibility that a sufficient number of votes actually cast for the candidate whose nomination was improperly accepted might have been cast for the candidate who secured the highest number of votes next to the successful candidate, so as to upset the result of the election, but whether a sufficient number of voters would have so done, would ordinarily remain a speculative possibility only. In this situation, the answer to the question whether the result of the election could be said to have been materially affected must depend on the facts, circumstances and reasonable probabilities

of the case, particularly on the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, as compared with the number of votes secured by the candidate whose nomination was improperly accepted and the proportion which the number of wasted votes (the votes secured by the candidate whose nomination was improperly accepted) bears to the number of votes secured by the successful candidate. If the number of votes secured by the candidate whose nomination was accepted is not disproportionately large as compared with the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, it would be next to impossibility to conclude that the result of the election has been materially affected. But, on the other hand, if the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable probability is that the result of the election has been materially affected and one may venture to hold the fact as proved. Under the Indian Evidence Act, a fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. If having regard to the facts and circumstances of a case, the reasonable probability is all one way, a court must not lay down an impossible standard of proof and hold a fact as not proved. In the present case, the candidate whose nomination was improperly accepted had obtained 6,710 votes, that is, almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. Not merely that. The number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate—it was a little over one-third. Surely, in that situation, the result of the election may safely be said to have been affected.

3. The learned counsel for the respondents invited our attention to the decisions of this court in *Vashist Narain Sharma v. Dev Chandra* [AIR 1954 SC 513] and *Samant N. Balakrishna v. George Fernandez* [AIR 1969 SC 1201]. In *Vashist Narain* case, 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 largest number of votes was very nearly the same as the number of votes secured by the candidate whose nomination was improperly accepted. Unless it was possible to say that all the wasted votes would have gone to the candidate who secured the highest number of votes next to the successful candidate, it was not possible to hold that the result of the election had been materially affected. It was in those circumstances that Ghulam Hasan, J. observed:

But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say

that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many of which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1) (c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand.

4. We do agree with the observations of Ghulam Hasan, J. in the context of the facts of that case. It does not, however, mean that whatever the number of wasted votes and whatever the margin of difference between the number of votes secured by the successful candidate and the number of votes secured by the next highest candidate, the court would invariably hold that the result of the election had not been materially affected. In an appropriate case having regard to the margin of difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and the proportion which such margin bears to the wasted votes, it is permissible for the court to hold that the burden of proving that the result of the election has been materially affected has been discharged.

5. In **Samant Balakrishna** case, the court observed:

In our opinion the matter cannot be considered on possibility. **Vashist Narain** case insists on proof. *If the margin of votes were small something might be made of the points* mentioned by Mr. Jethamalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently huge. There is no room, therefore, for a reasonable judicial guess. The law requires proof. How far that proof should go or what it should contain is not provided by the Legislature. In **Vashist** case and in **Inayatullah v. Divanchand Mahajan** (15 ELR 210) the provision was held to prescribe an impossible burden. The law has however remained as before. We are bound by the rulings of this Court and must say that the burden has not been successfully discharged....

We do not think that this case lays down any different principle than what we have already said. On the other hand, the sentence underlined by us indicates that where the difference between the number of votes secured by the successful candidate and the number of votes secured by the second highest candidate is marginal, it may be possible in the circumstances of a case to hold that the burden has been discharged. We have already indicated our view that in this case, the burden has certainly been discharged.

6. In the circumstances, the appeal has to be allowed.

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Santosh Yadav v. Narender Singh

AIR 2002 SC 241

R.C. LAHOTI, J. - Pursuant to a notification issued by the Election Commission of India under Section 30 of the Representation of the People Act, 1951 (hereinafter the Act) in the month of January 2000, several constituencies, including 80-Ateli Assembly Constituency, in the State of Haryana, were called upon to elect members for the Haryana Legislative Assembly. Several nomination papers were filed on the dates appointed for filing nomination papers. After scrutiny held on 4th February and withdrawal of candidature by a few candidates on 7th February there were 17 candidates, including the appellant and respondent, who remained in the fray for 80-Ateli Constituency. It may be stated that Smt. Om Kala, wife of a candidate Shri Naresh Yadav, had also filed her nomination. She is alleged to be a cover candidate for her husband. Once the nomination of Shri Naresh Yadav was found to be in order and accepted Smt. Om Kala withdrew her candidature. The constituency went to polls on 25.2.2000. On counting, the contesting candidates were found to have secured the following numbers of votes:-

Sr.No.	Name of the candidate	Party affiliation	No. of valid votes polled
1.	Rao Om Parkash Engineer	BSP	5819
2.	Sh. Jagat Singh	JD[U]	113
3.	Sh. Narender Singh	INC	31755
4.	Sh. J.D. Yadav	HVP	500
5.	Smt. Santosh D/o Sh. Bhagwan Singh	INLD	31421
6.	Sh. Yogesh Kumar	RJD	205
7.	Sh. Laxmi Narain	SP	785
8.	Sh. Vinod Kumar	SJP[R]	212
9.	Sh. Om Parkash Yadav	IND	18
10.	Sh. Om Parkash	IND	178
11.	Sh. Naresh Yadav	IND	19855
12.	Comrade Balbir Singh	IND	476
13.	Sh. Ram Singh	IND	111
14.	Sh. Rama Nand Sharma	IND	194
15.	Smt. Santosh w/o Yudhvair	IND	40
16.	Sh. Satbir	IND	92
17.	Sh. Surender	IND	18

3. The respondent Shri Narender Singh who was a candidate sponsored by Indian National Congress having secured 31755 votes, the highest number of votes, was declared elected. Smt. Santosh, the appellant, who was a candidate sponsored by Indian National Lok Dal (INLD) secured 31421 votes i.e. next below the highest number of votes. Thus, there was a margin of 334 votes between the votes secured by the respondent and the appellant.

4. The appellant filed an election petition putting in issue the election of the respondent. One of the grounds taken in the election petition was that the nomination of Shri Naresh Yadav was improperly accepted as he had been convicted under Section 304-B and Section 498-A of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for

seven years and one year respectively, besides the fine, under the judgment and order of sentence pronounced by the Court of Sessions at Gurgaon on 31/3/1990. Though an appeal was filed by him before the High Court and the High Court had suspended the execution of the sentence of imprisonment, nevertheless he remained a person convicted of offences falling under clause (a) of sub-section (1) and sub-section (3) of Section 8 of the Act and hence disqualified. The plea as to disqualification of Shri Naresh Yadav has been upheld by the High Court. Neither the factum of conviction of Shri Naresh Yadav nor the disqualification flowing therefrom is in issue in this appeal. However, in spite of holding that the election held in Ateli Assembly Constituency was vitiated on account of nomination of Shri Naresh Yadav having been improperly accepted, the learned designated Election Judge of the High Court of Punjab and Haryana has refused to set aside the election of the respondent as, in his opinion, the election-petitioner/appellant has failed in discharging the onus of proving that the result of the election, in so far as it concerns the respondent (the returned candidate), had been materially affected. The election petition having been dismissed, the judgment of the High Court has been put in issue by this appeal preferred under Section 116-A of the Act. The question arising for decision in this appeal is: whether the High Court was right in forming the opinion that on the established facts and circumstances of the case the appellant had failed in proving that the election of the respondent was materially affected by improper acceptance of the nomination paper of Shri Naresh Yadav.

5. The appellant's case in this regard is that Shri Naresh Yadav was an active worker/leader of INLD and was closely associated and well acquainted with the cadre, workers, supporters and well-wishers of INLD. He was earlier a member of Bahujan Samaj Party (BSP) and had contested 1996 Assembly Elections on the BSP ticket. In August 1998, he joined INLD and actively participated in all the programmes, functions and activities of INLD carried by Shri Om Prakash Chautala, president of INLD and Shri Ajay Singh Chautala, president of the youth wing of INLD. The respondent had extensively toured the constituency accompanying Shri Om Prakash and Shri Ajay Singh. He was an aspirant of INLD ticket for contesting as an official candidate of INLD from 80-Ateli constituency. However, the choice of INLD fell on the appellant. Shri Naresh Yadav, having failed in getting the ticket of INLD, revolted and filed his nomination as an independent candidate. On account of his close association with the INLD cadre he secured a high number of votes cutting into pro-INLD and anti-Congress votes which would have otherwise been polled in favour of the petitioner. Shri Naresh Yadav secured 19855 votes, which is more than 59 times the margin of votes between the votes secured by the respondent and the appellant. If only the nomination paper of Shri Naresh Yadav would have been rejected and his candidature would have been excluded the votes polled by him would have definitely been polled by the appellant. There was a pro-INLD wave in the entire State of Haryana in the Assembly Elections of the year 2000. It was in effect an anti-Congress wave. The respondent could not have secured more votes than what he had secured and in as much as the votes secured by Shri Naresh Yadav were otherwise pro INLD votes, they would all have been diverted to the appellant. These averments have been denied by the respondent in his written statement as already stated. The learned designated Election Judge has formed an opinion, on appreciation of evidence, that the appellant had failed in substantiating the plea raised in the election petition. Almost similar arguments, as were advanced in the High Court, have been advanced

before this Court, of course with added vigour by the learned senior counsel for the appellant. Before we deal with the merits of the submission so made and enter into appreciation of evidence in the light of the submissions made, it will be useful to set out the relevant law.

7. The Parliament has drawn a clear distinction between an improper rejection of any nomination and the improper acceptance of any nomination. In the former case, to avoid an election, it is not necessary to further prove that the result of the election has been materially affected. The underlining reasoning for this was well set out by a Constitution Bench of this Court in ***Surender Nath Khosla v. S. Dalip Singh*** [AIR 1957 SC 242]. There is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election. The fact that one of several candidates for an election was kept out of the arena is by itself a very material consideration. The officer rejecting the nomination paper of a candidate may have kept out the most desirable candidate, the most desirable from the point of view of electors and the most formidable candidate from the point of view of the other candidates, from seeking election and therefore the Parliament felt that an improper rejection of any nomination paper is conclusive proof of the election being void and therefore dispensed with the need of evidence being tendered in proof of the result of the election having been materially affected. On the other hand, in the case of an improper acceptance of a nomination paper, proof is required by way of evidence demonstrating that the coming into the arena of an additional candidate has had the effect on the election in such a manner that the best choice of the electorate was excluded.

8. It is well settled by a catena of decisions that the success of a winning candidate at an election should not be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act, especially clause (d) of sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be avoided unless and until it was proved that the result of the election, in so far as it concerns a returned candidate, was materially affected.

9. A few decisions were cited at the Bar and it will be useful to look at them. In ***Vashist Narain Sharma v. Dev Chandra*** [AIR 1954 SC 513] the candidate whose nomination was improperly accepted had secured 1983 votes while the margin of votes between the winning candidate and the next below candidate was 1872. This court held that having called upon to record a finding that the result of the election has been materially affected, the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that wasted votes would have been so distributed between the contesting candidates as would have brought about the defeat of the returned candidate. The Court emphasized the need of proof by affirmative evidence and discarded the test of a mere possibility to say that the result could have been different in all probability. The question is one of fact and has to be proved by positive evidence. The Court observed that the improper acceptance of a nomination paper may have, in the result, operated harshly upon the petitioner on account of his failure to adduce the requisite positive evidence but the Court is not concerned with the inconvenience resulting from the operation of the law. The Court termed it impossible to accept the *ipse dixit* of witnesses coming from one side or the other to

say that all or some of the votes would have gone to one or the other on some. In ***Samant M. Balakrishna v. George Fernandez*** [AIR 1969 SC 1201] this Court recognized that proof of material effect on the result of the election in so far as a returned candidate is concerned on account of a miscarriage occasioned by improper acceptance of nomination paper at an election may be a simple impossibility. The judge has to enquire how the election would have gone if the miscarriage would not have happened and that enquiry would result virtually placing the election not in the hands of the constituency but in the hands of the Election Judge. The Court held that neither the matter could be considered on possibility nor there was any room for a reasonable judicial guess. The law requires proof; how far that proof should go or what it should contain is not provided by the legislature. In ***Shiv Charan Singh v. Chandra Bhan Singh*** [AIR 1988 SC 237] this court pointed out that proof of material effect on the result of the election in a case of improper acceptance of nomination paper involved the harsh and difficult burden of proof being discharged by the election petitioner adducing evidence to show the manner in which the wasted ballots would have been distributed amongst the remaining validly nominated candidates and in the absence of positive proof in that regard the election must be allowed to stand and the Court should not interfere with the election on speculation and conjectures.

10. All the above said decisions were referred to, dealt with and followed in a recent decision of this court in ***Tek Chand v. Dile Ram*** [(2001) 3 SCC 290]. This court held that the mere fact that the number of votes secured by a candidate whose nomination paper was improperly accepted, was greater (more than three times in that case) than the margin of the difference between the votes secured by the returned candidate and the candidate securing the next higher number of votes, was not by itself conclusive proof of material effect on the election of the returned candidate.

11. It is common knowledge that voting and abstention from voting, as also the pattern of voting, depend upon a complex variety of factors, which may defy reasoning and logic. Depending on a particular combination of contesting candidates and the political parties fielding them, the same set of voters may cast their ballots in a particular way and may respond differently on a change in such combination. Voters have a short-lived memory and not an inflexible allegiance to political parties and candidates. Election manifestos of political parties and candidates in a given election, recent happenings, incidents and speeches delivered before the time of voting may persuade the voters to change their mind and decision to vote for a particular party or candidate giving up their previous commitment of belief. In ***Paokai Haokip v. Rishang*** [AIR 1969 SC 663] this court has taken judicial notice of the fact that in India all the voters do not always go to the polls and that the casting of votes at an election depends upon a variety of factors and it is not possible for anyone to predicate how many or which proportion of votes will go to one or the other of the candidates.

12. The learned senior counsel for the appellant placed heavy reliance on ***Chhedi Ram v. Jhilmit Ram*** [AIR 1984 SC 146] and submitted that the ratio of the decision squarely applies to the present case and should govern the decision thereof. It was submitted that in ***Chhedi Ram*** case the candidate whose nomination was improperly accepted had obtained 6710 votes which was almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. So also the

number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate - a little over 1/3rd. The learned senior counsel submitted that on availability of these twin factors it was held by this Court that the result of the election might safely be said to have been affected; while the case of the present appellant stands on a much better footing in as much as the number of votes secured by Shri Naresh Yadav is almost 59 times of the margin between the votes secured by the appellant and the respondent.

13. At the first blush the submission appears to be attractive but is found to be devoid of merit on closer scrutiny. *Chhedi Ram* case came up for the consideration of this Court at least on three occasions. In *Shiv Charan's case* and *Tek Chand* case, this Court has held that *Chhedi Ram* case rested on its own facts and did not overrule the earlier decisions of this Court namely the decisions in *Vashisht Narain Sharma* case and *Samant N. Balakrishna* case. In *Chhedi Ram* case not only the proportion of wasted votes was 20 times of the margin, there were six candidates in all in the election fray. The Court formed an opinion that a reasonable probability was raised in favour of holding that the result of the election had been materially affected. The decision in *Chhedi Ram* case does not set out detailed facts and circumstances and the nature of the evidence adduced which may have persuaded the Court in arriving at a finding in favour of the election petitioner. In view of the earlier decisions of this Court existing before *Chhedi Ram* case was decided, it cannot be held that merely because the number of wasted votes bears a high degree of proportion to the margin of votes between the winning candidate and the next highest candidate, an inference must always be drawn that the result of the election was materially affected in so far as the returned candidate is concerned. There must be definite evidence available before the Court enabling an inference being drawn as to how the wasted votes would have been distributed amongst the contesting candidates. The Court cannot conjecturise or return findings on surmises.

14. Observations in *Shiv Charan Singh* case are pertinent and apposite. It is no doubt true that the burden which is placed by law on the election petitioner is very strict; even if it is strict it is for the courts to apply it. It is for the Legislature to consider whether it should be altered. If there is another way of determining the burden, the law should say it and not the courts. It is only in given instances that, taking the law as it is the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not.

15. A word about the pleadings. Section 83 of the Act mandates an election petition to contain a concise statement of the material facts on which the petitioner relies. The rules of pleadings enable a civil dispute being adjudicated upon by a fair trial and reaching a just decision. A civil trial, more so when it relates to an election dispute, where the fate not only of the parties arrayed before the Court but also of the entire constituency is at a stake, the game has to be played with open cards and not like a game of chess or hide and seek. An election petition must set out all material facts wherefrom inferences vital to the success of the election petitioner and enabling the Court to grant the relief prayed for by the petitioner can be drawn subject to the averments being substantiated by cogent evidence. Concise and specific pleadings setting out all relevant material facts, and then cogent affirmative evidence being adduced in support of such averments, are indispensable to the success of an election

petition. An election petition, if allowed, results in avoiding an election and nullifying the success of a returned candidate. It is a serious remedy. Therefore, an election petition seeking relief on a ground under section 100 (1) (d) of the Act, must precisely allege all material facts on which the petitioner relies in support of the plea that the result of the election has been materially affected. Unfortunately in the present case all such material facts and circumstances are conspicuous by their absence.

16. The law as regards the result of election having been materially affected in case of improper acceptance of nomination may be summed up as under : -

(1) A case of result of the election, in so far as it concerns the returned candidate, having been materially affected by the improper acceptance of any nomination, within the meaning of Section 100(1)(d)(i) of the Representation of the People Act, 1951 has to be made out by raising specific pleadings setting out all material facts and adducing cogent evidence so as to enable a clear finding being arrived at on the distribution of wasted votes, that is, the manner in which the votes would have been distributed if the candidate, whose nomination paper was improperly accepted, was not in the fray.

(2) Merely because the wasted votes are more than the difference of votes secured by the returned candidate and the candidate securing the next highest number of votes, an inference as to the result of the election having been materially affected cannot necessarily be drawn. The issue is one of fact and the onus of proving it lies upon the petitioner.

(3) The burden of proving such material effect has to be discharged by the election petitioner by adducing positive, satisfactory and cogent evidence. If the petitioner is unable to adduce such evidence the burden is not discharged and the election must stand. This rule may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but the Court is not concerned with the inconvenience resulting from the operation of the law. Difficulty of proof cannot obviate the need of strict proof or relax the rigour of required proof.

(4) The burden of proof placed on the election petitioner is very strict and so difficult to discharge as nearing almost an impossibility. There is no room for any guess work, speculation, surmises or conjectures i.e. acting on a mere possibility. It will not suffice merely to say that all or majority of wasted votes might have gone to the next highest candidate. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature.

(5) The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. It is not permissible to accept the *ipse dixit* of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground.

17. Having so stated the law, we now proceed to assess and evaluate the evidence adduced by the parties.

18. In all there are 10 witnesses examined on behalf of the election petitioner/appellant. Balwant Singh, PW 1, the Returning Officer has deposed to only certain undisputed facts. Sant Lal, PW 2, has produced result-sheets of Haryana State Legislative Assembly Elections held in the years 1982, 1987, 1991, 1996 and 2000. Pawan Kumar, PW 3, is a photographer

and Ashok Wadhwa, PW 4, and Rohtas Yadav, PW 5, are press-reporters, who have deposed to Shri Naresh Yadav having joined INLD publicly in early August, 1998 in the presence of Shri Om Prakash Chautala and other leaders of INLD which is a fact not disputed by the respondent at this stage. Ram Kumar, PW 6, District Office Secretary of INLD, has deposed to Shri Naresh Yadav and the appellant - both having been aspirants for INLD party ticket but in mid-September, 1998 the ticket having been denied to Shri Naresh Yadav and the appellant having been given the party ticket where after Shri Naresh Yadav made a rebellion and chose to contest as an independent candidate. Again, this is also a fact not seriously disputed at this stage. The statements of remaining four witnesses are relevant and need to be scrutinized for the purpose of deciding the main controversy in this appeal.

19. Bali Ram, PW 7, is a resident of village Silarpur while Sher Singh, PW 8, is a resident of village Shyampura. Both of them have deposed to there having been two main groups in their respective villages in the election. The two groups were of the Congress and the INLD. None of them speaks of having any knowledge about the entire constituency. None of the two has deposed to, he himself having been a voter and exercised his own franchise. Bali Ram, PW 7, states Shri Naresh Yadav having made in-roads into the votes of the appellant. Obviously, the statement is confined to his own village. Sher Singh, PW 8, too deposed that Shri Naresh Yadav contesting as an independent candidate affected the votes of INLD and those votes were not in favour of Congress. What has been stated by these two witnesses does not go beyond being *ipse dixit* of the witnesses. There is nothing on record to show how many voters were there in the two villages and which way the polling went as amongst the different candidates.

20. Smt. Santosh Yadav, PW 9, the appellant herself, deposed about some party workers having gone with Shri Naresh Yadav without disclosing the names of such party workers. She further stated that the party votes were divided because Shri Naresh Yadav asked for the votes in the name of Shri Om Prakash Chautala a fact not alleged in the election petition. This is apart from the fact that who were such voters and at what point of time they were asked to vote for Shri Naresh Yadav is neither averred in the pleadings nor stated in her statement. According to her own admission Shri Om Prakash Chautala was touring the constituency and had come to support her in the constituency. Satbir Singh, PW 10, is General Secretary of INLD of District Mohindergarh and was in-charge of election campaigning in 80-Ateli Constituency in February, 2000. He claims to have toured the 80-Ateli Constituency during the elections and therefrom he deposed that on account of Shri Naresh Yadav having contested as an independent candidate many of the workers and voters of INLD supported him. The statement has remained as vague and general as is of the appellant herself. The witnesses PW 7, PW 8 and PW 10, are all party workers and would naturally have some bias in favour of their own party and would be obviously interested in the success of the appellant in the election petition. There evidence also does not advance the case of the appellant.

21. The documents which have been brought on record by the election petitioner show the State level results of Haryana. But what is relevant is the trend of voting and distribution of votes amongst contesting candidates in 80-Ateli Constituency and not necessarily the entire State. The election petitioner did not bring on record Form 20 document for the year 2000 elections or of the earlier elections so as to spell out what was the trend of voting in this

particular Constituency. Form 21-E tendered in evidence establish that in the past elections, it was the Congress Party which had won election in 80-Ateli in 1982, 1991 and 1996. In 1982 elections Congress (J) candidate was returned to Legislative Assembly having secured 27298 votes and Shri Banshi Singh, father of Shri Naresh Yadav secured 27105 votes and lost. In 1991, Shri Banshi Singh secured 19343 votes as a Congress candidate and won the election. In the year 1996 there were 47 candidates contesting from 80-Ateli constituency. INC candidate won having secured 22114 votes. However, Om Prakash Engineer contesting on Haryana Vikas Party ticket, Ajit Singh (Samajvadi Party), Naresh Yadav (BSP), Nihal Singh (Samta Party) and Bharat Singh (Independent) secured 19270, 15686, 9846, 7534 and 3328 respectively. In the year 2000 itself one Shri Om Prakash Engineer, a BSP candidate secured 5819 votes, not a totally insignificant number and in the event of Shri Naresh Yadav being excluded he would also have shared some of the wasted votes, apart from other candidates out of 17 in all. No definite trend or mood of voters is, thus, projected from the statistics so made available. In *Paokai Haokip* case, Chief Justice M. Hidayatullah said that statistics cannot be called in aid to prove such facts, because it is notorious that statistics can prove anything and made to lie for either case. It has also come in the evidence that father of Naresh Yadav has been a Sarpanch and Smt. Om Kala, the wife of Shri Naresh Yadav is herself active in politics and contested several elections. She had contested Zila Parishad Elections within the constituency of Ateli on two occasions and on both occasions she was elected. In the year 1996, Shri Naresh Yadav had contested elections as the candidate of Bahujan Samaj Party and had polled 9846 votes, almost half of the votes polled by him in the impugned elections. Thus, Shri Naresh Yadav and his family members are active in politics and they have their own political base. Shri Naresh Yadav does not have any fixed party affiliation; he has been often changing his party membership. It can not therefore be said that the votes which he secured were necessarily a cut into INLD vote bank. It is difficult to agree with the submission of the learned senior counsel for the appellant that while as a candidate of BSP, Shri Naresh Yadav polled 9846 votes in 1996 elections, his rise by 9885 votes in the year 2000 elections should be attributed to, and be treated as, a cut into INLD votes and these 9885 votes or a major chunk of them would have otherwise gone to the appellant. Shri Naresh Yadav having been continuously in politics, he may have gradually strengthened his political base and thereby secured a spurt in the number of his voters and supporters. It needs hardly any evidence to hold, as one can safely assume that the appellant must have openly and widely propagated herself as INLD candidate and made it known to the constituency that she was the official candidate sponsored by INLD and Shri Naresh Yadav was not an INLD sponsored candidate and was a defector. Therefore, it is difficult to subscribe to the suggested probability that any voter committed to INLD ideology would have still voted for Shri Naresh Yadav merely because he had for a period of two years before defection remained associated with INLD.

22. In *Vashist Narain Sharma* case, the election petitioner made an attempt at discharging the onus of proof by producing a number of electors before the Tribunal who had stated that all or some of the votes would have gone to the candidate who had polled the next highest number of votes and in the absence of the improperly nominated candidate he would have polled majority of valid votes. It was held that the statement of the witnesses as to in what manner votes would have been distributed among the remaining contesting candidates

could not be relied upon in determining the question of material effect on the election of the returned candidate. The Court observed that it was impossible to accept *ipse dixit* of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary grounds. In ***Paokai Haokip*** case witnesses were brought forward to state that a number of voters did not vote because of the change of venue and certain other incidents. This Court held that this kind of evidence was merely an assertion on the part of a witness who could not have spoken for 500 voters. The Court also refused to accept the statement even of village Headman that the whole village would have voted in favour of one candidate to the exclusion of the other.

23. The learned senior counsel for the appellant extensively read out a few passages from the decision of this Court in ***Tek Chand*** case. The passages relate to marshalling of evidence. During discussions this Court has made certain observations as to the missing pieces of the facts and circumstances which by their absence had a debilitating effect on the evidence adduced. The learned senior counsel submitted that the evidence which was missing in ***Tek Chand*** case has been adduced and made available in the present case and therefore the finding on the crucial issue should lean in favour of the appellant. We are afraid such a submission can not be accepted. We see no acceptable logic behind the argument that if what was missing in ***Tek Chand*** case, would have been available, the finding would necessarily have been in favour of the election petitioner.

24. We also do not see force in the submission of the learned senior counsel for the respondent that Smt. Om Kala had withdrawn her candidature because of her husband's nomination having been accepted and if the nomination of her husband Shri Naresh Yadav would have been rejected than she being a cover candidate, would have contested the election and therefore the result of the election can not be said to have been materially affected. Suffice it to observe that we have to deal with what has happened and not with an imaginary situation which could have happened but did not happen.

25. In our opinion, on the pleadings and the evidence adduced, the election petitioner/appellant has utterly failed in demonstrating the pattern of voting in 80-Ateli Constituency. There were 17 contesting candidates in the field. It is difficult to make a reasonable guess, much less with any certainty, that if Shri Naresh Yadav was excluded then such number of votes would have been taken out of the votes polled by him and fallen into the box of appellant as to make her successful.

26. In as much as we have found, agreeing with the High Court that the election petitioner/appellant has failed in discharging the heavy burden, which lay on her, of proving that the result of election, in so far as it concerns the returned candidate i.e., the respondent, has been materially affected by the improper acceptance of the nomination of Shri Naresh Yadav, the judgment of the High Court cannot be faulted. The appeal and the cross objections, are held liable to be dismissed and are dismissed accordingly, though without any order as to the costs.

* * * * *

Ram Phal Kundu v. Kamal Sharma

AIR 2004 SC 1657

G.P. MATHUR, J. - This appeal under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") has been preferred by the returned candidate Ram Phal Kundu against the judgment and order dated 8.5.2003 of High Court of Punjab and Haryana by which the election petition preferred by Kamal Sharma was allowed and the election of the appellant from 50-Safidon Assembly Constituency to the Haryana Vidhan Sabha was set aside and a direction was issued to the Election Commission of India to hold a fresh election for the said constituency.

2. The Election Commission of India issued a notification on 24.1.2000 calling upon the electors of Haryana to elect 90 members to the Haryana Vidhan Sabha including that from 50-Safidon Assembly Constituency (Distt. Jind). The schedule for holding the elections was as under:

Filing of nomination papers	:	27.1.2000 to 3.2.2000
Scrutiny of nomination papers	:	4.2.2000
Last date for withdrawal of candidature	:	7.2.2000
Allotment of Symbols	:	7.2.2000 after 3.00 p.m.
Date of polling, if necessary	:	22.2.2000
Counting of votes	:	25.2.2000

3. The appellant Ram Phal Kundu filed his nomination paper as a candidate of Indian National Lok Dal Party ('Lok Dal Party'). The respondent Kamal Sharma and Bachan Singh, both filed their nomination papers claiming to be candidates of Indian National Congress Party ('Congress Party'). The Returning Officer accepted the nomination paper of Bachan Singh as candidate of Congress Party and rejected that of Kamal Sharma. The election was held on 22.2.2000 as scheduled and the appellant Ram Phal Kundu secured the highest number of valid votes and was declared to have been elected. Kamal Sharma then filed an election petition under Sections 80, 81 read with Section 100 of the Act for setting aside the election of the appellant Ram Phal Kundu and for declaring his election as void. A further prayer was made that the Election Commission be directed to hold a fresh election to the said Assembly Constituency. After trial of the petition, the High Court allowed the election petition on the ground that the nomination paper of Kamal Sharma was wrongly rejected. Accordingly, the election of the appellant Ram Phal Kundu was set aside and the Election Commission was directed to hold a fresh election.

4. The case set up by Kamal Sharma in the election petition is as follows:

The election petitioner applied to the Congress Committee for sponsoring his name for the 50-Safidon Assembly Constituency to contest the election as a candidate of the said party. The Central Election Committee of the party vide Press release dated 2.2.2000 selected him as its candidate for the said Constituency. Shri Motilal Vora, General Secretary of the party issued Form A in the name of Shri Bhupinder Singh Hooda, President, Haryana Pradesh Congress Committee as the authorised person to intimate the names of the candidates to be set up by the party in the election. Shri Bhupinder Singh Hooda then communicated to the

Returning Officer, 50-Safidon Assembly Constituency the name of the election petitioner Kamal Sharma as an approved candidate of the Congress Party in Form B. The election petitioner filed his nomination paper as a candidate of Congress Party at 12.20 p.m. on 3.2.2000 before the Returning Officer. During the course of scrutiny proceedings on 4.2.2000 it was revealed that another candidate, namely, Bachan Singh had also filed his nomination paper at 2.50 p.m. on 3.2.2000 claiming himself as a candidate set up by the Congress Party. The scrutiny proceedings were adjourned to 5.2.2000. Shri Bhupinder Singh Hooda filed an affidavit dated 4.2.2000 before the Returning Officer that the election petitioner Kamal Sharma was the only person nominated as a candidate of the Congress Party and any other unsealed authorisation letter of the party submitted by someone else was not valid. Shri Bhupinder Singh Hooda also wrote to the Chief Election Commissioner, New Delhi that Kamal Sharma was the only officially approved candidate of the Congress Party. The scrutiny proceedings were conducted by the Returning Officer on 5.2.2000, who after hearing counsel for the parties, wrote out a hand written order dismissing the objection filed by the election petitioner Kamal Sharma and rejecting his nomination paper. The nomination paper of Bachan Singh as a candidate of the Congress Party was accepted. The election petitioner was the only official candidate of the Congress Party as Forms A and B submitted by him along with his nomination paper were duly signed and stamped by the seal of the party, whereas Form B submitted by Bachan Singh did not bear the seal of the party and was consequently invalid. The Returning Officer committed a grave illegality in overlooking another essential requirement of law that Form B submitted by Bachan Singh had not reached the office of the Chief Electoral Officer, Haryana within the prescribed time limit. The election petitioner then filed a petition before the Chief Election Commissioner, New Delhi on 6.2.2000, who by order dated 7.2.2000 set aside the order dated 5.2.2000 passed by the Returning Officer and directed him to conduct a fresh scrutiny at 10.00 a.m. on 8.2.2000. The Returning Officer, thereafter, gave notice to election petitioner Kamal Sharma, Bachan Singh and Shri Bhupinder Singh Hooda, who appeared before him and stated that Form B furnished by Bachan Singh was not issued by his approval and that the election petitioner was the only authorised candidate of the party. However, the Returning Officer passed an order at 4.30 p.m. on 8.2.2000 dismissing the objection raised by the election petitioner and allotted the Symbol of the Congress Party to Bachan Singh. The result of the election was declared on 25.2.2000 and out of 85,742 valid votes polled, the appellant Ram Phal Kundu secured 45,382 valid votes and was declared as elected. In para 25 of the petition it is pleaded that there was no proper authorisation by the Congress Party in favour of Bachan Singh as the Form B submitted by him did not contain the seal of the party and on account of wrongful rejection of the nomination paper of the election petitioner Kamal Sharma, the election of Ram Phal Kundu was vitiated.

5. The appellant Ram Phal Kundu contested the election petition on the ground, inter alia, that though the election petitioner produced Forms A and B before the Returning Officer that he is the nominee of the Congress Party, but subsequently Bachan Singh produced Forms A and B that he had been nominated by the Congress Party as a candidate for 50-Safidon Assembly Constituency. In Form B submitted by Bachan Singh the nomination of the election petitioner Kamal Sharma was rescinded and it was specifically mentioned that the Congress Party had changed its candidate and had nominated Bachan Singh as its official candidate.

The notice in Form B as per amended Clause 13 of Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as 'the Symbols Order') is required to be produced before the Returning Officer before 3.00 p.m. and there is no requirement that the same should also reach or produced before the Chief Electoral Officer. The nomination paper of election petitioner was filed along with requisite forms at 12.20 p.m. on 3.2.2000 whereas Bachan Singh had filed his nomination paper at 2.50 p.m. on 3.2.2000 and had submitted Forms A and B. Thereafter, no further notice in Form B was received by the Returning Officer. The Form B submitted by the election petitioner is dated 2.2.2000 whereas the Form B submitted by Bachan Singh at 2.50 p.m. on 3.2.2000 wherein Shri Bhupinder Singh Hooda had himself mentioned that the candidature of the election petitioner Kamal Sharma was rescinded is dated 3.2.2000. It is further pleaded that the letter of Shri Bhupinder Singh Hooda said to have been submitted on 4.2.2000 before the Returning Officer, is of no consequence and could not be taken into consideration in view of paras 13 and 13A of the Symbols Order which provide that the notice in writing in Form B regarding the declaration of the official candidate has to be made and submitted before the Returning Officer up to 3.00 p.m. on the last date of filing nomination papers and not thereafter. Shri Bhupinder Singh Hooda had not denied his signature on the authorisation Form B in favour of Bachan Singh in the affidavits filed by him on 4th and 5th February, 2000 and the same having been filed subsequent to 3.00 p.m. on the last date of filing of the nomination paper were of no consequence. The fact that the seal of the party was not present in Form B of Bachan Singh was of no consequence as it is not a defect of substantial character and under paras 13 and 13A of the Symbols Order only the signature of the authorised person is required and it is nowhere provided that the Form must contain the seal of the party. It is also pleaded that the Election Commission of India has no authority to set aside the order of the Returning Officer rejecting a nomination paper and to direct him to reconsider the matter. No appeal or revision lies to the Election Commission of India against an order rejecting a nomination paper. In para 22 it is pleaded that Bachan Singh contested the election as a candidate of the Congress Party and the appellant won the said election by a margin of 8,324 votes, having secured more than 55% of the actual votes polled. The nominee of the Congress Party was very much there in the election fray but the appellant was declared as elected. All the important leaders of Congress Party at the State level and the national level, including Shri Motilal Vora and others had campaigned for Bachan Singh. In the newspapers of 3.2.2000 it had been reported that the Congress Party had changed its candidate from Kamal Sharma to Bachan Singh.

6. It may be mentioned at the very outset that the election petitioner Kamal Sharma impleaded the returned candidate Ram Phal Kundu as the sole respondent and no other person was joined as party to the election petition. Though there is not even a whisper against the appellant Ram Phal Kundu and the entire allegations are against Bachan Singh but he was not arrayed as a party to the election petition. Strictly speaking it is not a case of rejection of nomination paper but of ascertaining who was the candidate of the Congress Party as two persons had filed nomination papers claiming to be the candidate of the said party. Since only one person can be a candidate of a political party and after acceptance of the candidature of Bachan Singh, the nomination paper of the election petitioner Kamal Sharma could be treated as that of an independent candidate. But as it was not subscribed by 10 proposers being electors of the constituency, it had to be rejected in view of First Proviso to sub-section(1) of

Section 33 of the Act. The non-joining of Bachan Singh may not result in dismissal of the election petition in terms of Section 82 of the Act. However, in absence of Bachan Singh having been joined as party to the election petition, an extremely difficult burden has been placed upon the appellant Ram Phal Kundu, who belongs to rival party (Lok Dal), to lead evidence regarding the internal affairs of Congress Party and to show that the nomination made in favour of Kamal Sharma had been subsequently rescinded and the party had set up Bachan Singh as its official candidate.

7. The main question which requires consideration is as to which of the two persons, namely, Kamal Sharma or Bachan Singh had been set up by the Congress Party. Paras 13 and 13A of Election Symbols (Reservation and Allotment) Order, 1968, as amended by Clause 3 of Election Symbols (Reservation and Allotment) (Amendment) Order, 1999, which came into force on 20.5.1999, which govern the situation read as under:

13. When a candidate shall be deemed to be set up by a political party - For the purposes of an election from any parliamentary or assembly constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any such parliamentary or assembly constituency, if, and only if –

(a) the candidate has made the prescribed declaration to this effect in his nomination paper;

(b) a notice by the political party in writing, in Form B, to that effect has, not later than 3 p.m. on the last date of making nominations, been delivered to the Returning Officer of the constituency;

(c) the said notice in Form B is signed by the President, the Secretary or any other office bearer of the party, and the President, Secretary or such other office bearer sending the notice has been authorised by the party to send the notice;

(d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the constituency, and to the Chief Electoral Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and

(e) Forms A and B are signed, in ink only, by the said office bearer or person authorised by the party:

Provided that no facsimile signature or signature by means of rubber stamp, etc., of any such office bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted.

13A. Substitution of a candidate by a political party - For the removal of any doubt, it is hereby clarified that a political party which has given a notice in Form B under paragraph 13 in favour of a candidate may rescind that notice and may give a revised notice in Form B in favour of another candidate for the constituency.

Provided that the revised notice in Form B, clearly indicating therein that the earlier notice in Form B has been rescinded, reaches the Returning Officer of the constituency, not later than 3 p.m. on the last date for making nominations, and the said revised notice in Form B is signed by the authorised person referred to in clause (d) of paragraph 13.

Provided further that in case more than one notice in Form B is received by the Returning Officer in respect of two or more candidates, and the political party fails to indicate in such notices in Form B that the earlier notice or notices in Form B, has or have been rescinded, the Returning Officer shall accept the notice in Form B in respect of the candidate whose nomination paper was first delivered to him, and the remaining candidate or candidates in respect of whom also notice or notices in Form B has or have been received by him, shall not be treated as candidates set up by such political party.

In terms of paras 13 and 13A of the Symbols Order, a candidate shall be deemed to be set up by a political party if the following conditions are fulfilled:

(1) The candidate has made the prescribed declaration to that effect in his nomination paper.

(2) A notice by the political party in Form B to that effect has been delivered to the Returning Officer not later than 3.00 p.m. on the last date for making nomination.

(3) The notice in Form B is signed by the President, Secretary or any other office bearer of the party and such person sending the notice has been authorised by the party to send the notice.

(4) The name and specimen signature of such authorised person are communicated by the party in Form A to (i) the Returning Officer; and (ii) the Chief Electoral Officer of the State or Union Territory concerned not later than 3.00 p.m. on the last date for making nomination.

(5) A political party which has given a notice in Form B in favour of candidate may rescind that notice and may give a revised notice in Form B in favour of another candidate, provided such revised notice in Form B clearly indicating therein that the earlier notice in Form B has been rescinded, reaches the Returning Officer not later than 3.00 p.m. on the last date for making nomination and such revised notice in Form B is signed by the authorised person referred to in Clause (d) of para 13.

(6) Forms A and B have to be signed in ink only by the office bearer or authorised person. No facsimile signature or signature by means of rubber stamp and no form transmitted by fax shall be accepted.

It may be noted that while Form A has to be submitted to both the Returning Officer of the Constituency and to the Chief Electoral Officer of the State, but there is no such requirement with regard to Form B. Form B has to be delivered only to the Returning Officer of the Constituency. The Symbols Order has made a specific provision that Forms A and B have to be signed in ink only and signature by means of rubber stamp, etc. shall not be accepted. In terms of the language used in paras 13 and 13A of the Symbols Order there is no requirement of putting the seal of the party in Forms A and B.

8. There is no dispute that Shri Motilal Vora, General Secretary of the Congress Party had sent a communication in Form A that Shri Bhupinder Singh Hooda had been authorised by the Indian National Congress to intimate the names of the candidates proposed to be set up by the party at the election and the said document Ex. PW2/M is on the record. A notice in Form B in favour of 'Kamal' dated 2.2.2000 signed in ink by Shri Bhupinder Singh Hooda was given by the election petitioner to the Returning Officer at 12.20 p.m. and it is marked as

Ex.PW2/L. Another notice in Form B dated 3.2.2000 in favour of Bachan Singh and signed in ink by Shri Bhupinder Singh Hooda was given by Bachan Singh to the Returning Officer at 2.50 p.m. on 3.2.2000 and it is marked as Ex.PW4/A. At the bottom of this form it is mentioned as under:

The notice in 'Form B' given earlier in favour of Shri Kamal s/o Janardhan as party's approved candidate, Smt Kusum w/o Kamal as party's substitute candidate is hereby rescinded.

Below this writing there is signature of Shri Bhupinder Singh Hooda. In his cross-examination PW5 Shri Bhupinder Singh Hooda has admitted that Form B in favour of Bachan Singh contains his signature. He stated as under:

...It is correct that document Ex.PW4/A which is Form B in favour of Shri Bachan Singh Arya bears my signatures. Volunteered I am admitting only my signatures and not the contents of the Form...

Towards the end of his cross-examination he stated as under:

On Form B issued to Shri Bachan Singh Arya I only own signature on this Form but I do not own the contents given in it.

Thus, there is no dispute that Form B submitted by Bachan Singh contained a categorical statement to the effect that the notice given in Form B earlier in favour of Kamal Sharma as party's approved candidate and Smt. Kusum w/o Shri Kamal as party's substitute candidate is rescinded and the said Form B had been signed in ink by Shri Bhupinder Singh Hooda, who had been nominated as authorised person of the Congress Party. There is also no dispute that the Form B submitted by Bachan Singh was later in point of time and had been given at 2.50 p.m. on 3.2.2000 when the last time and date for filing of the nomination paper was 3.00 p.m. on 3.2.2000.

9. In his statement PW6 Kamal Sharma has stated that in the list released by All India Congress Committee on 2.2.2000 his name was mentioned as a candidate for 50-Safidon Assembly Constituency. In the night he collected Forms A and B from the Camp Office and submitted his nomination paper along with Forms A and B to the Returning Officer. A letter written by Shri Bhupinder Singh Hooda wherein it was mentioned that Kamal Sharma is the candidate of Congress Party from 50-Safidon Constituency and no one else was a candidate, was delivered to the Returning Officer on 4.2.2000. This letter is on the record as Ex.PW2/J and it bears an endorsement by the Returning Officer that the same was received by him at 11.00 a.m. on 4.2.2000. He has also stated that the Returning Officer had a telephonic talk with Shri Hooda and thereafter an affidavit duly sworn by him on 4.2.2000 that Kamal is the only nominated candidate of the Congress Party, was also given. This affidavit also bears the endorsement of the Returning Officer that the same was received by him at 11.00 a.m. on 4.2.2000. PW5 Shri Bhupinder Singh Hooda has deposed that the name of Bachan Singh was under consideration as a Congress candidate but it was never finalised and, therefore, no Form B was issued to him and that Kamal Sharma was the candidate of the party. At about 3.30 p.m. on the last date of filing nomination, he received information that two nomination forms had been submitted on behalf of the Congress Party and thereafter he sent a letter through special messenger to the Returning Officer that Kamal Sharma is the official candidate. After

receiving a telephonic call from the Returning Officer on 4.2.2000, he informed him that Kamal Sharma is the official candidate and thereafter he sent an affidavit to that effect. He has further deposed that he wrote a letter to the Chief Election Commissioner and Chief Electoral Officer in this regard. Thus, the election petitioner Kamal Sharma has led evidence to show that after it had been revealed that Bachan Singh had also filed his nomination paper as a candidate of the Congress Party, he lodged a protest before the Returning Officer on the next day i.e. 4.2.2000 and Shri Bhupinder Singh Hooda telephoned to him and also sent a letter and an affidavit that only Kamal Sharma was the official candidate. But all these letters and affidavits, etc. were received by the Returning Officer on 4.2.2000 and on subsequent dates.

10. The question that arises is whether this evidence, which is all subsequent to the last date of filing of the nomination paper, can be looked into in order to ascertain as to who had been set up as a candidate by the Congress Party.

11. The Election Symbols (Reservation and Allotment) Order, 1968 has been made in exercise of power conferred by Article 324 of the Constitution read with Section 29A of the Representation of the People Act, 1951 and Rules 5 and 10 of the Conduct of Election Rules, 1961 and all other powers enabling it in this behalf by the Election Commission of India. In **Sadiq Ali v. Election Commission of India** [AIR 1972 SC 187] the Court explained the reasons which led to the introduction of the symbols and it was said that the object is to ensure that the process of election is as general and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice. In **Roop Lal Sathi v. Nachhattar Singh** [AIR 1982 SC 1559] it has been held that the Symbols Order is an order made under the Act.

12. Paras 13 and 13A of the Symbols Order lay down the mechanism for ascertaining when a candidate shall be deemed to be set up by a political party and also the procedure for substitution of a candidate. The opening part of para 13 says in unequivocal terms that for the purpose of an election for any Parliamentary or Assembly Constituency a candidate shall be deemed to be set up by a political party if and only if the conditions mentioned in sub-paragraphs (a) to (e) are satisfied. Para 13A lays down the procedure for substitution of a candidate, and also the requirements of a revised notice in Form B. The second proviso to this paragraph takes care of a situation where more than one notice in Form B is received by the Returning Officer and the political party fails to indicate in such notices in Form B that the earlier notice or notices have been rescinded. Thus, paras 13 and 13A are exhaustive and lay down the complete procedure for determining whether a candidate has been set up by a political party. The Rule laid down in **Taylor v. Taylor** [1876 (1) Ch.D. 426] that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden was adopted for the first time in India by the Judicial Committee of the Privy Council in **Nazir Ahmad v. King Emperor** [AIR 1936 PC 253]. The question for consideration was whether the oral evidence of a Magistrate regarding the confession made by an accused, which had not been recorded in accordance with the statutory provisions viz. Section 164 Cr.P.C. would be admissible. The First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put

in evidence. The Magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with Section 164 Cr.P.C. had not been followed. It was held that Section 164 Cr.P.C. having made specific provision for recording of the confession, oral evidence of the Magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In *State of U.P. v. Singhara Singh* [AIR 1964 SC 358] a Second Class Magistrate not specially empowered, had recorded confessional statement of the accused under Section 164 Cr.P.C. The said confession being inadmissible, the prosecution sought to prove the same by the oral evidence of the Magistrate, who deposed about the statement given by the accused. Relying upon the rule laid down in *Taylor v. Taylor* and *Nazir Ahmad v. King Emperor* it was held that Section 164 Cr.P.C. which conferred on a Magistrate the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him. This principle has been approved by this Court in a series of decisions and the latest being by a Constitution Bench in *Commissioner of Income Tax v. Anjum M.H. Ghaswala* [(2002)1 SCC 633 (para 27)]. Applying the said principle, we are of the opinion that the question as to who shall be deemed to have been set up by a political party has to be determined strictly in accordance with paras 13 and 13A of the Symbols Order and extrinsic evidence cannot be looked into for this purpose unless it is pleaded that the signature of the authorised person on Form B had been obtained from him under threat or by playing fraud upon him. Where signature is obtained under threat or by playing fraud, it will be a nullity in the eyes of law and the document would be void.

13. The issue can be examined from another angle. In a case where more than one notice in Form B has been received by the Returning Officer in respect of two or more candidates and the political party fails to indicate in such notices that the earlier notice or notices in Form B has or have been rescinded, the decision of controversy by extrinsic evidence would make the second proviso to para 13A wholly redundant. It is well settled principle of interpretation that the legislature is deemed not to waste its words or to say anything in vain. The Courts always presume that the legislature inserted every part of the Statute for a purpose and the legislative intention is that every part of the Statute should have effect.

14. If instead of deciding the matter in accordance with paras 13 and 13A of the Symbols Order, it is decided on the basis of extrinsic evidence (oral or documentary) given subsequent to the last date of filing of nomination paper, it is capable of good deal of misuse. Governments are sometimes formed with razor thin majority or with the support of a small splinter group or of independent candidates. A political party may adopt a device of filing nomination papers of two candidates. If the candidate of the party wins well and good, but if the candidate loses, the other candidate whose nomination paper would have been rejected may file an election petition, lead extrinsic evidence to show that he was the real candidate of the party and thereby get the election of the returned candidate set aside.

15. An election is not just a contest between two persons. The whole constituency is involved in the election process which has to send its representative to the Assembly or Parliament. The entire governmental machinery has to work for smooth holding of the election and huge expenditure is incurred from the public exchequer. The date of polling is declared a public holiday when all government offices, commercial establishments and

institutions are closed, resulting in loss of productivity. Public interest demands that there should be no vagueness or uncertainty regarding the candidature of a person seeking to contest the election as a candidate of a recognised political party. Therefore, this exercise should be done strictly in accordance with paras 13 and 13A of the Symbols Order and extrinsic evidence given in derogation thereof cannot be looked into.

16. There is no dispute that along with his nomination paper which was filed at 2.50 p.m. on 3.2.2000 Bachan Singh had submitted Forms A and B and thereafter no further notice in Form B was received by the Returning Officer. Shri Motilal Vora, General Secretary of the Congress Party had issued Form A in the name of Shri Bhupinder Singh Hooda authorising him to intimate the names of the candidates to be set up by the Congress Party in the election. This Form contained the signature of Shri Motilal Vora and also three signatures of Shri Bhupinder Singh Hooda. In Form B it was mentioned that the notice in Form B given earlier in favour of Kamal Sharma is rescinded and this was signed in ink by Shri Bhupinder Singh Hooda. Therefore, in terms of paras 13 and 13A of the Symbols Order Bachan Singh became the candidate of the Congress Party. In his order dated 5.2.2000 passed by the Returning Officer, he said that Bachan Singh had submitted Forms A and B at 2.50 p.m. on 3.2.2000 and thereafter no other nomination paper or Form had been submitted by any person and neither Kamal Sharma nor Shri Hooda had raised any objection regarding the signature on Form B and the only objection was that the same did not contain the seal of the Congress Party. It being not a defect of substantial character, the revised Forms A and B submitted by Bachan Singh will have to be accepted and accordingly Bachan Singh shall be treated as the candidate of the Congress Party. In pursuance of the Order passed by the Chief Election Commissioner on 7.2.2000 the Returning Officer heard the matter again where both the parties appeared with their respective counsel and Shri Hooda was also present. Shri Hooda admitted his signature on Form B submitted by Bachan Singh but stated that he had instructed the person concerned not to give the said Form to Bachan Singh till he gave his consent for the same on telephone and that he never gave any such consent. He also said that as the said Form B did not bear the seal of the Congress Party, it was liable to be rejected and Kamal was the official candidate of the Congress Party. The Returning Officer held that the acceptance of signature on Form B by Shri Hooda established that the same had been issued by him and the explanation offered by him for treating Kamal as the official candidate, was an internal matter of the Congress Party. He accordingly held that Form B submitted by Bachan Singh was perfectly valid and accordingly he shall be treated as the official candidate of the Congress Party and consequently the nomination paper of Kamal Sharma was rightly rejected. We are of the opinion that the view taken by the Returning Officer in his orders dated 5.2.2000 and 8.2.2000 being in accordance with law was perfectly correct.

17. Learned counsel for the respondents has laid great stress upon the fact that there was no seal of Congress Party on Form B which was submitted by Bachan Singh to the Returning Officer and consequently his nomination paper was invalid. It may be noticed that para 13 of the Symbols Order does not prescribe that Form B should also contain the seal of the party. In fact, it lays emphasis upon the signature of the person authorised by the party and says that the same should be in ink and that no facsimile signature or signature by means of rubber stamp, etc. shall be accepted and no form transmitted by fax shall be accepted. In the

proforma of Form B given in the Symbols Order a note has been appended at the end of the Form which reads as under:

N.B.

1. This must be delivered to the Returning Officer not later than 3 p.m. on the last date for making nominations.
2. Form must be signed in ink by the office bearer(s) mentioned above. No facsimile signature or signature by means of rubber stamp, etc., of any office bearer shall be accepted.
3. No form transmitted by fax shall be accepted.
4. Para 2 of the Form must be scored off, if not applicable, or must be properly filled, if applicable.

The Form B which has been submitted by Kamal Sharma no doubt bears seal of the Congress Party, which has been done by an ordinary rubber stamp with the commonly used blue ink pad and there is nothing special about it. Such a seal can easily be prepared or procured by a little effort. It is not a type of seal which may be difficult to emulate and is kept in a safe custody under the charge of a responsible person, which may not be available to anyone. What is important and decisive is the signature in ink of the authorised person and not the seal of the party which can be made by an ordinary rubber stamp by any one. Section 36(4) of the Act lays down that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. The absence of the seal of the Congress Party in the nomination paper of Bachan Singh cannot be said to be a defect of a substantial character so as to render it invalid.

18. The learned counsel for the respondent has submitted that Form B of Bachan Singh did not reach the office of Chief Electoral Officer and, therefore, there was no valid nomination of his. The High Court has gone to the extent of saying that though Bachan Singh had submitted Form A and Form B along with his nomination paper before the Returning Officer but no Form A in respect of his candidature was submitted by him to the Chief Electoral Officer and, therefore, the same would not have the effect of rescinding the candidature of Kamal Sharma. Learned counsel for the respondent has also referred to the amendment in Handbook for Returning Officers by which para 10.3(i) was substituted by the following sub-para:

Nomination paper filed by a candidate in which he has claimed to have been set up by a recognised National or State Party and which is subscribed by only one elector as proposer will be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the Constituency and the Chief Electoral Officer of the State by an authorised office-bearer of that political party by 3.00 P.M. on the last date for making nominations (Notice in Form 'A' is required to be submitted to the Chief Electoral Officer and the Returning Officer concerned and notice in Form 'B' is to be submitted to the Returning Officer).

On the basis of the above amendment of the Handbook it has been urged that Form B was also required to be submitted to the Chief Electoral Officer and as the same had not been done by Bachan Singh, his candidature could not be regarded as valid.

19. We are unable to accept the submission made. The requirement of paras 13 and 13A of the Symbols Order is that Form B should be submitted to the Returning Officer. There is no requirement of the submission of the said Form to the Chief Electoral Officer. The Handbook for Returning Officers contains instructions which have been issued by the Election Commission for the smooth holding of the election and being merely instructions cannot override the provisions of the Statute, Rules or the Order. In fact in the very first para of the first page of the Handbook in Chapter I titled as "PRELIMINARY" it is written as under:

However, please note that this Handbook cannot be treated as exhaustive in all respects and as a substitute for various provisions of election law governing the conduct of election.

The language used in the bracket in the substituted sub-para 10.3(i) clearly mentions that notice in Form B is to be submitted to the Returning Officer alone, which is also the mandate of para 13(b) of the Symbols Order. The requirement of para 13(d) of the Symbols Order is that the party has to communicate the name and specimen signature of the authorised person in Form A to the Returning Officer of the Constituency and to the Chief Electoral Officer of the State and admittedly this had been done.

20. In view of our finding that Form B submitted by Bachan Singh was perfectly valid and as the same was submitted in the last at 2.50 p.m. on 3.2.2000 and it contained a clear recital that notice in Form B given earlier in favour Kamal Sharma is rescinded, he became the candidate of the Congress Party. The nomination paper of Kamal Sharma was, therefore, rightly rejected. The appeal consequently deserves to be allowed and the High Court judgment is liable to be set aside. However, as the learned counsel have made submissions on the merits of the case, we will also examine whether the election petitioner has been able to establish the case set up by him.

21. Learned counsel for the respondent has submitted that Central Election Committee of the Congress Party had selected the candidates for contesting the election and from 50-Safidon Assembly Constituency, the name of Kamal Sharma had been decided. For this reliance is placed on the testimony of PW4 Punnu Ram who claims to be working as clerk in the office of Haryana Pradesh Congress Committee since 1970 and PW5 Shri Bhupinder Singh Hooda. PW4 has deposed that the parliamentary body of All India Congress Committee selects the candidates while PW5 has deposed that the candidature is finally decided by the Central Election Committee of the Congress Party. PW4 has proved a list Ex.PW.4/C of candidates dated 2.2.2000 which bears the signature of Shri Oscar Fernandes, General Secretary, AICC. At the top of the list it is mentioned - "AICC Press Release". It is not an original copy but a photocopy. The case of the appellant is that the aforesaid list was not a final list but was some kind of a tentative list and subsequently the Central Election Committee of the Congress Party decided the candidature of Bachan Singh Arya. PW2 Ravi Shankar, Election Kanungo, District Election Office, Jind has proved a list of the candidates

which was submitted by Bachan Singh before the Returning Officer and is marked as Ex.PW2/S. In this list the name of Bachan Singh Arya is shown as a candidate for 50-Safidon Assembly Constituency. This list also bears the seal of Indian National Congress. It is important to note here that in the list Ex.PW4/C, the names of the candidates for three Constituencies, viz., Nos.2-Naraingarh, 53-Ballabgarh and 54-Palwal were not mentioned and for Constituency no.51 - Faridabad, the name of Gyan Chand was shown. However, the list PW2/S, wherein the name of Bachan Singh Arya has been shown, is a complete list of all the 90 Constituencies wherein the names of the candidates for Constituency Nos.2, 53 and 54 have also been mentioned. The name of A.C. Chaudhary is shown for Constituency no.51 - Faridabad after deletion of the name of Gyan Chand. Both PW4 Punnu Ram and PW5 Shri Bhupinder Singh Hooda have admitted in their statement that the candidature of Gyan Chand was changed and finally A.C. Chaudhary had contested the election as an official candidate for the Congress Party for 51-Faridabad Constituency. PW5 has further admitted that three persons whose names are mentioned in the list Ex.PW2/S for Constituency Nos. 2, 53 and 54 actually contested the election as the official candidates for Congress Party. This conclusively establishes that the list dated 2.2.2000 (Ex.PW4/C) wherein the name of Kamal Sharma is mentioned as a candidate, was not the final list but was some sort of a tentative list and the list was finalised later on. Both the lists, Ex.PW4/C and PW2/S *prima facie* appear to have been prepared on the same computer as the letters and method of typing are exactly similar. At the top of Ex.PW2/S it is mentioned –“The Central Election Committee has selected the following candidates for the ensuing Assembly Elections from Haryana”. There appears to be no reason to doubt the correctness of list Ex.PW2/S which shows the name of Bachan Singh Arya and not that of Kamal Sharma. When Kamal Sharma was confronted with the situation that in the lists submitted by him (Ex.PW4/C) names of only 87 candidates were mentioned, he replied that he was not aware whether there were three constituencies regarding which decision had not been taken. When further confronted, he stated that it is true that there were 90 constituencies in Haryana. Regarding 51-Faridabad Constituency, he mentioned the name of Gyan Chand Ahuja as Congress candidate. When further cross-examined, he said that he cannot say whether Shri A.C. Chaudhary had fought the election. This shows that he has scant regard for truth and can go to any extent for supporting the list filed by him.

22. It is pleaded by Kamal Sharma in the election petition that after conclusion of the scrutiny proceedings, the Returning Officer passed a detailed order on 5.2.2000 rejecting his nomination paper and, thereafter he preferred a petition before the Chief Election Commission, New Delhi on 6.2.2000. The Election Commission vide its order dated 7.2.2000 accepted his petition and set aside the order dated 5.2.2000 of the Returning Officer and further directed him to hold fresh scrutiny on 8.2.2000 after giving notice and ensuring the presence of Shri Bhupinder Singh Hooda. Learned counsel for the respondent has submitted that when the re-scrutiny was done by the Returning Officer, Shri Bhupinder Singh Hooda was present and he made a statement before him that though Form B submitted by Bachan Singh contained his signature but the same was never validly issued by his office or by the party and that Kamal Sharma was the official candidate of the Congress Party. It has been urged that in view of this clear and categorical stand of Shri Bhupinder Singh Hooda, the Returning Officer committed manifest error of law in maintaining his earlier order wherein

the candidature of Kamal Sharma had been rejected. The High Court while dealing with this aspect of the case has observed that:

After the categorical stand adopted by Shri Hooda before the Returning Officer and in view of the explicit directions issued by the Election Commission of India vide order Ex.PW1/1 the Returning Officer had really no option but to accept the statement of Shri Hooda and treat the petitioner as an official candidate of the Congress Party.

After noticing the statement of Shri Bhupinder Singh Hooda, the High Court held as under:

The said function was apparently a quasi judicial function and once the rescrutiny was ordered by the Election Commission of India and the same was conducted in the presence of the various candidates and in the presence of the authorised person of the Congress Party, namely, Shri Bhupinder Singh Hooda, then the Returning Officer was expected to decide the matter keeping in view the various facts and circumstances of the case and the documents on the record and the statement made by Shri Hooda. Apparently, he has not done so. In this view of the matter the order dated February 8, 2000 Ex.PW2/H passed by him, whereby the nomination papers of the petitioner have been rejected, is clearly unsustainable in law and improper under the circumstances of the case.

In order to appreciate the contention raised by the learned counsel and for judging the correctness of the reasoning given by the High Court, it is necessary to refer to the order of the Election Commission.

23. Kamal Sharma had presented a petition before the Chief Election Commissioner of India on 6.2.2000 praying that the order of the Returning Officer dated 5.2.2000 may be set aside, the objections raised by him be accepted and the candidature of Bachan Singh may be set aside. It was further prayed that he may be declared as official candidate of the Congress Party. The Election Commission passed a detailed order on the very next day i.e. on 7.2.2000 and after noticing the submissions made in the petition issued a direction to the Returning Officer to conduct a re-scrutiny. The operative portion of the Order reads as under:

Now, therefore, the Election Commission hereby directs that the Returning Officer for the said 50-Safidon Constituency shall cause a re-scrutiny of the nomination papers of the aforesaid candidates, namely, Shri Kamal and Shri Bachan Singh in accordance with the relevant provisions of the Constitution, Representation of the People Act, 1951 and the Election Symbols (Reservation and Allotment) Order, 1968 and the pronouncements of the Hon'ble Supreme Court, particularly the pronouncement in the case of **Rakesh Kumar** issue as to who should be treated as the official candidate of the Indian National Congress. The Returning Officer on re-scrutinising the nomination papers of the aforesaid candidates, shall also take further consequential steps as may become necessary, by treating all earlier proceedings in relation to said candidates, as *ab initio void* and redraw the list of validly nominated candidates.

For passing the aforementioned order, the Election Commission basically relied upon a decision of this Court in **Rakesh Kumar v. Sunil Kumar** [(1999) 2 SCC 489]. It is important

to note that in this case the last date of filing nominations was 20.1.1997 and the date of polling was 6.2.1997 and, therefore, the case related to a period prior to the amendment of Symbols Order on 20.5.1999 by which para 13A has been added. Here, two persons, namely, Sunil Kumar and Veer Abhimanyu had submitted Forms A and B claiming to be candidate of Bhartiya Janta Party. At the time of scrutiny, the Returning Officer *suo moto* raised an objection to the effect that since BJP had set up more than one candidate, therefore, none could be treated as a candidate of said political party and rejected the nomination papers of both Sunil Kumar and Veer Abhimanyu. Sunil Kumar made an application stating that he was the official candidate of the party and he requested for 24 hours time to produce an official confirmation of his candidature but the application was rejected and no time was given, though no other candidate (including Veer Abhimanyu) had raised any objection. It was in these circumstances that it was held by this Court that the Returning Officer ought to have granted him time to meet the objection in the interest of justice and fair play. This authority can have no application now on account of amendment to the Symbols Order which lays down a complete procedure for acceptance of nomination paper of a candidate set up by a recognised political party and substitution of a candidate. The factual situation here is also different.

24. It may be noticed that the petition by Kamal Sharma was filed on 6.2.2000 and the same was allowed by the Election Commission very next day i.e. on 7.2.2000 by which a direction was issued to the Returning Officer to hold a fresh scrutiny. There is nothing on record to indicate nor it appears probable that before passing the order, the Election Commission issued any notice to Bachan Singh. Apparently the order was passed behind his back. The order of the Election Commission to the effect that the Returning Officer shall take further consequential steps as may become necessary, by treating all earlier proceedings in relation to said candidates, as *ab initio void* and redraw the list of validly nominated candidates could not have been passed without giving an opportunity of hearing to Bachan Singh. That apart, it has been held by a catena of decisions of this Court that once the nomination paper of a candidate is rejected, the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage. Therefore, the order passed by the Election Commission on 7.2.2000 was not only illegal but was also without jurisdiction and the respondent Kamal Sharma can get no advantage from the same. The inference drawn and the findings recorded by the High Court on the basis of the order of the Election Commission, therefore, cannot be sustained.

25. Shri Bhupinder Singh Hooda has admitted in his cross-examination that Bachan Singh Arya had contested the election from 50-Safidon Assembly Constituency and had won. He was a Minister when the Congress Party was in power. He had also contested in the year 1996 as a Congress candidate but had lost. The statements of PW4 and PW5 show that it is the Central Election Committee of the Congress Party which is the final authority to select a candidate to contest the election. Shri Bhupinder Singh Hooda, being President of the Party, was a member of the Central Election Committee. He, no doubt, supported the candidature of Kamal Sharma but no other member of the Central Election Committee was examined as a witness to prove that he was the final choice of the party. Shri Hooda has admitted that the

name of Bachan Singh was under consideration. Before the Returning Officer he had stated that though Form B of Bachan Singh contained his signature but he had instructed that the same should not be issued to him till he gave instructions in that regard on telephone which he never gave, which also shows that there was uncertainty about the candidature. The success or defeat of a political party is good deal attributed to the President of the party. Shri Hooda being the President of Haryana Pradesh Congress Party would certainly be interested in having the election of the winning candidate of the rival party set aside, more so here when he seems to be very much interested in Kamal Sharma. There can be differences amongst the members regarding the choice of a candidate. In this background, Kamal Sharma should have examined other members of the Central Election Committee of Congress Party to substantiate his case that the Party had finally selected him as its candidate and his candidature was never changed. The appellant being of a rival party Lok Dal and having defeated the Congress candidate could not have led this kind of evidence.

26. The election petitioner has examined in all six witnesses, out of whom PW1 Bernard John is Under-Secretary of the Election Commission of India, PW2 Ravi Shankar is the Election Kanungo in the District Election Office, Jind and PW3 Som Nath Luthra is the Assistant Chief Election Officer, Haryana and these witnesses have no personal knowledge of the controversy raised but have merely proved some documents. Apart from himself, the election petitioner has strongly relied upon the testimony of PW4 Punnu Ram and PW5 Shri Bhupinder Singh Hooda. PW4 Punnu Ram, who claims to be Clerk in the office of Haryana Pradesh Congress Committee since 1970, went to the extent of denying the signature of Shri Bhupinder Singh Hooda in Form B which was submitted by Bachan Singh though Shri Hooda himself admitted his signature on the said form at three different places during the course of his cross-examination. When questioned, he stated in his cross-examination that he did not know whether Bachan Singh had earlier contested election from 50-Safidon Constituency or had ever fought election as a candidate of the Congress Party. He further stated that he did not know whether Bachan Singh had ever remained a Minister. It is not possible to believe that a person who had been serving as a Clerk in the Congress office at Chandigarh for 30 years would not be knowing that Bachan Singh had earlier contested election as a Congress candidate twice and had remained a Minister. This shows that he has scant regard for truth and can go to any extent to help the election petitioner. It will, therefore, not be safe to rely upon his testimony. Shri Bhupinder Singh Hooda being President of Haryana Congress Party would not be favourably inclined towards the appellant who is of the rival Lok Dal Party and would certainly be interested in the success of the Election Petition so that the election of the appellant may be set aside. He is, therefore, not an independent witness. The election petitioner has thus not led any independent evidence of unimpeachable character on which implicit reliance may be placed.

28. The appeal is, therefore, allowed and the judgment and order dated 8.5.2003 of the High Court is set aside. The election petition filed by Kamal Sharma is dismissed. The appellant will be entitled to his costs both here and in the High Court.

* * * * *

Manubhai Nandlal Amersey v. Popatlal Manilal Joshi

AIR 1969 SC 734

BACHAWAT, J. - This appeal is directed against a judgment of single judge of the Gujarat High Court setting aside the election of the appellant from the Banaskantha Parliamentary constituency. At the last general election to the Lok Sabha from the Banaskantha constituency in Gujarat there were three contesting candidates. The appellant, the Swatantra Party candidate, secured 1,10,028 votes. Respondent 2, the Congress party candidate secured 1,05,621 votes. Respondent 3, an independent candidate secured 14,265 votes. The appellant was declared elected.

2. The election petition was filed by respondent 1, an elector in the constituency. Respondent 1 alleged a number of corrupt practices on the part of the appellant or his election agents, but at the trial, he pressed only the charge of corrupt practice under section 123 (2) proviso (a) (ii) of the Representation of the People Act, 1951. In the petition the charge was that several persons with the consent of the appellant or his election agents induced or attempted to induce the electors to believe that if they voted for the Congress Party candidate they would become the objects of divine displeasure and spiritual censure. In the particulars of this charge it was alleged that in the public meetings held at Amirgadh, Ikbalgadh, Wav, Laxmipura, Tharad Bhabhar and other places one Shambhu Maharaj told the electors that if they voted for the Congress candidate they would commit the sin of cow slaughter and urged them in the name of mother cow to take a vow not to vote for the congress candidate with the result that several members of the audience publicly took the vow.

3. At a late stage of the trial on March 7, 1968, the High Court gave leave to respondent no. 1 to amend the petition by adding fresh particulars of the corrupt practice. The substance of the new charge was that at those meetings Shambhu Maharaj induced or attempted to induce the electors to believe that their religious head Jagadguru Shankracharya had commanded them not to vote for the Congress and that contravention of his command would be a sin and would be visited with spiritual censure and divine displeasure. The High Court found that the aforesaid practice was committed by Shambhu Maharaj with the consent of one Punambhai, the election agent of the appellant, and declared the appellant's election to be void.

4. The appellant challenges the legality of the order passed by the High Court on March 7, 1968 allowing the amendment. The election petition was filed on April 10, 1967. The appellant filed his written statement on June 1; on September 9, the High Court gave leave to respondent 1 to amend the petition, by adding the charge that certain persons were threatened that they would commit the sins of *gohatya*, *brahmahatya* and *sadhuhatya*, if they worked for the Congress candidate. The order disallowed amendments seeking to introduce, charges of appeal to voters in the name of religion under Section 123 (3). The appellant filed his additional written statement on October 19. Issues were framed on November 30. Respondent 1 filed his list of witnesses on January 11, 1968. On February 21, the trial started and P.W. 1, P.W. 2, P.W. 3 and P.W. 4 were examined. P.W. 4, Ram Swarup was a witness with regard to the meeting at Amirgadh. The issues were amended on March 1, so as to make it clear that there was no charge of any corrupt practice under Section 123(3). On the same date,

respondent 1 was examined as P.W. 5. On March 2, P.W. 6, P.W. 7, P.W. 8 and P.W. 9 were examined. P.W. 7 and P.W. 8 spoke about the meetings at Palanpur and Bhabhar. P.W. 9 Bhogilal spoke about the meeting at Ikbalgadh. On March 4, P.W. 10 and P.W. 11 were examined and spoke, about the meetings at Wav and Laxmipura. On the same day, P.W. 12, S. P. Pandya, a sub-inspector of police at Palanpur, and P.W. 13, C.B. Barot, a short-hand writer were examined. The examination of Barot was concluded on March 6. Barot proved that he took shorthand notes of the speeches of Shambhu Maharaj at Ikbalgadh, Amirgadh, Bhabhar, Laxmipura, Wav and Tharad and sent reports of the speeches to S. P. Pandya. On March 6, P.W. 14 and P.W. 15 were examined. On March 5, respondent 1 filed, an application for leave to amend the petition by adding portions of the speeches which referred to the command of Shankracharya not to vote for the Congress and the consequences of not obeying the command. The application was allowed on March 7, 1968. The trial was, then adjourned and started again on April 8. Between April 8 and April 15, P.W. 17, P.W. 18, D.W. 1 and D.W. 2 were examined. The judgment was delivered on April 22 and 23.

5. The first question is whether the trial judge should have allowed the amendment. Section 83(1)(b) provides that:

An election petition shall set-forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date, and place of the commission of each such practice.

The section is mandatory. Where a corrupt practice is charged against the returned candidate the election petition must set-forth full particulars of the corrupt practice so as to give the charge a definite character and to enable the court to understand what the charge is. The charge must be substantially proved as laid and evidence cannot be allowed to be given in respect of a charge not disclosed in the particulars. On a charge of telling the electors that by giving their vote to the Congress candidate, they would commit the sin of *gohatya*, evidence cannot be led to prove the charge of telling them that they would commit a sin of *brahmahatya* or the sin of disobeying the command of their religious leader. Section 86(5) allows amendment of the particulars. It provides that:

The High Court may, upon such terms as to costs and otherwise, as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice, not previously alleged in the petition.

In *Harish Chandra Bajpai v. Triloki Singh* [(1957) SCR 371] the Court held that though under the English law the petitioner was not obliged to give the particulars of the corrupt practice in his petition the difference was a matter of form and not of substance and that under Section 83(3) as it stood before 1955, the Court could allow an amendment introducing fresh instances of the corrupt practice alleged in the petition. Referring to the English practice the Court observed at page 382 :

It is sufficient if the particulars are ordered to be furnished within a reasonable time before the commencement of the trial.

Section 83(3) has been repealed and is now replaced by section 86(5) which forbids any amendment introducing particulars of a corrupt practice not previously alleged in the petition. Assuming that the amendment of March 7, 1967 was permissible under section 86(5), the question is whether the High Court rightly allowed it. Normally an application for amendment under section 86(5) should be made within a reasonable time before the commencement of the trial. The Court has power to allow an amendment even after the commencement of the trial, but as a rule leave to amend at a late stage should be given in exceptional cases where the petitioner could not with reasonable diligence have discovered the new facts earlier. Leave to amend will not be given if the petitioner is not acting in good faith or has kept back the facts known to him before the trial started.

6. According to respondent 1 Shambhu Maharaj committed corrupt practice at election meetings held at Ikbalgadh where P.W. 9 was present, Amirgadh where P.W. 4 was present and at Wav where one Chotaji Bhattji was present and that he came to know of the corrupt practices from those persons. All the meetings are referred to in the election petition. If Shambhu Maharaj had told the electors that Sri Shankracharya had commanded them not to vote for the Congress candidate and that disobedience of his command would be sinful, P.W. 4 and Chotaji Bhattji must have informed respondent 1 of this corrupt practice before April 10, 1967 when the election petition was filed. No explanation is given as to why respondent 1 withheld this information in the petition. Respondent 1 now says that on April 17, 1967 he applied for certified copies of the reports of C. B. Barot to the Deputy Inspector-General of Police, C.I.D., Ahmedabad but the application was rejected on May 14, 1967. Assuming that he could not get certified copies of the reports, he could set forth in the petition the substance of the charge with regard to the command of Sri Shankracharya from the information supplied by his informants. He knew of the reports of C. B. Barot before April 17, 1967. Immediately after filing the election petition he could subpoena the reports and under orders of the Court he could inspect them long before the trial started. He was aware that the charge of telling the electors that they would commit the sin of *gohatya* was quite different from the charge of telling them that they would commit the sin of *brahmahatya* or the sin of disobeying the command of their religious leader Sri Shankracharya. On September 25, 1967, he obtained an order giving him leave to amend the petition by adding the charge with regard to the sins of *brahmahatya* and *sadhuhatya*, but he deliberately refrained from adding the charge with regard to the sin of disobeying the command of Sri Shankracharya. The trial commenced on February 29, 1968. On that date P.W. 4 said that at the Amirgadh meeting Shambhu Maharaj told the electors that he had brought a mandate from Jagadguru Shankracharya. On an objection being raised by the appellant's counsel Mr. Mehta, counsel for respondent 1, agreed that the statement of P.W. 4 would not be treated as part of the evidence on the record. Thereafter, the trial proceeded and 11 more witnesses were examined on the footing that respondent 1 would not rely on the charge with regard to the command of Jagadguru Shankracharya. On that footing the appellant's counsel adopted a definite line of cross-examination. On March 4, he consented to the marking of the full reports of the speeches of Shambhu Maharaj as exhibits and on March 5, he extracted an admission from Barot that the

witness had taken verbatim notes of the speeches of Shambhu Maharaj. Counsel adopted this line of cross-examination because he took the stand that the speeches did not prove the corrupt practice alleged in the petition. The application, for amendment was filed on March 5 and was allowed on March 7. The order allowing the amendment has resulted in manifest injustice to the appellant. His counsel could not thereafter take the stand that the reports had been fabricated at the instance of the Congress party, respondent 1 moved the application for amendment in bad faith at a very late stage of the trial.

7. Under section 116-A an appeal lies to this Court on any question whether of law or fact from the order of the High Court. The procedure in appeal is regulated by section 116 C. All the provisions of the Code of Civil Procedure including section 105 apply to the appeal, and any error in an order of the Trial court affecting the decision of the case may be taken as a ground of objection in the appeal. In an appeal under section 116A the whole case is within the jurisdiction of this Court. Normally the Court does not interfere with the Judge's discretion in granting amendments except on grounds of law but where, as in this case, the order has resulted in manifest injustice, the Court has the power and the duty to correct the error. We, therefore, hold that the order of the trial judge allowing the amendment was erroneous and must be set aside.

8. Respondent 1 proved six speeches of Shambhu Maharaj. He did not rely in the trial court on the speeches at Laxmipura, Bhabhar and Tharad. Mr. Gokhale stated that he did not rely on these speeches for any purpose whatsoever. Accordingly, those speeches were not read in this Court. There is no charge against the appellant on the ground of appeal to the electors, on the ground of religion. The only charge against him is that in his speeches at Ikbalgadh, Amirgadh and Wav, Shambhu Maharaj with the consent of his election agent Punambhai told the electors that "if they voted for the Congress party candidates the voters would commit the sin of cow slaughter (*gaumata vadh*).\" Respondent 1 has not proved the charge that the electors were urged in the name of mother cow to take a vow not to vote for the Congress party candidates, with the result that several members of the audience publicly took the vow. The Ikbalgadh speech (Ex. B1) and the Amirgadh speech (Ex. B3) were delivered on February 8, 1967. The Wav speech (Ex. B4) was delivered on February 9, 1967. There was then an acute political controversy with regard to the total ban on cow slaughter. Section 5(1) of the Bombay Animal Preservation Act, 1954 (Bombay Act no. LXXII of 1954) as amended by Gujarat Act No. XVI of 1961, there was a total ban on cow slaughter in Gujarat. But there was no absolute ban on cow slaughter in several other states. The Swatantra party was agitating for a total ban on cow slaughter throughout India. Public criticism of the Congress party for not abolishing cow slaughter throughout the country was permissible and legitimate. But the criticism ceases to be legitimate if the speaker commits the corrupt practice of undue influence under section 123(2), that is, if he interferes or attempts to interfere with the free exercise of electoral right. Under section 123(2) proviso (a) clause(ii) there is such undue influence if any person with the consent of the candidate or his election agent induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure. The actual effect of the speech is not material. Corrupt

practice, is committed if the speech is calculated to interfere with the free exercise of electoral right and to leave no choice to the electors in the matter.

9. In considering the speeches the status of the speaker and the character of the audience are relevant considerations. Shambhu Maharaj was a kirtankar of repute and well known and respected for his lectures on Hindu religion. The audience consisted mostly of illiterate and orthodox Hindus of the rural areas, adivasis and rabaris belonging to the scheduled tribes and scheduled castes. In this background, let us now consider the speeches. Respondent 1 charges corrupt practice in respect of 4 passages in the Ikbalgadh speech (Ex. B1), passages in the Wav speech (Ex. B4) and 3 passages in the Amirgadh speech (Ex. B3). The learned trial judge found that the corrupt practice was not committed by the 1st and 2nd passages in Ex. B1, the 1st, 2nd and 3rd and 6th passages in Ex. B4 and the 1st passage in Ex. B3.

10. But the learned Judge held that 3rd and 4th passages in Ex. B1 and the 4th and 5th passages in Ex. B4 amounted to corrupt practice as the electors were told that Sri Shankracharya had commanded them not to vote for the Congress and that if they disobeyed his command they would incur divine displeasure and spiritual censure. We have disallowed the amendment introducing this charge and we must therefore set aside the finding of the learned judge with regard to those passages. We find that the passages do not show any corrupt practice as alleged in the petition.

11. In the 2nd passage, in the, Amirgadh speech (Ex. B3) the speaker referred to the ban on cow slaughter in Pakistan, Afghanistan and Madhya Pradesh and said that the Swatantra Party had promised to ban slaughter of cow progeny and exemption of land revenue. He also said:

Sun rises and twenty two thousand cows are slaughtered. In Ahmedabad there is a prohibition on cow slaughter but the slaughtering of calf and ox is continued. The earth took the form of a cow and if the said 'Gaumata' or ox is slaughtered how earth can be satisfied and so long as the earth is not satisfied how can there be fertility in the earth.

In the third passage, the speaker said:

In the year 1942 sixteen lacs and in 1946 twenty four lacs and in 1947 after India became separate and at present about 1 crore cows are slaughtered. You say whether to vote for Congress is to become partner in sin or anything else. If you give co-operation for good cause you may get good fruit and if you co-operate in committing a sin you become a partner of sin. Why you become a partner of sin by giving votes to Congress?

He then referred to the command of Sri Shankracharya that the electors should not vote for the Congress party. But even apart from the command of Sri Shankracharya the electors are distinctly told that though there was a ban on cow slaughter in Ahmedabad, the Congress was permitting the slaughter of crores of cows elsewhere in India and was committing the sin of *gohatya* and those who vote for the Congress would be partners in the sin. The dominant theme of the speech was that those who commit the sin of *gohatya* would be visited with divine displeasure. Having regard to the character of the audience, the speech was calculated

to interfere with the free exercise of electoral right. In *Narbada Prasad v. Chhagan Lal* [AIR 1969 SC 395], Hidayatullah, C.J., observed:

It is not necessary to enlarge upon the fact that cow is venerated in our country by the vast majority of the people and that they believe not only in its utility but its holiness. It is also believed that one of the cardinal sins is that of *gohatya*. Therefore, it is quite obvious that to remind the voters that they would be committing the sin of *gohatya* would be to remind them that they would be objects of divine displeasure or spiritual censure.

In *Encyclopaedia of Religion and Ethics*, edited by James Hastings, vol. 4, pp. 225, 226, it is stated:

A well known verse (Mahabharata, xiii. 74.4) says : 'All that kill, eat and permit the slaughter of cows, rot in hell for as many years as there are hairs on the body of the cow so slain.

Reverence for the cow has not diminished in modern times. It is well known that the Hindus of the present day are filled with horror at the slaughter of the cow, which is therefore prohibited in native States under treaties with the English.

According to B. N. Mehta's *Modern Gujarati-English Dictionary*, vol. 1, page 480, *gohatya* (*go*, a cow + *hatya*, killing) means in Gujarat "slaughter of a cow; killing a cow, being one of the five great sins according to Hindu scriptures which can be atoned for only with capital punishment."

12. Accordingly, the offending passages in the Amirgadh speech fell within section 123(2) proviso (a)(ii). We are satisfied that Shambhu Maharaj spoke at the Amirgadh meeting with the consent of Punambhai, the election agent of the appellant. Punambhai was present at the Amirgadh meeting. He addressed the meeting before Shambhu Maharaj spoke. Shambhu Maharaj addressed several other election meetings of the Swatantra Party. Punambhai issued a pamphlet calling one of the meetings. P.W. 10 proved that he was asked by Punambhai to call Shambhu Maharaj for addressing another meeting as the voters were uneducated and had deep belief in religion. Punambhai accompanied Shambhu Maharaj from one place to another. On February 8, 1967 he went with Shambhu Maharaj to the meeting at Ikbalgadh and thereafter went to Amirgadh. On February 9, he went with Shambhu Maharaj to the meeting at Wav. The offending passages of the speech at the Amirgadh meeting are integral parts of the dominant theme of the sin of cow slaughter. They cannot be regarded as stray words spoken by Shambhu Maharaj without Punambhai's consent. Punambhai did not raise any objection to the impugned speeches at the meeting. He gave evidence in Court but did not say that he was not a consenting party to the offending passages. We hold that the corrupt practice under section 123(2) proviso (a)(ii) was committed at the Amirgadh meeting on February 8, 1967 with the consent of the election agent of the appellant.

13. In the result, the appeal is dismissed.

* * * * *

Ramesh Yeshwant Prabhoo (Dr.) v. Prabhakar Kashinath Kunte

(1996) 1 SCC 130

J.S. VERMA, J. - Both these appeals are under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as “the Act/R.P. Act”) against the judgment dated 7-4-1989 of the Bombay High Court in Election Petition No. 1 of 1988 by which the election of Dr Ramesh Yeshwant Prabhoo, the returned candidate from 38, Vile Parle Constituency to the Maharashtra State Legislative Assembly, held on 13-12-1987, has been declared to be void on the ground under Section 100(1)(b) of the Act. The appellant has been found guilty of the corrupt practices prescribed by sub-sections (3) and (3-A) of Section 123 of the Act at the election, in that he and his agent Bal Thackeray with his consent appealed for votes on the ground of the returned candidate's religion and that they promoted or tended to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion and community. Consequently, Bal Thackeray, after a notice issued under Section 99 of the Act to him, has also been named for commission of these corrupt practices. Civil Appeal No. 2836 of 1989 is by the returned candidate Dr. Ramesh Yeshwant Prabhoo and Civil Appeal No. 2835 of 1989 is by Bal Thackeray against that judgment.

2. The said election was held on 13-12-1987 and the result was declared on 14-12-1987, at which Dr Ramesh Yeshwant Prabhoo was declared to be duly elected. The charge of these corrupt practices is based on three public speeches delivered by Bal Thackeray: on 29-11-1987 at Parle (opposite Shiv Sena Shaka No. 84), on 9-12-1987 at Khar-Danda near Shankar Temple, and on 10-12-1987 at Jaltaran Maidan, Vile Parle (East). The public speech given on 9-12-1987 has been held to amount to the corrupt practice under sub-section (3) of Section 123, while public speeches delivered on 29-11-1987 and 10-12-1987 have been held to be corrupt practices under sub-sections (3) and (3-A) of Section 123 of the Act. The relevant pleading relating to these corrupt practices is contained in paras 6 and 8 of the election petition. Sub-para (a) to (d) of para 6 relate to first speech, sub-para (e) of para 6 relates to second speech and sub-para (f) of para 6 relates to third speech. Para 8 of the election petition then says that returned candidate indulged in the corrupt practices provided by sub-sections (3) and (3-A) of Section 123 of the Act and, therefore, his election is void.

3. After the election petitioner closed his evidence, the returned candidate Dr. Prabhoo examined only himself in rebuttal. After close of the evidence of the parties and hearing arguments of both sides, the High Court ordered issue of notice under Section 99 of the Act to Bal Thackeray who filed an affidavit in reply to the notice. The election petitioner and his three witnesses were recalled for cross-examination by counsel for the noticee, Bal Thackeray. The noticee did not examine himself or any other witness in rebuttal. The decision of the High Court is based on this material.

4. Dr. Prabhoo was set up as a candidate of the Shiv Sena which was then not a recognised political party for purposes of the Legislative Assembly elections and, therefore, Dr. Prabhoo's candidature was shown as “Shiv Sena — Independent”. Bal Thackeray is the top leader of Shiv Sena and he participated in the election campaign of Dr. Prabhoo as the main speaker in his capacity as the leader of Shiv Sena. The status of Bal Thackeray as the top leader of Shiv Sena has never been disputed. The gist of election petitioner's case which

has been found proved by the High Court is that the three public speeches of Bal Thackeray in the election campaign of Dr. Prabhoo were all in very intemperate language and incendiary in nature, which were appeals to the voters to vote for Dr Prabhoo because of his religion, i.e., he being a Hindu, and the speeches also promoted or tended to promote enmity and hatred between different classes of the citizens of India on the ground of religion. The High Court has held this charge of the alleged corrupt practices proved against the returned candidate Dr Prabhoo and Bal Thackeray. Accordingly, the election of the returned candidate has been declared to be void on the ground contained in Section 100(1)(b) of the Act, and Bal Thackeray has been named in accordance with Section 99 of the Act. Hence these appeals by them.

5. The averments in para 6 of the election petition alleging the commission of corrupt practices within the meaning of Section 123 of the Act are in sub-paras (a) to (f) which are as under:

“(a) The petitioner states that Respondent 1 during his election campaign indulged in corrupt practices by appealing himself, or by his election agents, or by his supporters with his consent to vote for him and refrain from voting for other candidates on the grounds of religion. The whole tenor of election propaganda of Respondent 1 was that he is a candidate of Hindus and Hindus should vote for him alone. The details of this appeal are given in the later part of this petition.

(b) Respondent 1, his election agents and his supporters with the consent of the candidate Respondent 1 also indulged in corrupt practice by promoting and by attempting to promote feelings of enmity and hatred between different classes of citizens of India on grounds of religion, community and language. The examples of this corrupt practice are also listed in the later part of this petition.

(c) The campaign for the election of Respondent 1 was headed by Shri Balasaheb Thackeray, the leader of the Shiv Sena, who had put up Respondent 1 in this election. Shri Thackeray addressed several meetings and also issued press statements during the course of the election in question. Out of these meetings Shri Thackeray spoke on 29-11-1987 at a meeting held at Shiv Sena Shaka No. 84 at Vile Parle, which took place from 9 p.m. to 12 midnight. In this meeting Shri Balasaheb Thackeray, Suryakant Mahadik, Pramod Navalkar, Ramesh Mehta, Madhukar Sarpotdar and the candidate Respondent 1 Dr Ramesh Prabhoo himself were also present. Shri Thackeray uttered the following words during this meeting. The words are quoted in Marathi and they are followed by the English translation.

Translation: ‘We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so.’

Since the petitioner was all throughout in the constituency for his election campaign, he came to know about the said meeting having been held and attended by Shri Bal Thackeray. Subsequently, he also came to know about the speeches made in the meeting from his friends and active workers of the Party. The petitioner has reliably learnt that the police reporters also attended the meeting and they have taken down the report of the

speeches made. The petitioner craves leave to call for the record of the speeches from the Police Department and to prove the point by examining the police reporters who have taken down the speeches. The petitioner craves leave to rely upon the said police report in the custody of the Police. A report regarding the said meeting and the speeches appeared in the newspaper *Mumbai Sakal* (a Marathi daily) dated 1-12-1987 with the photographs under the title “*Hindu Dev-Devtavareel Teeka Sahan Karnar Nahi — Thackeray*” (We will not tolerate the criticism of Hindu gods and goddesses — Thackeray). From the said photograph it is clear that Respondent 1 was also present in the said meeting. Thus all the utterances regarding the speeches made by Bal Thackeray to appeal to voters in the name of Hindu religion are with the consent and connivance of the first respondent. The same meeting was also reported in *Sanj Tarun Bharat* (an evening daily) dated 30-11-1987 with the photograph of Shri Thackeray, Respondent 1 and others on the dais. The said photograph further shows that a banner was put up on the dais which reads as under:

Garva Say Kaho (OM) Ham Hindu Hai'

The said meeting was also reported in *Sandhyakal*, another Marathi daily, on 1-12-1987. Hereto annexed and marked Exhibit 'A' and 'A-1' is a copy of the report appearing in the *Mumbai Sakal* with English translation, hereto annexed and marked Exhibits 'B' and 'B-1' is the original report appearing in *Sanj Tarun Bharat* with English translation and hereto annexed and marked Exhibits 'C' and 'C-1' is the said report appearing in *Sandhyakal* with English translation.

(d) The petitioner says that a report regarding the said meeting also appeared in the *Urdu Times*, an Urdu daily published from Bombay in its issue dated 1-12-1987. The petitioner does not know how to read and write Urdu. However, he got the said report translated. In the said *Urdu Times* the report appeared with the title '*Shiv Sena ko Musalmano ke voton ki zarurat nahin hai*' (Shiv Sena did not need the votes of Muslims). A true English translation of the said news item is annexed hereto and marked Exhibits 'D' and 'D-1' with a zerox copy of the report in Urdu.

(e) Again on 9-12-1987 there was another election meeting which took place from 9 p.m. to about 12 midnight at Khar-Danda, near Shankar Temple. This meeting was addressed by Shri Bal Thackeray, Respondent 1, Harishchandra Dattaji Salvi (a Shiv Sena leader) and Shambhoo Maharaj, a religious leader from Gujarat. In the said meeting Shri Bal Thackeray, while addressing the audience stated as under:

Translation: 'Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by name Prabhoo should be led to victory in the name of religion.'

The petitioner says that the proceedings of the said meeting were recorded by the police. Newspaper reports regarding the meeting also appeared. The petitioner will crave leave to and rely upon the records of the police and also the press report giving the version of the said meeting appearing in various newspapers.

(f) The petitioner says that on 10-12-1987 a meeting was held from 9 p.m. to about 12 midnight at Vile Parle (East) at Shahaji Raje Marg. This was addressed by Shri Bal Thackeray, Shambhoo Maharaj, Ramesh Mehta, Rishi Kapoor, Jitendra Madhukar Joshi and Ramesh Prabhoo, Respondent 1. In this meeting Shri Thackeray uttered the following words while addressing the meeting:

Translation: 'We have come with the ideology of Hinduism. Shiv Sena will implement this ideology. Though this country belongs to Hindus, Ram and Krishn are insulted. (They) valued the Muslim votes more than your votes; we do not want the Muslim votes. A snake like Shahabuddin is sitting in the Janata Party, a man like Nihal Ahmed is also in Janata Party. So the residents of Vile Parle should bury this party (Janata Party).'

The above utterances in these three meetings are the examples of promoting the feelings of enmity between different classes of citizens of India. The sole purpose in doing so and making the appeal was to canvass votes in favour of the first respondent on the ground of religion and make it appear to the voters that Respondent 1 was the only person who could represent the Hindu community. The effect of the said speeches was to promote the feelings of enmity and hatred between Hindus and non-Hindus on the ground of religion, race, caste, community etc. As such the petitioner and most of the respondents from 1 to 13 are Hindus, having full faith in the Hindu religion. The main ground of objection on the way of canvassing for votes by Respondent 1 and his supporters was to bring the element of religion into politics endangering the very foundation of the Constitution of India, viz., secularism. The petitioner honestly believes that it is one thing to follow one's own religion according to his own conviction and another thing to appeal to the voters to vote in the name of the religion."

6. Reliance was placed by the election petitioner on certain news items wherein the public speeches were published and also on certain reports alleged to have been made by some police officers who reported the making of the speeches raising some controversy relating to sufficiency of pleadings and the use of material for proving the contents of the speeches in excess of the exact words pleaded in the election petition. Details of this controversy would be mentioned later while considering that point. However, it may be mentioned that the extent to which there is specific pleading, and the returned candidate himself admitted the contents of the public speeches, can safely be considered subject to the objection raised of the alleged legal infirmities including want of a valid notice under Section 99 of the Act to the noticee Bal Thackeray. More details of the evidence would be mentioned at the appropriate stage.

7. Broadly stated, the contentions of Shri Ram Jethmalani, learned counsel for the appellants in these appeals are: (1) Sub-sections (3) and (3-A) of Section 123 of the Act are constitutionally invalid being violative of guarantee of free speech in Article 19(1)(a) of the Constitution; (2) To save both these provisions from constitutional invalidity, they must be read as reasonable restrictions in the interest of public order to get the protection of Article 19(2) of the Constitution. In other words, unless the speech is prejudicial to the maintenance of public order, it cannot fall within the net of either sub-section (3) or sub-section (3-A) of Section 123 of the Act; (3) In sub-section (3) of Section 123, the emphasis is on the word 'his' preceding the word 'religion' and its significance must be understood in the light of the

restricted scope of the provision indicated by the Union Law Minister during the parliamentary debates to explain the object of introduction of the word 'his' in the provision. In other words, only a direct appeal for votes on the ground of 'his' religion subject to its tendency to prejudice the maintenance of public order is contended to be the limited scope of sub-section (3) of Section 123; (4) A speech in which there be a reference to religion but no direct appeal for votes on the ground of his religion, does not come within the net of sub-section (3) of Section 123; (5) The public speeches in question did not amount to appeal for votes on the ground of his religion and the substance and main thrust thereof was 'Hindutva' which means the Indian culture and not merely the Hindu religion; (6) The public speeches criticised the anti-secular stance of the Congress Party in practising discrimination against Hindus and giving undue favour to the minorities which is not an appeal for votes on the ground of Hindu religion; (7) On behalf of the noticee Bal Thackeray, it was further contended that there was no compliance of the requirements of Section 99 of the Act, inasmuch as the notice contemplated by the provision was not given and the noticee was never informed of the precise charge against him. It was submitted that the notice given was not in conformity with the law and particulars required to be given by the court were never given, the High Court having merely asked the petitioner to indicate the particulars of the charge of the corrupt practice; and (8) that the pleadings in the election petition are deficient being devoid of the material particulars and, therefore, the material brought in at the stage of evidence and relied on to prove the charge of corrupt practice has to be excluded from consideration. Learned counsel for the appellant also made the grievance that the High Court had decided the election petition mainly on the basis of the general impressions and vague assertions made by the election petitioner instead of confining the decision to the precise pleadings and the legally admissible evidence examined in the light of the true meaning and scope of sub-sections (3) and (3-A) of Section 123 of the Act.

8. In reply, Shri Ashok Desai, learned counsel for the respondent refuted these contentions. He submitted that the question of constitutional validity of the provisions is no longer *res integra* being concluded by the decision of the Constitution Bench in ***Jumuna Prasad Mukhariya v. Lachhi Ram*** [(1955) 1 SCR 608 : AIR 1954 SC 60]. Alternatively, he contended that the freedom of speech guaranteed in the Constitution does not extend to giving speeches of the kind given by Bal Thackeray and, at any rate, these provisions impose reasonable restrictions on the freedom of speech which are saved by Article 19(2) of the Constitution. Shri Desai also submitted that the substance and main thrust of the speech, not merely the form, has to be seen in its context to determine if it amounts to an appeal for votes on the ground of 'his' religion, and such appeal need not necessarily be only direct. Learned counsel submitted that each one of the speeches in question was highly incendiary containing appeal to vote for Dr Ramesh Prabhoo because he is a Hindu; and it also tended to promote enmity and hatred between Hindus and Muslims. According to him, each one of the speeches amounted to the corrupt practice both under sub-sections (3) and (3-A) of Section 123 of the Act.

Meaning of sub-sections (3) and (3-A) of Section 123 of the R.P. Act

9. Sub-sections (3) and (3-A) of Section 123 of the R.P. Act are as under:

“123. *Corrupt practices.*— The following shall be deemed to be corrupt practices for the purposes of this Act:

* * *

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

(3-A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

* * *

10. The submission of Shri Ram Jethmalani, learned counsel for the appellants, is that the appeal to vote or refrain from voting for any person on the ground of ‘his’ religion etc. for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate, means a direct appeal to vote or refrain from voting on the ground of ‘his’ religion, etc.; and the appeal must also be provocative in nature to adversely affect public order. The further element of adverse effect on public order, it is urged, is implicit in the provision to save it from constitutional invalidity, which argument is considered separately. Shri Jethmalani laid emphasis on the word ‘his’ which was inserted by Act 40 of 1961 w.e.f. 20-9-1961 when the existing sub-section (3) was substituted for the old sub-section (3). Shri Jethmalani contended that the object of insertion of the word ‘his’ in the newly substituted sub-section (3) was to restrict the meaning of the provision and confine it only to a direct appeal based on ‘his’ religion. Learned counsel placed strong reliance on the statement of the Law Minister during the debates in Parliament to support this submission. In reply, Shri Ashok Desai, learned counsel for the respondent, contended that the word ‘his’ no doubt has significance, but its use does not confine the meaning of sub-section (3) only to a direct appeal on the ground of ‘his’ religion, etc. and extends to an appeal of which the main thrust in the context is on the religion of the candidate. Shri Desai submitted that an unduly restricted meaning cannot be given to sub-section (3) since the object of the provision is to prohibit appeal for votes during the election on the ground of religion of the candidate.

11. There can be no doubt that the word ‘his’ used in sub-section (3) must have significance and it cannot be ignored or equated with the word ‘any’ to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain language of sub-section (3) and this is the only manner in which the word ‘his’ used therein

can be construed. The expressions “the appeal ... to vote or refrain from voting for any person on the ground of *his* religion, ... for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate” lead clearly to this conclusion. When the appeal is to vote on the ground of ‘his’ religion for the furtherance of the prospects of the election of that candidate, that appeal is made on the basis of the religion of the candidate for whom votes are solicited. On the other hand when the appeal is to refrain from voting for any person on the ground of ‘his’ religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicially affected. It is thus clear that for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought; and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. There is no ambiguity in sub-section (3) and it clearly indicates the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3).

12. The argument that such an appeal must be a direct appeal, such as ‘Vote for A because he is a Hindu’ or ‘Do not vote for B because he is a Christian’, and that no other appeal leading to that conclusion is forbidden, does not appeal to reason. What is forbidden by sub-section (3) is an appeal of this kind and, therefore, any appeal which amounts to or leads to this inference must necessarily come within the prohibition in sub-section (3). Whether a particular appeal is of this kind, is a question of fact in each case. Where the words used in the appeal are clear and unambiguous amounting to a direct appeal, the exercise of construing the speech is not needed. However, where a reasonable construction of the appeal leads to that conclusion, the result must be the same. The substance of the speech and the manner in which it is meant to be understood by the audience determines its nature, and not the camouflage by an artistic use of the language. For understanding the meaning and effect of the speech, the context has to be found in the speech itself and not outside it with reference to any other background unless the speech itself imports any earlier fact in the context of that speech. The speech has also not to be construed in the abstract or in the manner in which it would be construed after an academic debate. Care must be taken to remember that the public speeches during election campaign ordinarily are addressed to an audience comprised of common men and, therefore, the manner in which it would be understood by such an audience has to be kept in view.

13. We are unable to accept the submission of Shri Jethmalani that a further element of prejudicial effect on public order, is implicit in sub-section (3). We do not find anything in the language of the provision to read this further element into it. Sub-section (3) in substance forbids appeal for votes for any candidate on the ground of ‘his’ religion and appeal to refrain from voting for any other candidate on the ground of the religion of that other candidate. Obviously the purpose of enacting the provision is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the ground of his religion. This is in keeping with the secular character of the Indian polity and rejection of the scheme of separate electorates based on religion in our constitutional scheme. An appeal of the kind forbidden by sub-section (3) based on the religion of a candidate, need not necessarily be prejudicial to public order and, therefore, the further element of likelihood of

prejudice to public order is unnecessary, on account of which it is not implicit in the provision. This, according to us, is the meaning and the correct construction of sub-section (3). The question of constitutional validity of the provision on this meaning is considered later.

14. Reference may now be made to the Parliamentary debates in which the reason ascribed by the Law Minister Shri A.K. Sen for adding the word 'his' in sub-section (3) and its purpose was stated thus—

“Shri A.K. Sen: *I added the word 'his' in the Select Committee in order to make quite clear as to what was the mischief which was sought to be prevented under this provision.*

* * *

The apprehension was expressed if one's right was going to be curbed by this section. If such a right was going to be curbed by the section, I would have been against such an amendment, because after all, *it is the right of a person to propagate his own language, his own particular culture and various other matters. But that does not mean vilifying another language or creating enmity between communities.*

* * *

... I am pained to hear Shri Hynniewta giving expression to an apprehension, which to me seems entirely baseless. That apprehension is to the effect that clause 23 will deprive him of his right to propagate his language or preserve his language, which cannot be taken away from him as he himself has quoted the relevant article of the Constitution. *If that right is taken away by the Bill, it will be struck down as contravening Article 19 and the section will not be given effect to by any court.* Fortunately, this country is still governed by the rule of law and the courts of law have the last say in these matters.

* * *

That is a different matter. With due respect to the hon. member, he has not really appreciated the rationale of the Supreme Court's decision. With regard to election matters, Parliament is free to enact such legislation as it thinks best and Chapter III does not come in. That is the decision of the Supreme Court. *But in the guise of framing an electoral law, no fundamental right of the citizen can be taken away. That is what I am saying. The right to preserve one's language cannot be taken away by an election law. That is as clear as daylight.*

* * *

You cannot make it an election issue if you say, 'Do not vote for him. He is a Bengali' or 'Do not vote for him. He is a Khasi.' I made it unequivocally clear that it is the purpose and design of this House and of the country to ensure that. *No man shall appeal only because he speaks a particular language and should get voted for that reason; or no man shall appeal against a particular person to the electorate solely because that opponent of his speaks a particular language.*

* * *

They are entitled to do so. The Constitution gives them the right to do so. *But we are on a very narrow point, whether we shall extend the right to a person, to a voter, to say: vote for me because I speak Hindi, I speak Garhwali, or I speak Nepali or I speak Khasi; or in the alternative, do not vote for my opponent because he is a man who speaks this*

particular language, his own language. It is on that sole narrow point that the prohibition is sought to be made.

... But we are not here on the aesthetics of language or the philosophy of language; nor are we here to debate the fundamental rights of a citizen to preserve his own language and culture. Fortunately, that is guaranteed to every man and woman in this country as it is not elsewhere. ...”

* * *

... But the problem is, are we going to allow a man to go to the electorate and ask for votes because he happens to speak a particular language or ask the electorate to refrain from voting for a particular person merely on the ground of his speaking a particular language or following a particular religion and so on? If not, we have to support this. The preservation of the minorities' rights and so on is a different and a wider question.

* * *

... But, if you say that Bengali language in this area is being suppressed or the schools are being closed, as Shri Hynniewta was saying, because they bore a particular name, then, you are speaking not only to fight in an election but you are also really seeking to protect your fundamental rights, to preserve your own language and culture. That is a different matter.

But, if you say, ‘I am a Bengali, you are all Bengalis, vote for me’, or ‘I am an Assamese and so vote for me because you are Assamese-speaking men’, I think, the entire House will deplore that as a hopeless form of election propaganda. And, no progressive party will run an election on that line. Similarly, on the ground of religion. In the olden days, what speeches we used to hear in Muslim League gatherings! They were purely appeals on the ground of religion. So, the issue is too narrow and not a wide issue in which the life and death of minorities are involved as Shri Hynniewta sought to make out. It is not at all in question. ...” (emphasis supplied)

15. The clarification given in the speech of the Law Minister clearly shows that a speech for the protection of fundamental rights, preservation of own language, religion and culture, etc. are not forbidden by sub-section (3) of Section 123, and the limit is narrow to the extent indicated.

16. It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism. Instances given in the speech of discrimination against any religion causing the imbalance in the professed goal of secularism, the allegation being against any individual or any political party, cannot be called an appeal on the ground of religion forbidden by sub-section (3). In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion. When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate's religion or alienating the electorate against another candidate on the ground of the other candidate's

religion. It also means that the State has no religion and the State practises the policy of neutrality in the matter of religion.

17. In *M. Ismail Faruqui (Dr.) v. Union of India (Ayodhya case)* [(1994) 6 SCC 360] the Constitution Bench, after a detailed discussion, summarised the true concept of secularism under the Indian Constitution as under: (SCC p. 403, para 37)

“It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.”

18. It cannot be doubted that an election speech made in conformity with the fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution, cannot be treated as anti-secular to be prohibited by sub-section (3) of Section 123, unless it falls within the narrow net of the prohibition indicated earlier. It is obvious that a speech referring to religion during election campaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3), if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion. When it is said that politics and religion do not mix, it obviously does not mean that even such permissible political speeches are forbidden. This is the meaning and true scope of sub-section (3) of Section 123 of the Act.

19. We would now consider the meaning of sub-section (3-A) of Section 123. This sub-section also was inserted along with the substituted sub-section (3) by Act 40 of 1961 w.e.f. 20-9-1961. The meaning of this sub-section is not much in controversy. Sub-section (3-A) is similar to Section 153-A of the Indian Penal Code. In sub-section (3-A), the expression used is “the promotion of, or attempt to promote, feelings of enmity or hatred” as against the expression “Whoever ... promotes or attempts to promote ... disharmony or feelings of enmity, hatred or ill will ...” in Section 153-A IPC. The expression “feelings of enmity or hatred” is common in both the provisions but the additional words in Section 153-A IPC are “disharmony ... or ill will”. The difference in the plain language of the two provisions indicates that mere promotion of disharmony or ill will between different groups of people is an offence under Section 153-A IPC while under sub-section (3-A) of Section 123 of the R.P. Act, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign.

20. The provision is made with the object of curbing the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies. The provision in the IPC as well as in the R.P. Act for this purpose was made by amendment at the same time. The amendment in the R.P. Act followed amendments made in the Indian Penal Code to this effect in a bid to curb any tendency to resort to divisive

means to achieve success at the polls on the ground of religion or narrow communal or linguistic affiliations. Any such attempt during the election is viewed with disfavour under the law and is made a corrupt practice under sub-section (3-A) of Section 123.

21. Shri Jethmalani is right that in sub-section (3-A), the element of prejudicial effect on public order is implicit. Such divisive tendencies promoting enmity or hatred between different classes of citizens of India tend to create public unrest and disturb public order. This is a logical inference to draw on proof of the constituent parts of sub-section (3-A). The meaning of sub-section (3-A) is not seriously disputed between the parties and, therefore, it does not require any further discussion. However, whether the act complained of falls within the net of sub-section (3-A) is a question of fact in each case to be decided on the basis of the evidence led to prove the alleged act.

22. The decision in *Ziyouddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra* [(1976) 2 SCC 17] lends assurance to the correctness of the construction made by us of these provisions. The returned candidate Bukhari was the candidate of Muslim League while the defeated candidate Shauket Chagla was the Congress candidate at the election. Both were Muslims. The returned candidate Bukhari in his appeal to the voters said that Chagla was not true to his religion while he himself was a true Muslim and that Chagla was neither a good Hindu nor a true Muslim. The clear implication of the appeal was that Chagla was not true to his religion whereas Bukhari was, and, therefore, the voters should prefer Bukhari. In short, the appeal for votes was made on the ground that Bukhari was a staunch believer of the Muslim religion as against Chagla who was not. It was this clear appeal based on the ground of the candidate's religion which was held to constitute the corrupt practices defined by sub-sections (3) and (3-A) of Section 123 of the R.P. Act. For this purpose, the true ambit and scope of these provisions was considered and indicated as under: (SCC pp. 24-33, paras 10-47)

“We propose to indicate, at this stage, what mischief the provisions were designed to suppress because that seems to us to be the most illuminating and certain way of correctly construing these statutory provisions. We cannot do so without adverting to the historical, political, and constitutional background of our democratic set-up, such provisions are necessary in our opinion, to sustain the spirit or climate in which the electoral machinery of this set-up could work.

Our Constitution-makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

It seems to us that Section 123, sub-sections (2), (3) and (3-A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse

irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised, political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories. The line has to be drawn by the courts, between what is permissible and what is prohibited, after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made.

* * *

We have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of this country in every case of alleged corrupt practice of undue influence by making statements. We will, therefore, proceed to consider the particular facts of the case before us.

* * *

... In other words, Bukhari, apart from making a direct attack on the alleged religious beliefs and practices of the Chagla family, clearly conveyed to the hearers that Chagla was an unfit person, on the ground of his mixed religious faith and practices, to represent Muslims. Bukhari had also called upon Muslims to unite against such a person if they wanted their religion to survive. The High Court had very rightly held that these statements contravened the provisions of Section 123(3) of the Act.

* * *

We do not think that any useful purpose is served by citing authorities, as the learned counsel for the appellant tried to do, to interpret the facts of the case before us by comparing them to the very different facts of other cases. In all such cases, the line has no doubt to be drawn with care so as not to equate possible impersonal attacks on religious bigotry and intolerance with personal ones actuated by bigotry and intolerance.

As already indicated by us, our democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy. That spirit was characterised by Montesquieu long ago as one of 'virtue'. It implies, as the late Pandit Jawaharlal Nehru once said, 'self-discipline'. For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda or professedly religious grounds directed against a candidate at an election may be permitted in a theocratic State but not in a secular republic like ours. It is evident that, if such propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others. It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed, such prohibitions are necessary in the interests of elementary public peace and order.

* * *

According to his own professions, the appellant wanted votes for himself on the ground that he staunchly adhered to what he believed to be Muslim religion as contrasted

with Chagla who did not. There is no doubt whatsoever in our minds that the High Court had rightly found the appellant guilty of the corrupt practices defined by the provisions of Sections 123(2), 123(3) and 123(3-A) of the Act by making the various speeches closely examined by us also.”(emphasis supplied)

The meaning of sub-sections (3) and (3-A) of Section 123 was understood and indicated in this decision, in the above manner.

Constitutional Validity of sub-sections (3) and (3-A) of Section 123

23. The next question now relates to the constitutional validity of these provisions on the meaning ascribed to them.

24. Sub-section (3-A) of Section 123 is undoubtedly a provision made in the interests of public order or incitement to an offence because the promotion or attempt to promote feelings of enmity or hatred between different classes of the citizens of India on any of the grounds specified therein, apart from creating divisive tendency, would also be prejudicial to the maintenance of public order and may amount to incitement to commission of offences. The freedom of speech and expression guaranteed to all citizens under Article 19(1)(a), which is the basis of the constitutional challenge to this provision, is subject to clause (2) of Article 19 which permits the making of any law imposing reasonable restrictions on the exercise of this right in the interests of public order or incitement to an offence. For this reason, no further attempt was made to press the argument of challenge to the constitutional validity of sub-section (3-A) on the construction we have made of that provision.

25. The question now is of the constitutional validity of sub-section (3) of Section 123. We have already rejected the argument that the element of prejudicial effect on public order is implicit also in sub-section (3) as it is in sub-section (3-A). According to Shri Ram Jethmalani, unless this element also is read into sub-section (3), it is violative of Article 19(1)(a) inasmuch as clause (2) of Article 19 does not save its validity under any of the other heads specified therein.

26. We have construed sub-section (3) of Section 123 as a restriction only to the extent that votes cannot be sought for a candidate on the ground of his religion, etc. and similarly there can be no appeal to refrain from voting for any person on the same ground. In other words, an appeal to vote for a candidate or not to vote for him on the ground of his religion, etc. is the restriction imposed by sub-section (3). This restriction is in the law enacted to provide for the conduct of elections, the qualifications and disqualifications for membership of the Houses, the corrupt practices and other offences at or in connection with such elections. The right to contest the election is given by the statute subject to the conditions prescribed therein. The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practise and propagate religion unconnected with the election campaign.

27. It is true, as argued by Shri Jethmalani, that the freedom of speech and expression guaranteed to all citizens under Article 19(1)(a) is absolute subject to the reasonable restrictions imposed by any law saved by clause (2) of Article 19, under one of the heads specified therein. The heads specified in clause (2) of Article 19 are, therefore, several and they are intended to cover the entire area within which the absolute freedom to say anything which the speaker may like would not extend, in keeping with the standards of a civilized

society, the corresponding rights in others in an orderly society, and the constitutional scheme.

28. The expression “in the interests of” used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are: decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19. Shri Jethmalani contended that the words “decency or morality” relate to sexual morality alone. In view of the expression “in the interests of” and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words “decency or morality” do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of ‘decency’ is “correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour” (*The Oxford Encyclopaedic English Dictionary*); “conformity to the prevailing standards of propriety, morality, modesty, etc.: and the quality of being decent” (*Collins English Dictionary*).

29. Thus, the ordinary dictionary meaning of ‘decency’ indicates that the action must be in conformity with the current standards of behaviour or propriety, etc. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. In *Kneller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions* [(1972) 2 All ER 898] the meaning of ‘indecent’ was indicated as under: (All ER p. 905)

“... Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting....”

Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society.

30. In our opinion, the saving in clause (2) of Article 19 permits the imposition of reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) by making any law in the interests of decency or morality; and sub-section (3) of Section 123 of the R.P. Act, as construed by us, has the protection of clause (2) of Article 19 under the head ‘decency’ therein. This conclusion is reached by us even if it is assumed that the provision is not saved merely as a condition subject to which the statutory right of contesting an election is available to the candidate. The fact that the scheme of separate electorates was rejected in framing the Constitution and secularism is the creed adopted in the constitutional scheme, are relevant considerations to treat this as a reasonable restriction on the freedom of speech and expression, for maintaining the standard of behaviour required in conformity with the decency and propriety of the societal norms. Viewed at in any manner, sub-section (3) of Section 123 cannot be held to be unconstitutional. This view is also in accord with the nature of right to contest an election, as understood in *Jumuna Prasad Mukhariya v. Lachhi Ram* [(1955) 1 SCR 608 : AIR 1954 SC 608].

31. The argument assailing the constitutional validity of sub-sections (3) and/or (3-A) of Section 123 is rejected.

Meaning of ‘Hindutva’ and ‘Hinduism’

32. The next contention relates to the meaning of ‘Hindutva’ and ‘Hinduism’ and the effect of the use of these expressions in the election speeches.

33. We have already indicated the meaning of sub-section (3) of Section 123 of the R.P. Act and the limit of its operation. It may be said straightaway that any speech wherein these expressions are used, irrespective of their meaning, cannot by itself fall within the ambit of sub-section (3) of Section 123, unless the speech can be construed as an appeal to vote for a candidate on the ground that he is a Hindu or to refrain from voting for a candidate on the ground of his religion, i.e., he not being a Hindu. We have also indicated that mere reference to any religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3-A) of Section 123, since reference can be made to any religion in the context of secularism or to criticise any political party for practising discrimination against any religious group or generally for preservation of the Indian culture. In short, mere use of the word ‘Hindutva’ or ‘Hinduism’ or mention of any other religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3-A) of Section 123, unless the further elements indicated are also present in that speech. It is also necessary to see the meaning and purport of the speech and the manner in which it was likely to be understood by the audience to which the speech was addressed. These words are not to be construed in the abstract, when used in an election speech.

34. Both sides referred copiously to the meaning of the words ‘Hindutva’ and ‘Hinduism’ with reference to several writings. Shri Jethmalani referred to them for the purpose of indicating the several meanings of these words and to emphasise that the word ‘Hindutva’ relates to Indian culture based on the geographical division known as Hindustan, i.e., India. On the other hand, Shri Ashok Desai emphasised that the term ‘Hindutva’ used in election speeches is an emphasis on Hindu religion bearing no relation to the fact that India is also known as Hindustan, and the term can relate to Indian culture.

35. The Constitution Bench in ***Sastri Yagnapurushdasji v. Muldas Bhudardas Vaishya*** [(1966) 3 SCR 242] held thus: (SCR pp. 259-66)

“Who are Hindus and what are the broad features of Hindu religion, that must be the first part of our enquiry in dealing with the present controversy between the parties. *The historical and etymological genesis of the word ‘Hindu’ has given rise to a controversy amongst indologists; but the view generally accepted by scholars appears to be that the word ‘Hindu’ is derived from the River Sindhu otherwise known as Indus which flows from the Punjab.* ‘That part of the great Aryan race’, says Monier Williams, ‘which immigrated from Central Asia, through the mountain passes into India, settled first in the districts near the River Sindhu (now called the Indus). The Persians pronounced this word Hindu and named their Aryan brethren Hindus. The Greeks, who probably gained their first ideas of India from the Persians, dropped the hard aspirate, and called the Hindus ‘Indoi’ (***Hinduism***’ by Monier Williams, p. 1).

The Encyclopaedia of Religion and Ethics, Vol. VI, has described 'Hinduism' as the title applied to that form of religion which prevails among the vast majority of the present population of the Indian Empire (p. 686). As Dr Radhakrishnan has observed: 'The Hindu civilization is so called, since its original founders or earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North-West Frontier Province and the Punjab. This is recorded in the Rig Veda, the oldest of the Vedas, the Hindu scriptures which give their name to this period in Indian history. *The people on the Indian side of the Sindhu were called Hindu by the Persian and the later western invaders*' (*The Hindu View of Life* by Dr Radhakrishnan, p. 12). *That is the genesis of the word 'Hindu'.*

When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.

... The term 'Hindu', according to Dr Radhakrishnan, had originally a territorial and not a credal significance. It implied residence in a well-defined geographical area. Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother. The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practised different rites (Kurma Purana) (Ibid. p. 12).

Monier Williams has observed that 'it must be borne in mind that Hinduism is far more than a mere form of theism resting on Brahmanism. It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country and finally resolving itself into an intricate Delta of tortuous streams and jungly marshes.... *The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds*'. (*Religious Thought & Life in India* by Monier Williams, p. 57).

We have already indicated that the usual tests which can be applied in relation to any recognised religion or religious creed in the world turn out to be inadequate in dealing with the problem of Hindu religion. Normally, any recognised religion or religious creed subscribes to a body of set philosophic concepts and theological beliefs. Does this test apply to the Hindu religion? In answering this question, we would base ourselves mainly on the exposition of the problem by Dr Radhakrishnan in his work on Indian philosophy. (*Indian Philosophy* by Dr Radhakrishnan, Vol. I, pp. 22-23). Unlike other countries,

India can claim that philosophy in ancient India was not an auxiliary to any other science or art, but always held a prominent position of independence. ... 'In all the fleeting centuries of history', says Dr Radhakrishnan, 'in all the vicissitudes through which India has passed, a certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage, and they will be the characteristic marks of the Indian people so long as they are privileged to have a separate existence'. *The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets. Truth is one, but wise men describe it differently.* The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the interrelation between the individual and the universal soul. 'If we can abstract from the variety of opinion', says Dr Radhakrishnan, 'and observe the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings'. (*Ibid*, p. 32)

... Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view. That is how 'the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the selfsame tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the truth'. (*Ibid*, p. 48) *When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no scope for excommunicating any notion or principle as heretical and rejecting it as such.*

* * *

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavira founded Jainism; Basava became the founder of Lingayat religion, Dhyaneswar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

... It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: 'When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and

philosophies of the Western half of the old world. Like them, *Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary* (*'The Present-Day Experiment in Western Civilisation'* by Toynbee, pp. 48-49).

The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Article 25 has made it clear that in sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."(emphasis supplied)

36. In a later Constitution Bench decision in *CWT v. R. Sridharan* [(1976) 4 SCC 489] the meaning of the term 'Hinduism' as commonly understood is stated thus: (SCC pp. 493-94, paras 10-16)

"... It is a matter of common knowledge that Hinduism embraces within itself so many diverse forms of beliefs, faiths, practices and worship that it is difficult to define the term 'Hindu' with precision.

The historical and etymological genesis of the word 'Hindu' has been succinctly explained by Gajendragadkar, C.J. in *Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya* [(1966) 3 SCR 242 : AIR 1966 SC 1119].

In Unabridged Edition of *Webster's Third New International Dictionary of the English Language*, the term 'Hinduism' has been defined as meaning

'a complex body of social, cultural and religious beliefs and practices evolved in and largely confined to the Indian subcontinent and marked by a caste system, an outlook tending to view all forms and theories as aspects of one eternal being and truth, a belief in ahimsa, karma, dharma, sanskara and moksha, and the practice of the way of works, the way of knowledge, or the way of devotion as the means of release from the bound of rebirths; the way of life and form of thought of a Hindu.'

In *Encyclopaedia Britannica* (15th Edition), the term 'Hinduism' has been defined as meaning

'the civilization of Hindus (originally, the inhabitants of the land of Indus River). It properly denotes the Indian civilization of approximately the last 2000 years, which gradually evolved from Vedism, the religion of the ancient Indo-European peoples who settled in India in the last centuries of the 2nd millennium B.C. Because it integrates a large variety of heterogeneous elements, Hinduism constitutes a very complex but largely continuous whole, and since it covers the whole of life, it has religious, social, economic, literary, and artistic aspects. As a religion, Hinduism is an utterly diverse conglomerate of doctrines, cults, and way of life.... In principle, Hinduism incorporates all forms of belief and worship without necessitating the selection or elimination of any. The Hindu is inclined to revere the divine in every manifestation, whatever it may be, and is doctrinally tolerant, leaving others —

including both Hindus and non-Hindus — whatever creed and worship practices suit them best. A Hindu may embrace a non-Hindu religion without ceasing to be a Hindu, and since the Hindu is disposed to think synthetically and to regard other forms of worship, strange gods, and divergent doctrines as inadequate rather than wrong or objectionable, he tends to believe that the highest divine powers complement each other for the well-being of the world and mankind. Few religious ideas are considered to be finally irreconcilable. The core of religion does not even depend on the existence or non-existence of God or on whether there is one god or many. Since religious truth is said to transcend all verbal definition, it is not conceived in dogmatic terms. Hinduism is, then both a civilization and a conglomerate of religions, with neither a beginning, a founder, nor a central authority, hierarchy, or organization. Every attempt at a specific definition of Hinduism has proved unsatisfactory in one way or another, the more so because the finest Indian scholars of Hinduism, including Hindus themselves, have emphasized different aspects of the whole’.

In his celebrated treatise *Gitarahasya*, B.G. Tilak has given the following broad description of the Hindu religion:

‘Acceptance of the Vedas with reverence; recognition of the fact that the means or ways of salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion’.

In *Bhagwan Koer v. J.C. Bose* [ILR (1904) 31 Cal 11 : 30 IA 249 : 7 CWN 895] it was held that Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship.

* * *

This being the scope and nature of the religion, it is not strange that it holds within its fold men of divergent views and traditions which have very little in common except a vague faith in what may be called the fundamentals of the Hindu religion.” (emphasis supplied)

37. These Constitution Bench decisions, after a detailed discussion, indicate that no precise meaning can be ascribed to the terms ‘Hindu’, ‘Hindutva’ and ‘Hinduism’; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term ‘Hindutva’ is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the face of these decisions the term ‘Hindutva’ or ‘Hinduism’ per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in sub-sections (3) and/or (3-A) of Section 123 of the R.P. Act.

38. Bharucha, J. in *M. Ismail Faruqui (Dr.) v. Union of India* [(1994) 6 SCC 360], (*Ayodhya case*), in the separate opinion for himself and Ahmadi, J. (as he then was), observed as under: (SCC p. 442, para 156)

“... Hinduism is a tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land”

39. Ordinarily, Hindutva is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism. In *Indian Muslims — The Need For A Positive Outlook* by Maulana Wahiduddin Khan, (1994), it is said (at p. 19):

“The strategy worked out to solve the minorities problem was, although differently worded, that of Hindutva or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all of the cultures coexisting in the country. This was felt to be the way to communal harmony and national unity. It was thought that this would put an end once and for all to the minorities' problem.”

The above opinion indicates that the word ‘Hindutva’ is used and understood as a synonym of ‘Indianisation’, i.e., development of uniform culture by obliterating the differences between all the cultures coexisting in the country.

40. In *Kultar Singh v. Mukhtiar Singh* [(1964) 7 SCR 790 : AIR 1965 SC 141], the Constitution Bench construed the meaning of sub-section (3) of Section 123 prior to its amendment. The question there was whether a poster contained an appeal to voters to vote for the candidate on the ground of his religion; and the meaning of the word ‘Panth’ in the poster was significant for the purpose. It was held as under: (SCR pp. 793-95)

“It is true that a corrupt practice under Section 123(3) can be committed by a candidate by appealing to the voters to vote for him on the ground of his religion even though his rival candidate may belong to the same religion. If, for instance, a Sikh candidate were to appeal to the voters to vote for him, because he was a Sikh and add that his rival candidate, though a Sikh in name, was not true to the religious tenets of Sikhism or was a heretic and as such, outside the pale of the Sikh religion, that would amount to a corrupt practice under Section 123(3), and so, we cannot uphold the contention that Section 123(3) is inapplicable because both the appellant and the respondent are Sikhs. ...

The corrupt practice as prescribed by Section 123(3) undoubtedly constitutes a very healthy and salutary provision which is intended to serve the cause of secular democracy in this country. In order that the democratic process should thrive and succeed, it is of utmost importance that our elections to Parliament and the different legislative bodies must be free from the unhealthy influence of appeals to religion, race, caste, community, or language. If these considerations are allowed any sway in election campaigns, they would vitiate the secular atmosphere of democratic life, and so, Section 123(3) wisely provides a check on this undesirable development by providing that an appeal to any of these factors made in furtherance of the candidature of any candidate as therein prescribed would constitute a corrupt practice and would render the election of the said candidate void.

In considering the question as to whether the distribution of the impugned poster by the appellant constitutes corrupt practice under Section 123(3), there is one point which has to be borne in mind. The appellant had been adopted as its candidate by the Akali Dal Party. *This Party is recognised as a political party by the Election Commission*

notwithstanding the fact that all of its members are only Sikhs. It is well-known that there are several parties in this country which subscribe to different political and economic ideologies, but the membership of them is either confined to, or predominantly held by, members of particular communities or religions. So long as law does not prohibit the formation of such parties and in fact recognises them for the purpose of election and parliamentary life, it would be necessary to remember that an appeal made by candidates of such parties for votes may, if successful, lead to their election and in an indirect way, may conceivably be influenced by considerations of religion, race, caste, community or language. This infirmity cannot perhaps be avoided so long as parties are allowed to function and are recognised, though their composition may be predominantly based on membership of particular communities or religion. That is why we think, in considering the question as to whether a particular appeal made by a candidate falls within the mischief of Section 123(3), courts should not be astute to read into the words used in the appeal anything more than can be attributed to them on its fair and reasonable construction.

That takes us to the question of construing the impugned poster. The principles which have to be applied in construing such a document are well-settled. *The document must be read as a whole and its purport and effect determined in a fair, objective and reasonable manner. In reading such documents, it would be unrealistic to ignore the fact that when election meetings are held and appeals are made by candidates of opposing political parties, the atmosphere is usually surcharged with partisan feelings and emotions and the use of hyperboles or exaggerated language, or the adoption of metaphors, and the extravagance of expression in attacking one another, are all a part of the game, and so, when the question about the effect of speeches delivered or pamphlets distributed at election meetings is argued in the cold atmosphere of a judicial chamber, some allowance must be made and the impugned speeches or pamphlets must be construed in that light. In doing so, however, it would be unreasonable to ignore the question as to what the effect of the said speech or pamphlet would be on the mind of the ordinary voter who attends such meetings and reads the pamphlets or hears the speeches. It is in the light of these well-established principles that we must now turn to the impugned pamphlet.*”(emphasis supplied)

41. The test applied in the decision was to construe the meaning of the word ‘Panth’ not in the abstract but in the context of its use. The conclusion reached was that the word ‘Panth’ used in the poster did not mean Sikh religion and, therefore, the appeal to the voters was not to vote for the candidate because of his religion. Referring to an earlier decision in **Jagdev Singh Sidhanti v. Pratap Singh Daulta** [(1964) 6 SCR 750 : AIR 1965 SC 183], it was reiterated as under: (SCR p. 799)

“... Political issues which form the subject-matter of controversies at election meetings may indirectly and incidentally introduce considerations of language or religion, but in deciding the question as to whether corrupt practice has been committed under Section 123(3), care must be taken to consider the impugned speech or appeal carefully and always in the light of the relevant political controversy. ...”

42. Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words 'Hinduism' or 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practising the Hindu religion as a faith.

43. Considering the terms 'Hinduism' or 'Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the detailed discussion in earlier authorities of this Court. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. It is indeed very unfortunate, if in spite of the liberal and tolerant features of 'Hinduism' recognised in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage. Fundamentalism of any colour or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation. Any misuse of these terms must, therefore, be dealt with strictly.

44. It is, therefore, a fallacy and an error of law to proceed on the assumption that any reference to Hindutva or Hinduism in a speech makes it automatically a speech based on the Hindu religion as opposed to the other religions or that the use of the words 'Hindutva' or 'Hinduism' per se depict an attitude hostile to all persons practising any religion other than the Hindu religion. It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for votes for a Hindu candidate on the ground that he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of sub-section (3) or (3-A) of Section 123. It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant. The parliamentary debates, including the clarifications made by the Law Minister quoted earlier, also bring out this difference between the prohibited and permissible speech in this context. Whether a particular speech in which reference is made to Hindutva and/or Hinduism falls within the prohibition under sub-section (3) or (3-A) of Section 123 is, therefore, a question of fact in each case.

45. This is the correct premise in our view on which all such matters are to be examined. The fallacy is in the assumption that a speech in which reference is made to Hindutva or Hinduism must be a speech on the ground of Hindu religion so that if the candidate for whom the speech is made happens to be a Hindu, it must necessarily amount to a corrupt practice under sub-section (3) and/or sub-section (3-A) of Section 123 of the R.P. Act. As indicated, there is no such presumption permissible in law contrary to the several Constitution Bench decisions referred to herein.

Non-compliance of Section 99 of the R.P. Act

46. The contention that the notice given to Bal Thackeray under Section 99 of the R.P. Act was not in conformity with that provision and that there is non-compliance of the requirements of Section 99, has no merit. The notice was given after the entire evidence had been recorded and the learned trial Judge formed the prima facie opinion that the corrupt practices alleged to have been committed under sub-sections (3) and (3-A) of Section 123 appeared to have been proved and Bal Thackeray was likely to be named along with the returned candidate to be guilty of those corrupt practices. The notice given was accompanied by copies of pleadings and the entire evidence adduced at the trial for proving those corrupt practices. The notice clearly stated that the noticee had the opportunity to cross-examine such witnesses as had already been examined and of calling evidence in his defence and of being heard. The noticee raised objection to the notice alleging that it was vague, which was rejected by the High Court. That order was challenged by a special leave petition in this Court which was dismissed granting liberty to the noticee to apply in the High Court for the precise particulars claimed by him. Ultimately certain portions from the material on record were indicated by the petitioner on such a direction being given by the High Court. In view of the direction of this Court in the special leave petition, it would have been more appropriate for the High Court to indicate the precise portions. However, there is no prejudice caused, inasmuch as the portions were indicated by the election petitioner on the High Court's direction. The election petitioner Prabhakar Kashinath Kunte (PW 1) was called for cross-examination on behalf of the noticee. The noticee was given full opportunity to cross-examine the witnesses already examined and to adduce evidence in his defence and to argue his case in the High Court. The noticee Bal Thackeray did not choose to enter the witness-box and, therefore, the material present has to be examined without any denial by the noticee as a witness in the case.

47. There is no dispute that no material which was not given to the noticee Bal Thackeray was used against him. We have already indicated that the finding of proof of the corrupt practices alleged in the election petition is based on the three speeches of Bal Thackeray which are not denied either by Dr Ramesh Prabhoo or by Bal Thackeray. Copy of the text of those speeches is also undisputed. All this was furnished to the noticee Bal Thackeray. It is difficult to visualise what prejudice could be caused to the noticee on these facts and how there could be any non-compliance of Section 99 of the R.P. Act in this situation.

48. In order to examine the contention of non-compliance of Section 99, it is necessary to examine the requirements of that provision. Section 99 reads as under:

“99. Other orders to be made by the High Court.— (1) At the time of making an order under Section 98 the High Court shall also make an order—

(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless—

(a) he has been given notice to appear before the High Court and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard.

(2) In this section and in Section 100, the expression ‘agent’ has the same meaning as in Section 123.”

49. Sub-section (1) requires that at the time of making an order under Section 98, the High Court shall also make an order recording the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. In other words, while deciding the election petition at the conclusion of the trial and making an order under Section 98 disposing of the election petition in one of the ways specified therein, the High Court is required to record the names of all persons guilty of any corrupt practice which has been proved at the trial. Proviso to sub-section (1) then prescribes that a person who is not a party to the petition shall not be so named unless the condition specified in the proviso is fulfilled. The requirement of the proviso is only in respect of a person who is not a party to the petition and is to be named so that he too has the same opportunity which was available to a party to the petition. The requirement specified is of a notice to appear and show cause why he should not be named and if he appears in pursuance of the notice, he has to be given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him and also the opportunity of calling evidence in his defence and of being heard. In short, the opportunity which a party to the petition had at the trial to defend against the allegation of corrupt practice is to be given by such a notice to that person of defending himself if he was not already a party to the petition. In other words, the noticee has to be equated with a party to the petition for this purpose and is to be given the same opportunity which he would get if he was made a party to the petition.

50. This is the pragmatic test to be applied for deciding the question of compliance of Section 99 of the R.P. Act. If the noticee had the opportunity which he would have got as a party to the petition, then there can be no case of non-compliance of Section 99. The opportunity required to be given by the proviso to sub-section (1) of Section 99 is the same and not more than that available to a party to the petition to defend himself against the charge of corrupt practice. Applying the above test, there can be no doubt that there is no non-compliance of Section 99 in the present case. The noticee Bal Thackeray had the same opportunity which the returned candidate Dr Ramesh Yeshwant Prabhoo got as a respondent to the petition. The noticee was given the opportunity to cross-examine any witness who had already been examined by the High Court and the witnesses who were considered to have given evidence against him, were also enumerated in the notice; and he was given an opportunity to call evidence in his defence and to be heard.

51. In this situation, the grievance made that specific portions of the material which formed the record at the trial were not precisely indicated to the noticee has no merit. It was

clear from the pleading that the allegation against the noticee was in respect of the three speeches made by him, the particulars of which were given and the text of those speeches also was available to the noticee which he did not even deny. On these facts, there is no ground to allege non-compliance of Section 99 of the R.P. Act. This contention on behalf of the noticee Bal Thackeray is, therefore, rejected and the objection raised in the appeal of Bal Thackeray of non-compliance of Section 99 of the R.P. Act has no merit.

52. We would now proceed to examine the facts of this case.

Speeches

53. It is in the light of the above discussion and the meaning of sub-sections (3) and (3-A) of Section 123 that the effect of the alleged offending speeches has to be examined. The three speeches were made on 29-11-1987, 9-12-1987 and 10-12-1987. The High Court has held that the speeches of 29-11-1987 and 10-12-1987 amount to corrupt practices under sub-sections (3) and (3-A) of Section 123, while the speech of 9-12-1987 is a corrupt practice only under sub-section (3) thereof. The returned candidate Dr Ramesh Yeshwant Prabhoo was present in all the three meetings in which these speeches were given by Bal Thackeray. The consent of Dr Prabhoo for these speeches is implied from his conduct including his personal presence in all the three meetings.

54. Certain extracts from the alleged speeches of Bal Thackeray, translated in English, are expressly pleaded in the election petition, as under:

From Speech of 29-11-1987

“We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so.”

From Speech of 9-12-1987

“Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by name Prabhoo should be led to victory in the name of religion.”

From Speech of 10-12-1987

“We have gone with the ideology of Hinduism. Shiv Sena will implement this ideology. Though this country belongs to Hindus, Ram and Krishn are insulted. (They) valued the Muslim votes more than your votes: we do not want the Muslim votes. A snake like Shahabuddin is sitting in the Janata Party, a man like Nihal Ahmed is also in Janata Party. So the residents of Vile Parle should bury this party (Janata Party).”

55. It has been pleaded in the election petition that the above utterances in the three meetings are examples to show that the appeal to voters emphasised that Dr Ramesh Prabhoo was the only person who could represent the Hindu community and, therefore, the voters should vote for Ramesh Prabhoo in the name of religion. The full text of the speeches was adduced in evidence and the contents thereof are not disputed. It may be mentioned that a notice under Section 99 of the R.P. Act was issued to Bal Thackeray who merely filed an affidavit but did not enter the witness-box. The true import and impact of these speeches has,

therefore, to be adjudged in the light of the evidence including the statement of Dr Ramesh Yeshwant Prabhoo without the version in evidence of Bal Thackeray.

56. The case was argued even before us on a demurrer treating the contents of the speeches as reproduced in the full text in evidence, of which the specific portions pleaded in the election petition are extracts. The question is: Whether these speeches amount to corrupt practices under sub-sections (3) and/or (3-A) of Section 123 as held by the High Court?

57. We may now quote certain extracts from the three speeches of Bal Thackeray on which reliance has been placed in particular by Shri Ashok Desai to support the judgment of the High Court that they constitute the said corrupt practices. These are:

First speech on 29-11-1987

“All my Hindu brothers, sisters and mothers gathered here. ... Today Dr Prabhoo has been put up as candidate from your Parle. ... But here one cannot do anything at anytime about the snake in the form of Khalistan and Muslim. ... The entire country has been ruined and therefore we took the stand of Hindutva and by taking the said stand we will step in the Legislative Assembly. ... Unless we step forward strongly it would be difficult for us to live because there would be war of religion. ... Muslims will come. What will you Hindu (people) do? Are you going to throw ‘Bhasma’ (i.e. ashes) on them? ... We won't mind if we do not get votes from a single Muslim and we are not at all desirous to win an election with such votes. ... therefore, there is a dire need of the voice of Hindutva and therefore please send Shiv Sena to Legislative Assembly. ... who are (these) Muslims? Who are these ‘lande’? Once Vasant Dada had called me when he was a Chief Minister. He told me that rest is O.K. But asked me as to why I was calling them Lande. But is it correct if they call us ‘Kafer’ (i.e. traitor) then we will certainly call them ‘Lande’. ... They should bear in mind that this country is of Hindus, the same shall remain of Hindus. ... if Shiv Sena comes to power and if the morchas come ---- first of all (we) shall make them come. Everybody will have to take ‘diksha’ (i.e. initiation) of Hindu religion. ...”

Second speech of 9-12-1987

“... The victory will not be mine or of Dr Prabhoo or of Shiv Sena but the victory will be that of Hinduism. You will be instrumental in victory and you should become instrument for the same. At last you have the right to get rid of the difficulties faced by your caste, creed, gods, deities and Hindu religion. ... Therefore, I want to say that today we are standing for Hinduism. ... Whatever Masjids are there, if one starts digging the same, one will find Hindu temples under the same. ... If any body stands against Hindustan you should show courage by performing pooja (i.e. worship) with shoes. ... And a person by name Prabhoo who is contesting the election in the name of religion sent ahead (in the assembly). A ‘Jawan’ — like Prabhoo should go there (in the assembly). ...”

Third speech of 10-12-1987

“... It will do, if we do not get a vote from any Muslim. If anybody from them is present at this place he should think for himself. I am not in need of their votes. But I want your vote. ... You must send only Dr Ramesh Prabhoo of Shiv Sena, otherwise Hindus will be finished. It will not take much take (*sic*) for Hindustan to be green (i.e. Pakistan?). ...”

58. As earlier stated, the three speeches of Bal Thackeray from which the above extracts have been quoted are admitted. Similarly the interview of Dr Ramesh Yeshwant Prabhoo and its text published in *Janmabhoomi Prawasi* is admitted. Dr Prabhoo was the Mayor of Bombay. Dr Prabhoo (RW 1) admitted his presence in the meetings held on 29-11-1987, 9-12-1987 and 10-12-1987 in which the above speeches were given by Bal Thackeray. He admitted speaking himself also in these meetings. He has said nothing in his statement to suggest that he did not consent to the contents of the speeches of Bal Thackeray. In his deposition, he has expressly admitted that the speeches of Bal Thackeray were according to his election campaign. The element of the candidate's consent for the appeal to the voters made by Bal Thackeray in his speeches is, therefore, adequately proved. About his interview published in the *Janmabhoomi Prawasi*, issue of 9-12-1987, he said that the report is substantially correct, even though the first paragraph of that news item is incorrect. Omitting the first paragraph of the news item which he denied, certain portions, translated into English, from the remaining news item publishing the interview are as under:

“... Dr Prabhoo told me that there was a Hindu wave in Parle. The battle is between Hindus and Muslims i.e. to say between nationalist and anti-nationalist. ...

* * *

Supremely confident about his victory in the Vile Parle bye-election, Dr Prabhoo discounted any possibility of his defeats but he added that if he loses, it will mean that Hinduism has lost, ...”

59. The appeal made to the voters by Bal Thackeray in his aforesaid speech was a clear appeal to the Hindu voters to vote for Dr Ramesh Prabhoo because he is a Hindu. The clear import of the above extracts in each of the three speeches is to this effect. The first speech also makes derogatory reference to Muslims by calling them ‘snake’ and referring to them as ‘lande’ (derogatory term used for those practising circumcision). The language used in the context, amounted to an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion. The first speech, therefore, also constitutes the corrupt practice under sub-section (3-A).

60. The High Court has held the second speech to fall only under sub-section (3) and not sub-section (3-A), but the third speech has been held to fall both under sub-sections (3) and (3-A). We have already held the third speech also to constitute the corrupt practice under sub-section (3). The correctness of the English translation of a part of the third speech was found to be defective at the hearing and, therefore, an agreed fresh translation thereof was taken on record. Reading the speech in the light of the fresh agreed translation of the defective portion, it appears to us that the High Court's finding that the third speech amounts also to the corrupt practice under sub-section (3-A) cannot be affirmed, even though this variation is of no consequence to the ultimate result.

61. Our conclusion is that all the three speeches of Bal Thackeray amount to corrupt practice under sub-section (3), while the first speech is a corrupt practice also under sub-section (3-A) of Section 123 of the R.P. Act. Since the appeal made to the voters in these speeches was to vote for Dr Ramesh Prabhoo on the ground of his religion as a Hindu and the appeal was made with the consent of the candidate Dr Ramesh Prabhoo, he is guilty of these corrupt practices. For the same reason, Bal Thackeray also is guilty of these corrupt practices

and, therefore, liable to be named in accordance with Section 99 of the R.P. Act of which due compliance has been made in the present case.

62. We cannot help recording our distress at this kind of speeches given by a top leader of a political party. The lack of restraint in the language used and the derogatory terms used therein to refer to a group of people in an election speech is indeed to be condemned. The likely impact of such language used by a political leader is greater. It is, therefore, a greater need for the leaders to be more circumspect and careful in the kind of language they use in the election campaign. This is essential not only for maintaining decency and propriety in the election campaign but also for the preservation of the proper and time-honoured values forming part of our cultural heritage and for a free and fair poll in a secular democracy. The offending speeches in the present case discarded the cherished values of our rich cultural heritage and tended to erode the secular polity. We say this, with the fervent hope that our observation has some chastening effect in the future election campaigns.

63. For the aforesaid reasons, both the appeals must fail. We may observe that considerable irrelevant material was brought on record during the trial at the instance of both the parties which, apart from needlessly enlarging the scope of the trial, has led to needless extra expense and wastage of time even in the hearing of these appeals. In these circumstances, it is appropriate to direct the parties to bear their own costs in this Court. Accordingly, both the appeals are dismissed.

* * * * *

Dev Kanta Barooah v. Golok Chandra Baruah

AIR 1970 SC 1231

BHARGAVA, J. - The appellant, Dev Kanta Barooah, was declared elected at the last general elections to the Legislative Assembly of Assam in 1967, defeating the four rival candidates who are respondents 1 to 4 in this appeal. Respondent no. 1, Golok Chandra Baruah, filed an election petition challenging the election of the appellant on various grounds, including a charge that false statements as to the personal character of respondent no. 1 had been published with the consent of the appellant, thus constituting a corrupt practice under section 123(4) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act"). This is the only ground which has been accepted by the High Court of Assam and Nagaland and the election of the appellant has been set aside on this ground. In this appeal, consequently, the only question that falls for decision is whether the High Court was right in setting aside the election of the appellant on the ground of corrupt practice having been committed within the meaning of section 123(4) of the Act. This corrupt practice was alleged by respondent no. 1 to have been committed by the appellant by publication of a leaflet which is, for convenience, reproduced below:

Why Golok Barua was driven away from the Congress?

(Picture of a pair of bullock with yoke)

Humble submission: One leaflet bearing full of downright falsehood and false allegation with the Caption "Why I have left the Congress" has been published and distributed by Shri Golok Chandra Barua in the Samaguri Constituency. The patriot voters of Samaguri have sufficient experience and political consciousness. They would not believe the abominable and false publicity of Shri Golok Barua. Still for the knowledge of the public a brief description of the activities of public life of Shri Barua has been published. From that it will be understood that Sri Golok Barua is not an actual Congressman. He is a driven-out Congressman wearing a mask.

1. Golok Barua after rolling from several Colleges failed to pass the I.A. and at first became a copyist at the Katchery and thereafter became a Clerk. At the mass-movement of 1942 he earned some money by doing Military Contracts.

2. In 1952 by entering in the Congress sought nomination from the Congress from the Samaguri Constituency. The Congress did not give him nomination as in the 1942 movement he helped the British and revolted against the Country. After breach of promise he was badly defeated by standing against Shrimati Usha Barthakur who was a Congress nominee.

3. Again by entreaties he joined the Congress and on the sudden death of Late Pratap Chandra Sarma, Shri Golok Barua became the Chairman of Nowgong Municipality. Please note some of the instances of injustice and chaos during his tenure of office:

(Ka) During his time several thousand rupees were taken away from the Treasury unlawfully on signatures resembling to those of his signatures. The matter is now pending for hearing.

(Kha) When a huge amount of money withdrawn from the National Savings was misappropriated, the Govt. Examiner of Accounts declared Sri Golok Barua alone as guilty.

(Ga) At that time also on account of corruption in the Municipality alone late Dharmeswar Sarma the then Head Clerk of his time had to commit suicide.

(Gha) While Sri Golok Barua was the Chairman at night like drunkard went to the Ex-Chairman Dr. Birendra Kishore Guha and not finding Dr. Guha behaved his wife and daughter unmannerly. After that, assaulted Dr. Guha with shoes in presence of many persons. On that offence Sri Golok Barua was compelled to resign his Chairmanship by the Executive Committee of the District Congress Committee.

4. This time Sri Golok Barua sought for nomination from the Congress as a candidate to the Parliament from Kaliabar Constituency and a candidate to the Legislative Assembly from the Barhampur Constituency. But the Congress refused to give nomination due to his conduct and character and due to his treachery towards the country and the Congress. Out of that grudge he, again, by breaking his written promise to the effect that he would not go against the Congress if he was not given nomination by the Congress, has stood as a non-party candidate again from the Samaguri Constituency and he has published untrue and false propaganda against the Congress.

5. Due to the offence of the treachery he has been completely driven away from the Congress for a period of six years by the Assam Provincial Congress Committee. As a matter of fact Sri Golok Barua has been driven out from the Congress. These facts have been published for the knowledge of the vigilant and patriot electors of Samaguri.

Nowgong
5-2-67.

Nowgong District Congress Election Committee

The original leaflet was in Assamese and the above version of it is in accordance with the official translation prepared in the paper book. During the course of arguments, however, it was brought to our notice that, at some places, the translation did not correctly represent the meaning conveyed in Assamese, so that the Assamese words were read out to us. Further, our attention was also drawn to the translation accepted by the learned Judge of the High Court who tried the election petition and who had some knowledge of Assamese language. We shall indicate later where we consider that the translation reproduced above cannot be accepted as correctly representing the text in Assamese language.

2. The ground taken in the election petition was that this leaflet contained false statements as to the personal character or conduct of respondent no. 1 which were reasonably calculated to prejudice his prospects of being elected in this election. The learned trial Judge held that some of the statements of fact made in the leaflet did relate to the personal character or conduct of respondent no. 1 and that, except for two such statements which were proved to be true, they were false to the knowledge of the appellant. It was also held that this leaflet had been published and distributed with the consent of the appellant, so that the election of the appellant was set aside. In this appeal, Mr. Daphtary, appearing on behalf of the appellant,

challenged the decision of the High Court in two respects. The first contention raised by him was that the statements in this leaflet, which have been held to be false, did not relate to the personal character or conduct of respondent no. 1 and that the statements which did relate to the personal character or conduct of respondent no. 1 were proved to be true, so that the provisions of section 123(4) of the Act were not attracted. The second contention was that the High Court was not right in holding that this leaflet had been published and distributed with the consent of the appellant. Since, after hearing arguments of learned counsel for both parties, we have come to the view that the first point raised by Mr. Daphtary must be accepted, we did not consider it necessary to hear counsel on the second point relating to proof of consent of the appellant to the publication of this leaflet.

3. The leaflet purports to have been published on behalf of the Nowgong District Congress Election Committee. It is admitted that respondent no. 1 wanted to be sponsored as the candidate for the Legislative Assembly by the Congress Party in this general election. The Congress Party, however, sponsored the candidature of the appellant, whereupon respondent no. 1 stood for election as an independent candidate. In this background, respondent no. 1 issued a leaflet explaining why he had left the Congress and it was in reply to that leaflet that the Nowgong District Congress Election Committee issued the leaflet in question. The leaflet, thus, begins with the caption: "Why Golok Barua was driven away from the Congress?" The leaflet thereafter purports to give the reasons why he was expelled from the Congress, and the facts stated in it are divided into five paragraphs.

4. The first paragraph mentions that respondent no. 1 after rolling from several colleges failed to pass the Intermediate Examination and at first became a copyist at the Kachery and thereafter became a Clerk. At the mass movement of 1942, he earned some money by doing Military Contracts. The High Court has held that this paragraph amounts to publication of false statement covered by Section 123(4) of the Act inasmuch as it is incorrect that respondent no.1 rolled from several colleges and that at the mass movement of 1942 he earned some money by doing military contracts. The evidence disclosed that respondent no. 1 studied for his Intermediate Examination in only two Colleges one after the other and did not move from college to college. It was also found as a fact that he did not pass the Intermediate Arts Examination and that the reason was that he could not appear at the Examination at all due to the death of his father. He did not fail at that examination. The further finding was that he himself was in government service at the time of the movement of 1942, so that he could not have done any military contract work in that year. It was only later on that he resigned and joined the military contract business which was being carried on by his two brothers. The High Court was of the view that the publication of these statements was bound to lower respondent no. 1 in the opinion of the voters and, consequently, this publication amounted to a corrupt practice. As urged by Mr. Daphtary, we are unable to agree that the publication of the facts in this paragraph can be held to amount to false statements as to the personal character or conduct of respondent no. 1. In an election, it is always open to a candidate to show that his rival candidate is lacking in knowledge in education and is not capable of managing the affairs properly in any public body. The intention in the first part of paragraph 1 of the leaflet was to inform the voters of the educational qualifications of respondent no. 1. He did move from one college to a second one during his period of study for the Intermediate

Arts Examination. May be, that there is a slight exaggeration when the leaflet mentions that he rolled from several colleges; but such an exaggeration is quite natural on occasions when canvassing is going on for an election. It is to be noted that the leaflet does not state that respondent no. 1 failed at the Intermediate Arts Examination. All it says is that he failed to pass that Examination which has been admitted as being perfectly true by respondent no. 1 himself. He failed to pass, because he did not appear at the examination. Such a statement cannot, in our opinion, be held to be a false statement affecting the personal character or conduct of respondent no. 1. The second part of this paragraph can be conveniently dealt with while discussing the facts mentioned in paragraph 2.

5. In paragraph 2 of the leaflet, the reason why the Congress did not give him nomination is given. It is stated, that in the 1942 movement, he helped the British and revolted against the country. The expression "revolted against the country" is a translation for the Assamese word "*Deshdrohita*". It is true that the High Court has come to the finding of fact that in 1942 respondent no. 1 was in government service working as a Clerk and it was only later on, after 1943, that he actively participated in the business of his brothers of taking military contracts for the British. The trend of the evidence, however, shows that his brothers had been carrying on the military contracts business even earlier than 1943. Even for the later period, respondent no. 1 tried to deny that he actually participated in the military contract business with his brothers; but, when cross-examined in detail and confronted with a power of attorney in his favour, he had to make admissions which clearly show that he was taking part in that business. It appears to be quite likely that, even before he actually resigned government service and joined the business of his brothers, he may have been assisting them, so that the allegation that he helped the British in 1942 movement by taking military contracts cannot be said to be a false statement; at best, there may be a slight errors about the period during which he did that work. Again, the aspect that he was helping the British by taking military contracts relates to a reflection on his political conduct in siding with the British Government rather than joining the Congress which was carrying on a movement against the British for achieving independence of the country. It was in this background that his activities were described by using the word "*Deshdrohita*" in this pamphlet. Whether it amounted to "*deshdrohita*" or not may be a disputed question. Members of the Congress, who were carrying on the agitation against the British for achieving independence of the country, could very legitimately think that any one who helped the British at that time was guilty of "*deshdrohita*" inasmuch as his activities were against the interests of our country. This expression was also, therefore, used to describe the nature of his activities which, in fact, related to the political situation at that time. It cannot be said that this paragraph reflects on the personal character or conduct of respondent no. 1, as there is no imputation of any depravity or immorality in this paragraph.

6. Paragraph 3 is the principal paragraph in which the conduct of respondent no. 1 has been criticised. Admittedly, he was the Chairman to the Nowgong Municipality, and the principal part of this paragraph asks the voters to note some of the instances of injustice and chaos during his tenure of office. In Assamese, the two words which have been translated as "injustice" and "chaos" were "*Durniti*" and "*Arajakta*". Our attention was drawn by learned counsel for respondent no. 1 to the statement of Devendra Nath Bora, the writer of this leaflet,

where he stated that he meant by these words "corruption" and "lack of administration". The High Court took these words to mean "corruption" and "anarchism" as these are the English words used in the judgment of the High Court. It may, however, be noted that, in this part, it is not stated that respondent no. 1 himself was corrupt. The imputation only is that, during his tenure of office, there were instances of corruption and chaos. Thereafter, the four instances are given. It cannot, therefore, be held that the leaflet was intended to convey to the readers that respondent no. 1 was himself corrupt. The impression that would be expected to be created would be that his administration as Chairman of the Municipality was so unsatisfactory that corruption and chaos prevailed in the affairs of the Municipality. The imputation, therefore, was as to mismanagement of the affairs of the Municipality by respondent no. 1, indicating that he was not a good administrator. The leaflet was not intended to convey to the voters any reflection on the personal character of respondent no. 1.

7. In clause (Ka), the instance given is that, during his time, several thousand rupees were taken away from the Treasury unlawfully on signatures resembling his signatures and that the matter was still pending for hearing when the leaflet was issued. Mr. Daphtary drew our attention to the admissions made by respondent no. 1 himself when he was in the witness-box that several thousand rupees were, in fact, drawn from the Treasury in the municipal accounts on the basis of some cheques containing signatures which resembled the signature of respondent no. 1. In substance, therefore, the truth of the statement contained in this clause is admitted. The only part of the statement in this clause, which is found to be incorrect, is that the matter was pending for hearing even at the time of the election. It appears that the criminal case relating to that incident had been decided earlier. The part of the statement, which was not true, did not, by itself, contain any statement relating to the conduct or character of respondent no. 1. The first sentence, which cast reflection on respondent no. 1 by indicating that the management of the affairs of the Municipality in his time was not good and successful, has been admitted to be true. Consequently, this clause cannot be held to constitute corrupt practice under Section 123(4) of the Act.

8. In clauses (Kha) and (Cha), there are, undoubtedly, statements which reflect on the personal character and conduct of respondent no. 1. Clause (Kha) mentions that, when a huge amount of money withdrawn from the National Savings was misappropriated, the Government Examiner of Accounts declared Sri Golok Barua alone as guilty. The word "guilty", in fact, is not the correct translation for the Assamese word which was "*Dae*". The learned Judge of the High Court translated this word as "responsible" in his judgment, which appears to us to be correct. The learned Judge also held that the allegation contained in this clause has been proved to be true. The report of the Government Examiner of Accounts was brought to our notice. In that report, the Auditor wrote:

The entire responsibility for their encashment and credit to the fund rests with him and the fact that the accounts were maintained by the Head-Assistant does not absolve the Chairman of his responsibility in this connection. The Chairman, Sri G. C. Barua, stands fully liable for the loss, which should be recovered from him now.

The contents of clause (Kha) do not go beyond what was found by the Auditor in his report, the relevant part of which has been reproduced by us above. It is true that this statement, to some extent, reflects on the personal character of respondent no. 1 in as much as it states that

he was held responsible for the misappropriated money; but, that being a true fact, its publication has rightly been held by the High Court not to amount to corrupt practice.

9. Similarly, in clause (Gha), there is mention of an incident when respondent no. 1, while Chairman of the Municipality, is alleged to have gone at night like a drunkard to the house of Ex-Chairman, Dr. Birendra Kishore Guha, and, not finding Dr. Guha, "behaved with his wife and daughter unmannerly". It is further stated that, after that, he assaulted Dr. Guha with shoes in the presence of many persons, and that, on that offence, he was compelled to resign the Chairmanship by the Executive Committee of the District Congress Committee. The High Court has held that the facts stated in this clause are also true. The only point that Mr. Chatterjee, counsel for respondent no. 1, could urge was that, according to the evidence of the daughter of Dr. Guha, there was no misbehaviour with the wife and the mention of the wife in this clause was intended to convey an idea of some immoral behaviour on the part of respondent no. 1 which is not supported by any statement of fact. We have examined the evidence of the daughter, Miss Sipra Guha alias Miss Lily Guha, who related what happened during that night. According to her, she and her mother were inside the house when some one knocked at the door calling out "Dr. Guha, Dr. Guha". At the instance of her mother, she opened the door and the gentleman who was there caught hold of her clothes just under the neck and pulled her towards him. At this, she shouted for her mother who came to the scene and recognised respondent no. 1. Respondent no.1 then angrily asked where Dr. Guha was and whether he was inside the house. Her mother replied to him that her father had gone to see the Jatra performance. She also got angry and protested against his being there at such a time. She also found smell of alcohol coming from the mouth of respondent no. 1. The version given by this witness seems to fully justify the statement contained in clause (Gha). The mention of the wife is with reference to unmannerly behaviour towards her. It does not say that any attempt was made by him to assault her. The High Court was, therefore, quite correct in recording the finding that these allegations contained in this clause were true and, not being false statements, they could not constitute corrupt practice under Section 123(4) of the Act.

10. There remains clause (Ga) of paragraph 3 in which it is stated that, at that time also, on account of corruption in the Municipality alone, late Dharmeswar Sarma, the then Head Clerk of his time, had to commit suicide. Some of the ingredients of this clause have been found by the High Court to be incorrect. The facts found show that, while respondent no. 1 was Chairman, he issued an order to the effect that the salaries of sweepers were to be paid by the Head Clerk instead of the Accountant who was to hand over the money for that purpose of the Head Clerk. Respondent no. 1 resigned the Chairmanship in November, 1964 and his resignation was accepted on 21st November, 1964. It was subsequently in the month of December, 1964 that the salary of the sweepers was not paid by the Head Clerk, Dharmeswar Sarma, who had received the money for this purpose. Under the orders of respondent no. 1, the payments had to be made by the Head Clerk in the presence of the Chairman or the Vice-Chairman or some, other member nominated for the purpose by the Chairman. The Vice-Chairman held Dharmeswar Sarma responsible for the money when he found that the sweepers had not been paid and, thereupon, directed Dharmeswar Sarma to make good the shortage and pay up all the sweepers by 1 p.m. on 10th December, 1964 positively, failing

which legal action would be taken against him. This order was not carried out and, instead, on 10th December, 1964, Dharmeswar Sarma committed suicide. These facts, no doubt, indicate that the statements made in clause (Ga) of paragraph 3 are not strictly correct. The main allegation that Dharmeswar Sarma, the Head Clerk, committed suicide and that it was the result of corruption which was going on in the Municipality are borne out by the facts found. The expression used "at that time" in this clause, if interpreted literally, would mean that the suicide was committed while respondent no. 1 was himself the Chairman which is not true inasmuch as he had resigned earlier. It is, however, to be noted that the opportunity for Dharmeswar Sarma to misappropriate the money occurred only because of an order which had been passed earlier by respondent no. 1 while he was Chairman of the Municipality. In these circumstances, it has to be held that the allegation made in this clause is also substantially correct. The allegation was intended to convey that there was corruption in the Municipality at the time when respondent no. 1 was the Chairman and that it was so has been found to be true. There was no suggestion in this clause that respondent no. 1 himself was corrupt and that the suicide was the result of his personal corruption. Thus, this part of the leaflet also cannot constitute corrupt practice under Section 123(4) of the Act.

11. Then, we come to paragraphs 4 and 5 of the leaflet in which the main objection is to the mention of his treachery towards the country and the Congress. In paragraph 4, it is stated that the Congress refused to give nomination due to his conduct and character and due to his treachery towards the country and the Congress, while paragraph 5 states that, due to the offence of treachery, he had been completely driven away from the Congress for a period of six years by the Assam Provincial Congress Committee. The word "treachery" is a translation for the Assamese word "*Vishwasghataкта*" which probably can be more appropriately translated as "breach of faith", though treachery may also be one of the translations for this word. On the face of it, the treachery or breach of faith towards the country again refers to his help to the British by taking military contracts at about the time of the movement of 1942, while his treachery or breach of faith towards the Congress has reference to his standing as a candidate against the Congress nominee in the earlier election as well as in this election. Learned counsel for respondent no. 1 urged that the terms used in this leaflet, viz. "*Deshdrohita*" and "*Vishwasghataкта*" are very strong terms and are, bound to be taken by voters in such a light that they would have a low opinion about the character of respondent no. 1. It is, however, to be noted that these words have been used in the context of facts on the basis of which the writer of this leaflet thought that respondent no. 1 had been guilty of "*Deshdrohita*" and "*Vishwasghataкта*". It is, therefore, really an expression of opinion about respondent no. 1 based on facts. These words do not themselves connote any statement of fact which can be, said to be false.

12. In this connection, learned counsel for respondent no. 1 relied on the decision of this Court in *Kumara Nand v. Brijmohan Lal Sharma* [(1967) 2 SCR 127] where, in a poem, the candidate was described as the "greatest of all thieves". The Court held that this description was not a mere opinion and that, when the candidate was called the greatest of all thieves, a statement of fact was being made as to his personal character or conduct. There are two features which distinguish that case from the case before us. First, a statement that a person is a thief clearly imputes to him moral depravity, while statements saying that he has committed

"*Deshdrohita*" or "*Vishwasghatakta*" only reflect on his conduct in the political field and do not bring in any element of moral depravity. Secondly, in that case, no facts were given from which an inference might have been sought to be drawn that the candidate was the greatest of all thieves, while, in the case before us, objectionable words have been used after giving the facts, on the basis of which it was held that the conduct of respondent no. 1 had been undesirable so as to be described as "*Deshdrohita*" and "*Vishwasghatakta*". Counsel for the appellant, in this connection, relied on a passage at page 91 of **Parker's Election Agent and Returning Officer**, 6th Edition, which is to the following effect:

But the following have been held not to be within the provision: - a statement which imputed that the candidate was a traitor, and was one of certain persons who were in correspondence with the enemy shortly before the South African war broke out in 1899.

This passage is based on the decision in ***Ellis v. The National Union of Conservative and Constitutional Association*** [109 LT Jo. 493] which book has not been available to us. Based on the same case, it is stated in note (a) at page 227 under paragraph 394 of **Halsbury's Laws of England**, 3rd Edn., Volume 14, that:

The words 'Radical Traitors' were held to be not within the provision, as being a statement of opinion rather than of fact.

Counsel for respondent no. 1, however, drew our attention to the fact that in the case of ***Kumara Nand*** [(1967) 2 SCR 127] this Court did not rely on Parker's version of the decision on the ground that in ***Rogers on Elections***, Vol. II, 20th edn., at page 368, the facts given indicated that there was no statement of fact with respect to the candidate himself that he was a traitor and all that was said was that Radical members of the House of Commons were in correspondence with the Boers and the candidate happened to be one of the Radical members. On this ground, the Court did not choose to accept the dictum reproduced by Parker. It, however, appears that, even in ***Rogers on Elections***, it was mentioned, in addition to the facts noted in that case by this Court, that "any false statements were of opinion only and not of fact". This part of the sentence in *Rogers on Elections* does not seem to have been brought to the notice of the Court. It appears that, apart from the allegation that Radical members of the House of Commons were in correspondence with the enemy, there must have been an inference drawn that the candidate was a traitor and it is with reference to this last statement that Rogers mentions that the false statements were held to be matters of opinion only and not of fact. In any case, even if we do not rely on the principle laid down in that case in England, we are still of the view that, in the present case where the statements of fact are given and only inferences are drawn, the words used at the time of putting down the inferences have to be held to be expressions of opinion and not statements of fact.

13. Reliance was also placed on behalf of respondent no. 1 on the quotation from the decision in ***T. K. Gangi Reddy v. M. C. Anjaneya Reddy*** reproduced in the case of ***Sheopat Singh v. Ram Pratap*** [(1965) 1 SCR 175,179] which is to the following effect:

The words 'personal character or conduct' are so clear that they do not require further elucidation or definition. The character of a person may ordinarily be equated with his mental or moral nature. Conduct connotes a person's actions or behaviour.....

What is more damaging to a person's character and conduct than to state that he instigated a murder and that he was guilty of violent acts in his political career?

This view expressed in that case is also not applicable to the case before us, because here the objectionable words have been very clearly and obviously used as inferences drawn by the writer from statements of fact given in the leaflet itself. Reference was also made by counsel for respondent no. 1 to the decision of this Court in *Mohan Singh v. Bhanwarlal* [(1960) 22 E.L.R. 261] where it was held that the leaflets in question clearly implied that the candidate had misappropriated the fund collected by him, and this was held to be a statement of fact constituting a corrupt practice under Section 123(4) of the Act. In that case, again, the imputation was of a nature that affected the personal character of the candidate indicating that he had been dishonest in misappropriating money, while, in the case before us, no such facts have been found.

14. It is quite clear that these words "*Deshdrohita*" and "*Vishwasghatakta*" have been used in this leaflet only to bring into light the conduct of respondent no. 1 which was adverse to the policies of the Congress and, at one stage, against the interests of the country. Possibly, milder words could have been used to describe his conduct on those occasions, but even the use of strong words is not very unnatural at the time of elections. In judging whether the use of such words can be held to be a corrupt practice, we have to keep in view the principles indicated by this Court, how such document should be read, in the case of *Kultar Singh v. Mukhtiar Singh* [(1964) 5 SCR 12]. The Court held :

The principles which have to be applied in construing such a document are well-settled. The document must be read as a whole and its purport and effect determined in a fair, objective and reasonable manner. In reading such documents, it would be unrealistic to ignore the fact that when election meetings are held and appeals are made by candidates of opposing political parties, the atmosphere is usually surcharged with partisan feelings and emotions and the use of hyperboles or exaggerated language, or the adoption of metaphors, and the extravagance of expression in attacking one another, are all a part of the game, and so, when the question about the effect of speeches delivered or pamphlets distributed at election meetings is argued in the cold atmosphere of a judicial chamber, some allowance must be made and the impugned speeches or pamphlets must be construed in that light. In doing so, however, it would be, unreasonable to ignore the question as to what the effect of the said speech or pamphlet would be on the mind of the ordinary voter who attends such meetings and reads the pamphlets or hears the speeches.

Examined on these principles, it would be clear that the words that were used, though harsh, were not such as to lead the voters to think that respondent no. 1 had a low moral character. Care was taken to give the facts from which inferences were being drawn and the voters could very well perceive for themselves whether the inference, which was drawn and expressed in these strong terms, was justified or not. Schofield in his book on *Parliamentary Elections*, 2nd Edition, at page 437, has reproduced a quotation from a decision of Darling, J. in *Cumberland Cockermouth Division* case [(1901) 5 O. M. & H. 155] where he said:

You must not make or publish any false statement of fact in relation to the personal character or conduct of a candidate; if you do, it is an illegal practice. It is not an offence to say something which may be severe about another person nor which may be unjustifiable nor which may be derogatory unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate; there is a great distinction to be drawn between a false statement of fact which affects the personal character or conduct of a candidate and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind, this statute would simply have prohibited at election times all sorts of criticism which was not strictly true relating to the political behaviour and opinions of the candidate. That is why it carefully provides that the false statements in order to be an illegal practice, must relate to the personal character and personal conduct.

This passage was quoted with approval by this Court in *Guruji Shrihari Baliram Jivatode v. Vithalrao* [(1969) 1 SCC 82]. It is to be noted that Darling, J., held that a false statement of fact, which deals with the political position or reputation or action of a candidate, cannot be held to be a corrupt practice. The imputations that have been made in paragraphs 1, 2, 4 and 5 of the leaflet and which have been found to be false in the case before us clearly relate to the political position, reputation or action of respondent no. 1. A similar distinction was also drawn by this Court in the case of *Inder Lal v. Lal Singh* [(1962) 3 Supp. SCR 114]. All these cases clearly indicate that imputations of the type which are in question in the leaflet before us and which may, to some extent, be false or inaccurate cannot be held to be false statements as to the personal character of respondent no. 1 and cannot, therefore, constitute corrupt practice under Section 123(4) of the Act. The only statements, which did relate to the personal character of respondent no. 1, have been found to be true.

15. In support of his argument, counsel for respondent no. 1 drew our attention to the evidence of some of the witnesses examined on his behalf in order to show what was the reaction of this leaflet on the various voters. P.W. 2, Shashi Nath Bardoloi, stated that his own reaction was that this leaflet had very much scandalised respondent no. 1 and, when asked what he remembered about the leaflet, he mentioned that respondent no. 1 could not pass the Intermediate Examination, though he rolled from college to college, whereafter he joined as a copyist and then became a clerk at Nowgong Court, that there was an allegation that somebody withdrew some money from the treasury with the forged signature of respondent no. 1 about which a case was pending, and that, for his fault, one Head-clerk of the Municipality committed suicide. It is to be noticed that none of the facts given in the leaflet casting reflection on the personal character of respondent no. 1 seem to have impressed him or stuck in his mind. He also stated that some persons, who were going to vote for respondent no. 1, decided not to do so after the issue of this leaflet; but, when asked to name even one of those persons, he could not do so.

16. The evidence of the next witness P.W.3, Golok Chand Saikia, is even more unsatisfactory, because he did not give his own reaction to the leaflet at all and only stated that, after its publication, most of the people who were in favour of respondent no. 1 changed their minds about respondent no. 1, but, again, he could not give the name of even one single person who wanted to vote for respondent no. 1 and did not in fact do so.

17. P.W. 4 is Bhola Ram Das. According to his evidence, he carried the impression that this leaflet had stated that respondent no. 1 had misappropriated some money from the Congress and, consequently, he changed his mind about giving vote to him on receipt of this leaflet. On the face of it, there is nothing at all in the leaflet to justify his inference, as there was no suggestion at all of any misappropriation of money by respondent no. 1, much less money belonging to the Congress. He purported to state that he had read the leaflet himself, though, when cross-examined and asked if he could read Assamese, he admitted that he was almost illiterate.

18. The next witness P.W. 5, Hara Kanta Bora, also stated that, on reading the leaflet, he got the impression that respondent no. 1 was a man of bad character, the main impression which was carried by him being that respondent no. 1 had some bad relationship with the wife of Dr. Guha. To test the veracity of this witness, he was asked which candidate he had worked for in this election and he stated that he had worked for the appellant, having been appointed as his polling agent. When further cross-examined, he was unable to state what the duties of a polling agent were, while evidence has been led to prove that another person of the same name had worked as polling agent of the appellant. This leads to the inference that this witness falsely posed to be the polling agent of the appellant and no reliance can, therefore, be placed on the evidence of such a witness.

19. The last witness, whose evidence was brought to our notice, is P.W. 6 Liladhar Barua who stated that, on reading this leaflet, he gathered the impression that respondent no. 1 was a man of bad character and that it was also stated in it that respondent no. 1 took the side of the military and committed atrocities on the people in 1942 movement period. In his case, again, the mention of commission of atrocities in 1942 movement could not have been inferred from any statement at all contained in the leaflet. Counsel for respondent no. 1 stated that the witness knew that atrocities were committed in 1942 and, consequently, he drew this inference from the mention of respondent no. 1 in connection with that movement stating that he had sided with the British. This witness was scarcely five years old in 1942 and he could not have any recollection of atrocities committed about the year 1942, so that the suggestion made by counsel for respondent no. 1 offers no explanation. It is clear that all these witnesses have merely tried to favour the case of respondent no. 1 and their evidence relating to the impression created by the leaflet is of no value at all. In the circumstances, the view we have formed above on our own assessment of the material contained in this leaflet does not require to be revised on the basis of this evidence. The publication of the leaflet cannot be held to constitute corrupt practice under Section 123(4) of the Act.

20. The appeal is, consequently, allowed, the decision of the High Court is set aside and the election petition is dismissed with costs in both Courts.

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People's Union for Civil Liberties v. Union of India

AIR 2003 SC 2363

P. VENKATARAMA REDDI, J. - 83. The width and amplitude of the right to information about the candidates contesting elections to the Parliament or State Legislature in the context of the citizens' right to vote broadly falls for consideration in these writ petitions under Article 32 of the Constitution. While I respectfully agree with the conclusion that Section 33-B of the Representation of the People Act, 1951 does not pass the test of constitutionality, I have come across a limited area of disagreement on certain aspects, especially pertaining the extent of disclosures that could be insisted upon by the Court in the light of legislation on the subject. Moreover, the importance and intricacies of the subject-matter and the virgin ground trodden by this Court in *Union of India v. Association for Democratic Reforms* [(2002) 5 SCC 294] to bring the right to information of the voter within the sweep of Article 19(1)(a) has impelled me to elucidate and clarify certain crucial aspects. Hence, this separate opinion.

1. (1) Freedom of expression and right to information

84. In the Constitution of our democratic Republic, among the fundamental freedoms, freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post independent era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the constitutional courts. Barring a few aberrations, the Executive Government and the Political Parties too have not lagged behind in safeguarding this valuable right which is the insignia of democratic culture of a nation. Nurtured by this right, Press and electronic media have emerged as powerful instruments to mould the public opinion and to educate, entertain and enlighten the public.

85. Freedom of speech and expression, just as equality clause and the guarantee of life and liberty has been very broadly construed by this Court right from 1950s. It has been variously described as a 'basic human right', 'a natural right' and the like. It embraces within its scope the freedom of propagation and inter-change of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right.

86. In due course of time, several species of rights unenumerated in Article 19(1)(a) have branched off from the genus of the Article through the process of interpretation by this apex Court. One such right is the 'right to information'. Perhaps, the first decision which has adverted to this right is *State of U.P. v. Raj Narain* [(1975) 4 SCC 428]. 'The right to know', it was observed by Mathew, J. "which is derived from the concept of freedom of speech, though not absolute is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". It was said very aptly-

In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.

87. The next milestone which showed the way for concretizing this right is the decision in *S.P. Gupta v. Union of India* [(1981) Supp 1 SCC 87] in which this Court dealt with the issue of High Court Judges' transfer. Bhagwati, J. observed-

The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception.

88. Peoples' right to know about governmental affairs was emphasized in the following words:

No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only when people know how Government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.

89. These two decisions have recognized that the right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(a). The pertinent observations made by the learned Judges in these two cases were in the context of the question whether the privilege under Section 123 of the Evidence Act could be claimed by the State in respect of the Blue Book in the first case i.e., *Raj Narain* case and the file throwing light on the consultation process with the Chief Justice, in the second case. Though the scope and ambit of Article 19(1)(a) *vis-a-vis* the right to information did not directly arise for consideration in those two landmark decisions, the observations quoted supra have certain amount of relevance in evaluating the nature and character of the right.

90. Then, we have the decision in *Dinesh Trivedi v. Union of India* [(1997) 4 SCC 306] where this Court was confronted with the issue whether background papers and investigatory reports which were referred to in Vohra Committee's Report could be compelled to be made public. The following observations of Ahmadi, C.J. are quite pertinent:--

In modern Constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute.

91. The proposition expressed by Mathew, J. in *Raj Narain* case was quoted with approval.

92. The next decision which deserves reference is the case of *Secretary, Ministry of I & B v. Cricket Association of Bengal* [(1995) 2 SCC 161]. Has an organizer or producer of any event a right to get the event telecast through an agency of his choice whether national or

foreign? That was the primary question decided in that case. It was highlighted that the right to impart and receive information is a part of the fundamental right under Article 19(1)(a) of the Constitution. On this point, Sawant, J. had this to say at paragraph 75-

The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property.

93. Jeevan Reddy, J. spoke more or less in the same voice:

The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them.

94. A conspectus of these cases would reveal that the right to receive and impart information was considered in the context of privilege pleaded by the State in relation to confidential documents relating to public affairs and the freedom of electronic media in broadcasting/telecasting certain events.

I. (2) Right to information in the context of the voter's right to know the details of contesting candidates and the right of the media and others to enlighten the voter

95. In *Democratic Reforms' case*, which is the forerunner to the present controversy, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(a). There can be no doubt that by doing so, a new dimension has been given to the right embodied in Article 19(1)(a) through a creative approach dictated by the need to improve and refine the political process of election. In carving out this right, the Court had not traversed a beaten track but took a fresh path. It must be noted that the right to information evolved by this Court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the Press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter/citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters. Secondly, that right cannot materialize without State's intervention. The State or its instrumentality has to compel a subject to make the information available to public, by means of legislation or orders having the force of law. With respect, I am unable to share the view that it stands on the same footing as right to telecast and the right to view the sports and games or other items of entertainment through television. One more observation at Paragraph 30 to the effect that "the decision making process of a voter would include his right to know about public functionaries who are required to be elected by him" needs explanation. Till a candidate gets elected and enters the House, it would not be appropriate to refer to him as a public functionary. Therefore, the right to know about a public act done by a public functionary to

which we find reference in *Raj Narain* case is not the same thing as the right to know about the antecedents of the candidate contesting for the election. Nevertheless, the conclusion reached by the Court that the voter has such a right and that the right falls within the realm of freedom of speech and expression guaranteed by Article 19(1)(a) can be justified on good and substantial grounds. To this aspect, I will advert a little later. Before that, I would like to say that it would have been in the fitness of the things if the case [*U.O.I. v. Association for Democratic Reforms*] was referred to the Constitution Bench as per the mandate of Article 145(3) for the reason that a new dimension has been added to the concept of freedom of expression so as to bring within its ambit a new species of right to information. Apparently, no such request was made at the hearing and all parties invited the decision of three Judge Bench. The law has been laid down therein elevating the right to secure information about a contesting candidate to the position of a fundamental right. That decision has been duly taken note of by the Parliament and acted upon by the Election Commission. It has attained finality. At this stage, it would not be appropriate to set the clock back and refer the matter to Constitution Bench to test the correctness of the view taken in that case. I agree with my learned brother Shah, J. in this respect. However, I would prefer to give reasons of my own—may not be very different from what the learned Judge had expressed, to demonstrate that the proposition laid down by this Court rests on a firm Constitutional basis.

96. I shall now proceed to elucidate as to how the right to know the details about the contesting candidate should be regarded as a part of the freedom of expression guaranteed by Article 19(1)(a). This issue has to be viewed from more than one angle—from the point of view of the voter, the public viz., representatives of Press, organizations such as the petitioners which are interested in taking up public issues and thirdly from the point of view of the persons seeking election to the legislative bodies.

97. The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered forever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as [(1993) 4 SCC 234] quoting from *Black's Law Dictionary*. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the

basic postulate of democracy is thus two fold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information-relevant and essential would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the Press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly it will facilitate the Press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter-whether he acquires information directly by keeping track of disclosures or through the Press and other channels of communication, will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of electoral process which is so essential for the growth of democracy. Though I do not go to the extent of remarking that the election will be a farce if the candidates' antecedents are not known to the voters, I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicised and openly debated.

98. The problem can be approached from another angle. As observed by this Court in *Association for Democratic Reforms'* case, 'a voter speaks out or expresses by casting vote'. Freedom of expression, as contemplated by Article 19(1)(a) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings given in **Ramanatha Iyer's Law Lexicon** (edited by Justice Y.V. Chandrachud). Even a manifestation of an emotion, feeling etc., without words would amount to expression. The example given in **Collin's Dictionary of English Language** (1983 reprint) is: "tears are an expression of grief", is quite apposite. Another shade of meaning is: "a look on the face that indicates mood or emotion; eg: a joyful expression". Communication of emotion and display of talent through music, painting etc., is also a sort of expression. Having regard to the comprehensive meaning of phrase 'expression', voting can be legitimately regarded as a form of expression. Ballot is the instrument by which

the voter expresses his choice between candidates or in respect to propositions; and his 'vote' is his choice or election, as expressed by his ballot. "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression 'vote' in the *New Oxford Illustrated Dictionary*. It is well settled and it needs no emphasis that the fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. I would only reiterate and say that freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself.

I. (3) Right to vote is a Constitutional right though not a fundamental right but right to make choice by means of ballot is part of freedom of expression

99. The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution. This move found its expression in Article 326 which enjoins that The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 21 years of age (now 18 years), and is not otherwise disqualified under the Constitution or law on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice-shall be entitled to be registered as voter at such election. However, case after case starting from *Ponnuswami* case [(1952) SCR 218] characterized it as a statutory right. "The right to vote or stand as a candidate for election", it was observed in *Ponnuswami* case "is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it." It was further elaborated in the following words:

Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

101. In *Jyoti Basu v. Debi Ghoshal* [(1982)3 SCR 318] this Court again pointed out in no uncertain terms that: "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." With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely, R.P. Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of people and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor General that the right to vote not being a fundamental right, the information which at best facilitates

meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met. Here, a distinction has to be drawn between the conferment of the right to vote on fulfillment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. None of the decisions of this Court wherein the proposition that the right to vote is a pure and simple statutory right was declared and reiterated, considered the question whether the citizen's freedom of expression is or is not involved when a citizen entitled to vote casts his vote in favour of one or the other candidate. The issues that arose in *Ponnuswami* case and various cases cited by the learned Solicitor-General fall broadly within the realm of procedural or remedial aspects of challenging the election or the nomination of a candidate. None of these decisions, in my view, go counter to the proposition accepted by us that the fundamental right of freedom of expression sets in when a voter actually casts his vote. I, therefore, find no merit in the submission made by the learned Solicitor General that these writ petitions have to be referred to a larger bench in view of the apparent conflict. As already stated, the factual matrix and legal issues involved in those cases were different and the view, we are taking, does not go counter to the actual ratio of the said decisions rendered by the eminent Judges of this Court.

102. Reliance has been placed by the learned Solicitor General on the Constitution Bench decision in *Jamuna Prasad v. Lachhi Ram* [(1955) 1 SCR 608]. That was a case of special appeal to this Court against the decision of an Election Tribunal. Apart from assailing the finding of the Tribunal on the aspect of 'corrupt practice', Sections 123(5) and 124(5) (as they stood then) of the R.P. Act were challenged as *ultra vires* Article 19(1)(a). The former provision declared the character assassination of a candidate as a major corrupt practice and the latter provision made an appeal to vote on the ground of caste a minor corrupt practice. The contention that these provisions impinged on the freedom of speech and expression was unhesitatingly rejected. The Court observed that those provisions did not stop a man from speaking. They merely prescribed conditions which must be observed if a citizen wanted to enter the Parliament. It was further observed that the right to stand as a candidate and contest an election is a special right created by the statute and can only be exercised on the conditions laid down by the statute. In that context, the Court made an observation that the fundamental right chapter had no bearing on the right to contest the election which is created by the statute and the appellant had no fundamental right to be elected as a member of Parliament. If a person wants to get elected, he must observe the rules laid down by law. So holding, those sections were held to be *intra vires*. I do not think that this decision which dealt with the contesting candidate's rights and obligations has any bearing on the freedom of expression of the voter and the public in general in the context of elections. The remark that 'the

fundamental right chapter has no bearing on a right like this created by statute' cannot be divorced from the context in which it was made.

103. The learned senior counsel appearing for one of the interveners (B.J.P.) has advanced the contention that if the right to information is culled out from Article 19(1) (a) and read as an integral part of that right, it is fraught with dangerous consequences inasmuch as the grounds of reasonable restrictions which could be imposed are by far limited and therefore, the Government may be constrained to part with certain sensitive informations which would not be in public interest to disclose. This raises the larger question whether apart from the heads of restriction envisaged by sub-Article (2) of Article 19, certain inherent limitations should not be read into the Article, if it becomes necessary to do so in national or societal interest. The discussion on this aspect finds its echo in the separate opinion of Jeevan Reddy, J. in *Cricket Association* case. The learned Judge was of the view that the freedom of speech and expression cannot be so exercised as to endanger the interest of the nation or the interest of the society, even if the expression 'national interest' or 'public interest' has not been used in Article 19(2). It was pointed out that such implied limitation has been read into the first amendment of the U.S. Constitution which guarantees the freedom of speech and expression in unqualified terms.

104. The following observations of the U.S. Supreme Court in this context:

It is a fundamental principle, long established, that the freedom of speech and of the Press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom.

105. Whenever the rare situations of the kind anticipated by the learned counsel arise, the Constitution and the Courts are not helpless in checking the misuse and abuse of the freedom. Such a check need not necessarily be found strictly within the confines of Article 19(2).

II. Sections 33-A and 33-B of the Representation of People (3rd Amendment) Act, 2002-whether Section 33-A by itself effectively secures the voter's/citizen's right to information-whether Section 33-B is unconstitutional?

II. (1). Sections 33-A and 33-B of the Representation of People (3rd Amendment) Act

106. Now I turn my attention to the discussion of core question, that is to say, whether the impugned legislation falls foul of Article 19(1)(a) for limiting the area of disclosure and whether the Parliament acted beyond its competence in deviating from the directives given by this Court to the Election Commission in *Democratic Reforms Association* case. By virtue of the Representation of the People (Amendment) Act, 2002 the only information which a prospective contestant is required to furnish apart from the information which he is obliged to disclose under the existing provisions is the information on two points: (i) Whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed and; (ii) Whether he has been convicted of an offence [other than the offence referred to in sub-Sections (1) to (3) of Section 8] and sentenced to imprisonment for one year or more. On other points spelt out in this Court's judgment, the

candidate is not liable to furnish any information and that is so, notwithstanding anything contained in any judgment or order of a Court or any direction, order or instruction issued by the Election Commission. Omission to furnish the information as per the mandate of Section 33B and furnishing false information in that behalf is made punishable. That is the sum and substance of the two provisions namely, Sections 33-A and 33-B.

107. The plain effect of the embargo contained in Section 33B is to nullify substantially the directives issued by the Election Commission pursuant to the judgment of this Court. At present, the instructions issued by the Election Commission could only operate in respect of the items specified in Section 33A and nothing more. It is for this reason that Section 33B has been challenged as *ultra vires* the Constitution both on the ground that it affects the fundamental right of the voter/citizen to get adequate information about the candidate and that the Parliament is incompetent to nullify the judgment of this Court. I shall briefly notice the rival contentions on this crucial issue.

II. (2). Contentions

108. Petitioners' contention is that the legislation on the subject of disclosure of particulars of candidates should adopt in entirety the directives issued by this Court to the Election Commission in the pre-ordinance period. Any dilution or deviation of those norms or directives would necessarily violate the fundamental right guaranteed by Article 19(1)(a) as interpreted by this Court and therefore the law, as enacted by Parliament, infringes the said guarantee. This contention has apparently been accepted by my learned brother M.B. Shah, J. The other view point presented on behalf of Union of India and one of the interveners is that the freedom of legislature in identifying and evolving the specific areas in which such information should be made public cannot be curtailed by reference to the ad hoc directives given by this Court in pre-ordinance period and the legislative wisdom of Parliament, especially in election matters, cannot be questioned. This is the position even if the right to know about the candidate is conceded to be part of Article 19(1)(a). It is for the Parliament to decide to what extent and how far the information should be made available. In any case, it is submitted that the Court's verdict has been duly taken note of by Parliament and certain provisions have been made to promote the right to information vis-a-vis the contesting candidates. Section 33-B is only a part of this exercise and it does not go counter to Article 19(1)(a) even though the scope of public disclosures has been limited to one important aspect only.

II. (3). Broad points for consideration

109. A liberal but not a constricted approach in the matter of disclosure of information in relation to candidates seeking election is no doubt a desideratum. The wholesale adoption of the Court's diktats on the various items of information while enacting the legislation would have received public approbation and would have been welcomed by public. It would have been in tune with the recommendations of various Commissions and even the statements made by eminent and responsible political personalities. However, the fact remains that the Parliament in its discretion did not go the whole hog, but chose to limiting the scope of mandated disclosures to one only of the important aspects highlighted in the judgment. The question remains to be considered whether in doing so, the Parliament out-stepped its limits

and enacted a law in violation of the guarantee enshrined in Article 19(1)(a) of the Constitution. The allied question is whether the Parliament has no option but to scrupulously adopt the directives given by this Court to the Election Commission. Is it open to the Parliament to independently view the issue and formulate the parameters and contents of disclosure, though it has the effect of diluting or diminishing the scope of disclosures which, in the perception of the Court, were desirable? In considering these questions of far reaching importance from the Constitutional angle, it is necessary to have a clear idea of the ratio and implications of this Court's Judgment in the *Association for Democratic Reforms*' case.

II. (4) Analysis of the judgment in Association for Democratic Reforms case - Whether and how far the directives given therein have impact on the Parliamentary legislation- Approach of Court in testing the legislation.

110. The first proposition laid down by this Court in the said case is that a citizen/voter has the right to know about the antecedents of the contesting candidate and that right is a part of the fundamental right under Article 19(1)(a). In this context, M.B. Shah, J. observed that-

Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote.

It was then pointed out that the information about the candidate to be selected is essential as it would be conducive to transparency and purity in the process of election. The next question considered was how best to enforce that right. The Court having noticed that there was void in the field in the sense that it was not covered by any legislative provision, gave directions to the Election Commission to fill the vacuum by requiring the candidate to furnish information on the specified aspects while filing the nomination paper. Five items of information which the Election Commission should call for from the prospective candidates were spelt out by the Court. Two of them relate to criminal background of the candidate and pendency of criminal cases against him. Points 3 and 4 relate to assets and liabilities of the candidate and his/her family. The last one is about the educational qualifications of the candidate. The legal basis and the justification for issuing such directives to the Commission has been stated thus (vide paragraphs 19 & 20) :

19. At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. * * * * *

20. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

Again, at paragraph 49 it was emphasized-

It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the

aforesaid directions should be drawn up properly by the Election Commission as early as possible.

111. Thus, the Court was conscious of the fact that the Election Commission could act in the matter only so long as the field is not covered by legislation. The Court also felt that the vacuum or void should be suitably filled so that the right to information concerning a candidate would soon become a reality. In other words, till the Parliament applied its mind and came forward with appropriate legislation to give effect to the right available to a voter-citizen, the Court felt that the said goal has to be translated into action through the media of Election Commission, which is endowed with 'residuary power' to regulate the election process in the best interests of the electorate. Instead of leaving it to the Commission and with a view to give quietus to the possible controversies that might arise, the Court considered it expedient to spell out five points (broadly falling into three categories) on which the information has to be called for from the contesting candidate. In the very nature of things, the directives given by the Court were intended to operate only till the law was made by legislature and in that sense 'pro-tempore' in nature. The five directives cannot be considered to be rigid theorems-inflexible and immutable, but only reflect the perception and tentative thinking of the Court at a point of time when the legislature did not address itself to the question.

112. When the Parliament, in the aftermath of the verdict of this Court, deliberated and thought it fit to secure the right to information to a citizen only to a limited extent (having a bearing on criminal antecedents), a fresh look has to be necessarily taken by the Court and the validity of the law made has to be tested on a clean slate. It must be remembered that the right to get information which is a corollary to the fundamental right to free speech and expression has no fixed connotation. Its contours and parameters cannot be precisely defined and the Court in my understanding, never meant to do so. It is often a matter of perception and approach. How far to go and where to stop? These are the questions to be pondered over by the Legislature and the Constitutional Court called upon to decide the question of validity of legislation. For instance, many voters/citizens may like to have more complete information-a sort of bio-data of the candidate starting from his school days such as his academic career, the properties which he had before and after entering into politics, the details of his income and tax payments for the last one decade and sources of acquisition of his and his family's wealth. Can it be said that all such information which will no doubt enable the voter and public to have a comprehensive idea of the contesting candidate, should be disclosed by a prospective candidate and that the failure to provide for it by law would infringe the fundamental right under Article 19(1)(a)? The preponderance of view would be that it is not reasonable to compel a candidate to make disclosures affecting his privacy to that extent in the guise of effectuating the right to information. A line has to be drawn somewhere. While there cannot be a lip service to the valuable right to information, it should not be stretched too far. At the same time, the essence and substratum of the right has to be preserved and promoted, when once it is brought within the fold of fundamental right. A balanced but not a rigid approach, is needed in identifying and defining the parameters of the right which the voter/citizen has. The standards to be applied to disclosures *vis-a-vis* public affairs and governance and the disclosures relating to personal life and bio-data of a candidate cannot be the same. The

measure or yardstick will be somewhat different. It should not be forgotten that the candidates' right to privacy is one of the many factors that could be kept in view, though that right is always subject to overriding public interest.

113. In my view, the points of disclosure spelt out by this Court in the *Association for Democratic Reforms*' case should serve as broad indicators or parameters in enacting the legislation for the purpose of securing the right to information about the candidate. The paradigms set by the Court, though pro-tempore in nature as clarified *supra*, are entitled to due weight. If the legislature in utter disregard of the indicators enunciated by this Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass the muster of Article 19(1) (a). Though certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It is for the Constitutional Court in exercise of its judicial review power to judge whether the areas of disclosure carved out by the Legislature are reasonably adequate to safeguard the citizens' right to information. The Court has to take a holistic view and adopt a balanced approach, keeping in view the twin principles that the citizens' right to information to know about the personal details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. It is not a proper approach to test the validity of legislation only from the stand-point whether the legislation implicitly and word to word gives effect to the directives issued by the Court as an ad hoc measure when the field was unoccupied by legislation. Once legislation is made, this Court has to make an independent assessment in the process of evaluating whether the items of information statutorily ordained are reasonably adequate to secure the right of information to the voter so as to facilitate him to form a fairly clear opinion on the merits and demerits of the candidates. In embarking on this exercise, as already stated, this Court's directives on the points of disclosure even if they be tentative or ad hoc in nature, cannot be brushed aside, but should be given due weight. But, I reiterate that the shape of legislation need not be solely controlled by the directives issued to the Election Commission to meet an ad-hoc situation. As I said earlier, the right to information cannot be placed in straight jacket formulae and the perceptions regarding the extent and amplitude of this right are bound to vary.

III. Section 33-B is unconstitutional

III. (1). The right to information cannot be frozen and stagnated

114. In my view, the Constitutional validity of Section 33B has to be judged from the above angle and perspective. Considered in that light, I agree with the conclusion of M.B. Shah, J. that Section 33-B does not pass the test of constitutionality. The reasons are more than one. Firstly, when the right to secure information about a contesting candidate is recognized as an integral part of fundamental right as it ought to be, it follows that its ambit, amplitude and parameters cannot be chained and circumscribed for all time to come by

declaring that no information, other than that specifically laid down in the Act, should be required to be given. When the legislation delimiting the areas of disclosure was enacted, it may be that the Parliament felt that the disclosure on other aspects was not necessary for the time being. Assuming that the guarantee of right to information is not violated by making a departure from the paradigms set by the Court, it is not open to the Parliament to stop all further disclosures concerning the candidate in future. In other words, a blanket ban on dissemination of information other than that spelt out in the enactment, irrespective of need of the hour and the future exigencies and expedients is, in my view, impermissible. It must be remembered that the concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnated; but the mandate of Section 33B prefaced by the *non obstante* clause impedes the flow of such information conducive to the freedom of expression. In the face of the prohibition under Section 33B, the Election Commission which is entrusted with the function of monitoring and supervising the election process will have to sit back with a sense of helplessness inspite of the pressing need for insisting on additional information. Even the Court may at times feel handicapped in taking necessary remedial steps to enforce the right to information. In my view, the legislative injunction curtailing the nature of information to be furnished by the contesting candidates only to the specific matters provided for by the legislation and nothing more would emasculate the fundamental right to freedom of expression of which the right to information is a part. The very objective of recognizing the right to information as part of the fundamental right under Article 19(1)(a) in order to ensure free and fair elections would be frustrated if the ban prescribed by Section 33-B is taken to its logical effect.

III. (2) Impugned legislation fails to effectuate right to information on certain vital

115. The second reason why Section 33B should be condemned is that by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, the Parliament failed to give effect to one of the vital aspects of information, viz., disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression. The right to information which is now provided for by the legislature no doubt relates to one of the essential points but in ignoring the other essential aspect relating to assets and liabilities as discussed hereinafter, the Parliament has unduly restricted the ambit of information which the citizens should have and thereby impinged on the guarantee enshrined in Article 19(1)(a).

III. (3) How far the principle that the Legislature cannot encroach upon the judicial sphere applies?

116. It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment or otherwise fundamentally altering the basis of the judgment either prospectively or retrospectively. The legislature cannot overrule or supersede a judgment of the Court without lawfully removing

the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the Courts. Relying on this principle, it is contended that the decision of apex Constitutional Court cannot be set at naught in the manner in which it has been done by the impugned legislation. As a sequel, it is further contended that the question of altering the basis of judgment or curing the defect does not arise in the instant case as the Parliament cannot pass a law in curtailment of fundamental right recognized, amplified and enforced by this Court.

117. The contention that the fundamental basis of the decision in *Association for Democratic Reforms*' case has not at all been altered by the Parliament, does not appeal to me. I have discussed at length the real scope and ratio of the judgment and the nature and character of directives given by this Court to the Election Commission. As observed earlier, those directions are pro tempore in nature when there was vacuum in the field. When once the Parliament stepped in and passed the legislation providing for right of information, may be on certain limited aspects, the void must be deemed to have been filled up and the judgment works itself out, though the proposition laid down and observations made in the context of Article 19(1)(a) on the need to secure information to the citizens will hold good. Now the new legislation has to be tested on the touchstone of Article 19(1)(a).

Of course, in doing so, the decision of this Court should be given due weight and there cannot be marked departure from the items of information considered essential by this Court to effectuate the fundamental right to information. Viewed in this light, it must be held that the Parliament did not by law provide for disclosure of information on certain crucial points such as assets and liabilities and at the same time, placed an embargo on calling for further informations by enacting Section 33-B. That is where Section 33-B of the impugned amendment Act does not pass the muster of Article 19(1)(a), as interpreted by this Court.

IV. Right to information with reference to specific aspects:

118. I shall now discuss the specifics of the problem. With a view to promote the right to information, this Court gave certain directives to the Election Commission which, as I have already clarified, were *ad hoc* in nature. The Election Commission was directed to call for details from the contesting candidates broadly on three points, namely, (i) criminal record (ii) assets and liabilities and (iii) educational qualification. The third amendment to R.P. Act which was preceded by an Ordinance provided for disclosure of information. How far the third amendment to the Representation of the People Act, 2002 safeguards the right of information which is a part of the guaranteed right under Article 19(1) (a), is the question to be considered now with specific reference to each of the three points spelt out in the judgment of this Court in *Association for Democratic Reforms*' case.

IV. (1). Criminal background and pending criminal cases against candidates-Section 33-A of the R.P. (3rd Amendment) Act.

119. As regards the first aspect, namely criminal record, the directives in *Association for Democratic Reforms*' case are two fold:

- (i) whether the candidate is convicted/ acquitted/discharged of any criminal case in the past, if any, whether he is punished with imprisonment or fine and

(ii) prior to six months of filing of nomination, whether the candidate is an accused in any pending case of any offence punishable with imprisonment for two years or more and in which charge is framed or cognizance is taken by the Court of law.

As regards the second directive, the Parliament has substantially proceeded on the same lines and made it obligatory to the candidate to furnish information as to whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the competent Court. However, the case in which cognizance has been taken but charge has not been framed is not covered by clause (i) of Section 33A(1). The Parliament having taken the right step of compelling disclosure of the pendency of cases relating to major offences, there is no good reason why it failed to provide for the disclosure of the cases of the same nature of which cognizance has been taken by the Court. It is common knowledge that on account of variety of reasons such as the delaying tactics of one or the other accused and inadequacies of prosecuting machinery, framing of formal charges get delayed considerably, especially in serious cases where committal procedure has to be gone through. On that account, the voter/citizen shall not be denied information regarding cognizance taken by the Court of an offence punishable with imprisonment for two years or more. The citizen's right to information, when once it is recognized to be part of the fundamental right under Article 19(1)(a), cannot be truncated in the manner in which it has been done. Clause (i) of Section 33(A)(1) therefore falls short of the avowed goal to effectuate the right of information on a vital aspect. Cases in which cognizance has been taken should therefore be comprehended within the area of information accessible to the voters/citizens, in addition to what is provided for in Clause (i) of Section 33-A.

120. Coming to clause (ii) of Section 33A(1), the Parliament broadly followed the pattern shown by the Court itself. This Court thought it fit to draw a line between major/serious offences and minor/non-serious offences while giving direction no. 2 (*vide* Para 48). If so, the legislative thinking that this distinction should also hold good in regard to past cases cannot be faulted on the ground that the said clause fails to provide adequate information about the candidate. If the Parliament felt that the convictions and sentences of the long past related to petty/non serious offences need not be made available to electorate, it cannot be definitely said that the valuable right to information becomes a casualty. Very often, such offences by and large may not involve moral turpitude. It is not uncommon, as one of the learned senior counsel pointed out that the political personalities are prosecuted for politically related activities such as holding demonstrations and visited with the punishment of fine or short imprisonment. Information regarding such instances may not be of real importance to the electorate in judging the worth of the relative merits of the candidates. At any rate, it is a matter of perception and balancing of various factors, as observed *supra*. The legislative judgment cannot be faulted merely for the reason that the pro tempore directions of this Court have not been scrupulously followed. As regards acquittals, it is reasonable to take the view that such information will not be of much relevance inasmuch as acquittal prima facie implies that the accused is not connected with the crime or the prosecution has no legs to stand. It is not reasonable to expect that from the factum of prosecution resulting in the acquittal, the voters/citizens would be able to judge the candidate better. On the other hand, such

information in general has the potential to send misleading signals about the honesty and integrity of the candidate.

121. I am therefore, of the view that as regards past criminal record, what the Parliament has provided for is fairly adequate.

122. One more aspect which needs a brief comment is the exclusion of offences referred to in sub-sections (1) and (2) of section 8 of the R.P. Act, 1951. Section 8 deals with disqualification on conviction for certain offences. Those offences are of serious nature from the point of view of national and societal interest. Even the existing provisions, viz., Rule 4A inserted by Conduct of Elections (Amendment) Rules, 2002 make a provision for disclosure of such offences in the nomination form. Hence, such offences have been excluded from the ambit of clause (ii) of Section 33A.

IV. (2). Assets and liabilities: Disclosure of assets and liabilities is another thorny issue.

123. If the right to information is to be meaningful and if it is to serve its avowed purpose, I am of the considered view that the candidate entering the electoral contest should be required to disclose the assets and liabilities (barring articles of household use). A member of Parliament or State Legislature is an elected representative occupying high public office and at the same time, he is a 'public servant' within the meaning of Prevention of Corruption Act as ruled by this Court in the case of *P.V. Narasimha Rao v. State* [(1998) 4 SCC 626]. They are the repositories of public trust. They have public duties to perform. It is borne out by experience that by virtue of the office they hold there is a real potential for misuse. The public awareness of financial position of the candidate will go a long way in forming an opinion whether the candidate, after election to the office had amassed wealth either in his own name or in the name of family members viz., spouse and dependent children. At the time when the candidate seeks re-election, the citizens/voters can have a comparative idea of the assets before and after the election so as to assess whether the high public office had possibly been used for self-aggrandizement. Incidentally, the disclosure will serve as a check against misuse of power for making quick money—a malady which nobody can deny, has been pervading the political spectrum of our democratic nation. As regards liabilities, the disclosure will enable the voter to know, *inter alia*, whether the candidate has outstanding dues payable to public financial institutions or the Government. Such information has a relevant bearing on the antecedents and the propensities of the candidate in his dealings with public money. 'Assets and liabilities' is one of the important aspects to which extensive reference has been made in *Association for Democratic Reforms* case. The Court did consider it, after an elaborate discussion, as a vital piece of information as far as the voter is concerned. But, unfortunately, the observations made by this Court in this regard have been given a short shrift by the Parliament with little realization that they have significant bearing on the right to get information from the contesting candidates and such information is necessary to give effect to the freedom of expression.

124. As regards the purpose of disclosure of assets and liabilities, I would like to make it clear that it is not meant to evaluate whether the candidate is financially sound or has sufficient money to spend in the election. Poor or rich are alike entitled to contest the election. Every citizen has equal accessibility in public arena. If the information is meant to mobilize

public opinion in favour of an affluent/financially sound candidate, the tenet of socialistic democracy and the concept of equality so firmly embedded in our Constitution will be distorted. I cannot also share the view that this information on assets would enable the public to verify whether unaccounted money played a part in contesting the election. So long as the Explanation-I to Section 77 of R.P. Act, 1951 stands and the contributions can legitimately come from any source, it is not possible for a citizen/voter to cause a verification to be made on those lines. In my opinion, the real purposes of seeking information in regard to assets and liabilities are those which I adverted to in the preceding paragraph. It may serve other purposes also, but, I have confined myself to the relevancy of such disclosure *vis-a-vis* right to information only.

125. It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same. In this context, I would like to recall the apt words of Mathew J., in **Gobind v. State of M.P.** [(1975) 2 SCC 148]. While analyzing the right to privacy as an ingredient of Article 21, it was observed:

There can be no doubt that privacy- dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior.

126. It was then said succinctly:

If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right.

127. It was further explained-

Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a

countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that the Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure; but, the hitch lies in the fact that the disclosure has to be made to the Speaker or Chairman of the House after he or she is elected. No provision has been made for giving access to the details filed with the presiding officer of the House. By doing so, the Parliament has omitted to give effect to the principle, which it rightly accepted as a step in aid to promote integrity in public life. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of other family members, the Parliament refrained from making a provision for furnishing the information at the time of filing the nomination. This has resulted in jeopardizing the right to information implicitly guaranteed by Article 19(1)(a). Therefore, the provision made in Section 75A regarding declaration of assets and liabilities of the elected candidates to the presiding officer has failed to effectuate the right to information and the freedom of expression of the voters/citizens.

IV. (3). Educational qualifications

128. The last item left for discussion is about educational qualifications. In my view, the disclosure of information regarding educational qualifications of a candidate is not an essential component of the right to information flowing from Article 19(1)(a). By not providing for disclosure of educational qualifications, it cannot be said that the Parliament violated the guarantee of Article 19(1)(a). Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, I am inclined to think that the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. It is a well known fact that barring a few exceptions, most of the candidates elected to Parliament or the State Legislatures are fairly educated even if they are not graduates or post-graduates. To think of illiterate candidates is based on a factually incorrect assumption. To say that well educated persons such as those having graduate and post-graduate qualifications will be able to serve the people better and conduct themselves in a better way inside and outside the House is nothing but overlooking the stark realities. The experience and events in public life and the Legislatures have demonstrated that the dividing line between the well educated and less educated from the point of view of his/her calibre and culture is rather thin. Much depends on the character of the individual, the sense of devotion to duty and the sense of concern to the welfare of the people. These characteristics are not the monopoly of well educated persons. I do not think that it is necessary to supply information to the voter to facilitate him to indulge in an infructuous exercise of comparing the educational qualifications of the candidates. It may be that certain candidates having exceptionally high qualifications in specialized field may prove useful to the society, but it is natural to expect that such candidates would voluntarily come forward with an account of their own academic and other talents as a part of their election programme. Viewed from any angle, the information regarding educational qualifications is

not a vital and useful piece of information to the voter, in ultimate analysis. At any rate, two views are reasonably possible. Therefore, it is not possible to hold that the Parliament should have necessarily made the provision for disclosure of information regarding educational qualifications of the candidates.

V. Conclusions

Finally, the summary of my conclusions:

1. Securing information on the basic details concerning the candidates contesting for elections to the Parliament or State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the Press and electronic media, though, to a certain extent, there may be overlapping.

2. The right to vote at the elections to the House of people or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

3. The directives given by this Court in *Union of India v. Association for Democratic Reforms* [(2002) 5 SCC 294] were intended to operate only till the law was made by the Legislature and in that sense '*pro tempore*' in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even if they be tentative or ad-hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced.

4. The Court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right.

5. Section 33-B inserted by the Representation of People (3rd Amendment) Act, 2002 does not pass the test of constitutionality. Firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

6. The right to information provided for by the Parliament under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by Court from the ambit of disclosure.

7. The provision made in section 75A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with

those of spouse or dependent children, the Parliament ought to have made a provision for furnishing this information at the time of filing the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(a).

8. The failure to provide for disclosure of educational qualification does not, in practical terms, infringe the freedom of expression.

9. The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders related to disclosure of assets and liabilities will still hold good and continue to be operative. However, direction no. 4 of para 14 in so far as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced.

130. Accordingly, the writ petitions stand disposed of without costs.

Resurgence India v. Election Commission of India
2013 (11) SCALE 348

P. Sathasivam, CJI. : 1) This writ petition, under Article 32 of the Constitution of India, has been filed to issue specific directions to effectuate meaningful implementation of the judgments rendered by this Court in *Union of India v. Association for Democratic Reforms* [(2002) 5 SCC 294] and *People's Union for Civil Liberties (PUCL) v. Union of India* [(2003) 4 SCC 399] and also to direct the respondents herein to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants are complete in all respects and to reject the affidavits having blank particulars.

Background:

2) In order to maintain purity of elections and to bring transparency in the process of election, this Court, in *Association for Democratic Reforms*, directed the Election Commission of India-Respondent No. 1 herein to issue necessary orders, in exercise of its power under Article 324 of the Constitution, to call for information on affidavit from each candidate seeking election to the Parliament or a State Legislature as a necessary part of his nomination paper furnishing therein information relating to his conviction/acquittal/discharge in any criminal offence in the past, any case pending against him of any offence punishable with imprisonment for 2 years or more, information regarding assets (movable, immovable, bank balance etc.) of the candidate as well as of his/her spouse and that of dependants, liability, if any, and the educational qualification of the candidate.

3) Pursuant to the above order, the Election Commission, vide order dated 28.06.2002, issued certain directions to the candidates to furnish full and complete information in the form of an affidavit, duly sworn before a Magistrate of the First Class, with regard to the matters specified in *Association for Democratic Reforms*. It was also directed that non-furnishing of the affidavit by any candidate or furnishing of any wrong or incomplete information or suppression of any material information will result in the rejection of the nomination paper, apart from inviting penal consequences under the Indian Penal Code, 1860. It was further clarified that only such information shall be considered to be wrong or incomplete or suppression of material information which is found to be a defect of substantial character by the Returning Officer in the summary inquiry conducted by him at the time of scrutiny of nomination papers.

4) In *People's Union for Civil Liberties (PUCL)*, though this Court reaffirmed the aforementioned decision but also held that the direction to reject the nomination papers for furnishing wrong information or concealing material information and verification of assets and liabilities by means of a summary inquiry at the time of scrutiny of the nominations cannot be justified.

5) Pursuant to the above, the Election Commission, vide order dated 27.03.2003, held its earlier order dated 28.06.2002 non-enforceable with regard to verification of assets and

liabilities by means of summary inquiry and rejection of nomination papers on the ground of furnishing wrong information or suppression of material information.

6) Again, the Election Commission of India, vide letter dated 02.06.2004 directed the Chief Electoral Officers of all the States and Union Territories that where any complaint regarding furnishing of false information by any candidate is submitted by anyone, supported by some documentary evidence, the Returning Officer concerned should initiate action to prosecute the candidate concerned by filing formal complaint before the appropriate authority.

Brief facts:

7) In the above backdrop, the brief facts of the case in hand are as under:- Resurgence India-the petitioner herein is a non-governmental organization (NGO) registered under the Societies Registration Act, 1860 and is working for social awakening, social empowerment, human rights and dignity. During Punjab Legislative Assembly Elections, 2007, the petitioner-organization undertook a massive exercise under the banner "Punjab Election Watch" and affidavits pertaining to the candidates of six major political parties in the State were analyzed in order to verify their completeness. During such campaign, large scale irregularities were found in most of the affidavits filed by the candidates.

8) On 09.02.2007, the petitioner-organization made a representation to the Election Commission of India regarding large number of non-disclosures in the affidavits filed by the contestants in the State of Punjab and poor level of scrutiny by the Returning Officers. Vide letter dated 20.02.2007, the Election Commission of India expressed its inability in rejecting the nomination papers of the candidates solely due to furnishing of false/incomplete information in the affidavits in view of the judgment in *People's Union for Civil Liberties (PUCL)*.

9) Being aggrieved of the same, the petitioner-organization has preferred this petition for the issuance of a writ of mandamus to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants should be complete in all respects and to reject those nomination papers which are accompanied by incomplete/blank affidavits. The petitioner-organization also prayed for deterrent action against the Returning Officers in case of acceptance of such incomplete affidavits in order to remove deficiencies in the format of the prescribed affidavit.

10) Heard Mr. Prashant Bhushan, learned counsel for the petitioner-organization, Ms. Meenakshi Arora, learned counsel for the Election Commission of India-Respondent No. 1 herein and Mr. A. Mariarputham, learned senior counsel for the Union of India. Prayer/Relief Sought for:

Stand of the Petitioner-Organization:

11) The Petitioner-organization pleaded for issuance of appropriate writ/direction including the writ of mandamus directing the respondents herein to make it compulsory for the Returning Officers to ensure that the affidavits filed by the candidates are complete in all respects and to reject those nomination papers, which are accompanied by blank affidavits.

Stand of the Election Commission of India:

It is the stand of the Election Commission of India that the judgment in *People's Union for Civil Liberties (PUCL)* does not empower the Returning Officers to reject the nomination papers solely due to furnishing of false/incomplete/blank information in the affidavits signed by the candidates. In succinct, they put forth the argument that they do not have any latitude for rejecting the nomination papers in view of the above mentioned judgment. However, learned counsel for the Election Commission of India made an assertion that the Election Commission too is of the opinion that incomplete nomination papers must be rejected. Hence, the Election Commission of India sought for clarification in that regard.

Stand of the Union of India:

The Union of India also put forth the similar contention as raised by the Election Commission. Interestingly, the Union of India also raised a query as to how this Court will be justified in accepting the nomination paper with false information but rejecting the nomination paper for filing affidavit with particulars left blank and hence prayed that both the abovesaid situations must be treated at par.

Discussion:

12) Both the petitioner-organisation and the respondent/UOI sought divergent remedies against the same situation viz., wherein the affidavit filed by the candidate stating the information given as correct but the particulars of the same are left blank. The petitioner-organisation is seeking for rejection of nomination paper in such a situation whereas the Union of India is pleading for treating it at par with filing false affidavit and to prosecute the candidate under Section 125A of the Representation of the People Act, 1951 (in short 'the RP Act').

13) In order to appreciate the issue involved, it is desirable to refer the relevant provisions of the RP Act. Sections 33A, 36 and 125A of the RP Act read as under:

“33A. Right to information.-(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether -

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

36. Scrutiny of nomination.-(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely: Articles 84, 102, 173 and 191,

Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in clause (b) or clause (c) of sub-section (2) shall be deemed to authorize the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement, of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.

125A. Penalty for filing false affidavit, etc.-A candidate who himself or through his proposer, with intent to be elected in an election,-

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) gives false information which he knows or has reason to believe to be false; or

(iii) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section

33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.”

14) In view of the above, the power to reject the nomination paper by the Returning Officer on the instance of candidate filing the affidavit with particulars left blank can be derived from the reasoning of a three-Judge Bench of this Court in *Shaligram Shrivastava v. Naresh Singh Patel* [(2003) 2 SCC 176]. In the aforesaid case, the nomination paper of a candidate got rejected at the time of scrutiny under Section 36(2) of the RP Act on the ground that he had not filled up the proforma prescribed by the Election Commission wherein the candidate was required to state whether he had been convicted or not for any offence mentioned in Section 8 of the RP Act. In actual, the candidate therein had filed an affidavit stating that the information given in the proforma was correct but the proforma itself was left blank. The candidate therein coincidentally raised somewhat similar contention as pleaded by the Union of India in the present case. The candidate pleaded that his nomination paper could not be rejected on the ground that he had not filled up the proforma prescribed since no such proforma was statutorily provided under the provisions of the Act or under the rules framed thereunder. It was contended that the Commission could not legislate to prescribe a proforma; at best it can only be an executive instruction of the Election Commission whereas the petitioner had filled the proforma prescribed under the Rules, which did not suffer from any defect.

15) Although, the grounds of contention may not be exactly similar to the case on hand but the reasoning rendered in that verdict will come in aid for arriving at a decision in the given case. In order to arrive at a conclusion in that case, this Court traversed through the objective behind filing the proforma. The proforma mandated in that case was required to be filed as to the necessary and relevant information with regard to the candidate in the light of Section 8 of the RP Act. This Court further held that at the time of scrutiny, the Returning Officer is entitled to satisfy himself whether the candidate is qualified and not disqualified, hence, the Returning Officer was authorized to seek such information to be furnished at the time or before scrutiny. It was further held that if the candidate fails to furnish such information and also absents himself at the time of the scrutiny of the nomination papers, then he is obviously avoiding a statutory inquiry being conducted by the Returning Officer under Section 36(2) of the RP Act relating to his being not qualified or disqualified in the light of Section 8 of the RP Act. It is bound to result in defect of a substantial character in the nomination. This Court further held as under:-

“17. In the case in hand the candidate had failed to furnish such information as sought on the pro forma given to him and had also failed to be present personally or through his representative at the time of scrutiny. The statutory duty/power of Returning Officer for holding proper scrutiny of nomination paper was rendered nugatory. No scrutiny of the nomination paper could be made under Section 36(2) of the Act in the light of Section 8 of

the Act. It certainly rendered the nomination paper suffering from defect of substantial character and the Returning Officer was within his rights in rejecting the same.”

16) It is clear that the Returning Officers derive the power to reject the nomination papers on the ground that the contents to be filled in the affidavits are essential to effectuate the intent of the provisions of the RP Act and as a consequence, leaving the affidavit blank will in fact make it impossible for the Returning Officer to verify whether the candidate is qualified or disqualified which indeed will frustrate the object behind filing the same. In concise, this Court in *Shaligram* evaluated the purpose behind filing the proforma for advancing latitude to the Returning Officers to reject the nomination papers.

17) In the light of the above reasoning, now let us assess the facts of the given case. In *Association for Democratic Reforms*, this Court arrived at a decision that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and it would include their decision of casting votes in favour of a particular candidate. This Court further held that if there was a disclosure by a candidate with regard to his criminal antecedents, assets and liabilities and educational qualification, then it would strengthen the voters in taking appropriate decision of casting their votes. This Court further stated as under:-

“38. If right to telecast and right to view to sport games and right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen/voter - a little man - to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a). In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry, which makes democracy a farce. Therefore, casting of vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information, which includes freedom to hold opinions. Entertainment is implied in freedom of ‘speech and expression’ and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy.

46. ...4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary

right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

...7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law-makers."

18) Thus, this Court held that a voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament and such right to get information is universally recognized natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution. It was further held that the voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Thus, in unequivocal terms, it is recognized that the citizen's right to know of the candidate who represents him in the Parliament will constitute an integral part of Article 19(1)(a) of the Constitution of India and any act, which is derogative of the fundamental rights is at the very outset *ultra vires*.

19) With this background, Section 33A of the RP Act was enacted by Act 72 of 2002 with effect from 24.08.2002. Thus, the purpose of the Act 72 of 2002 was to effectuate the right contemplated in *Association for Democratic Reforms*. However, the legislators did not incorporate all the suggestions as directed by this Court in the above case but for mandating all the candidates to disclose the criminal antecedents under Section 33A by filing an affidavit as prescribed along with the nomination paper filed under Section 33(1) of the RP Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, at present, every candidate is obligated to file an affidavit with relevant information with regard to their criminal antecedents, assets and liabilities and educational qualifications.

20) Let us now test whether the filing of affidavit stating that the information given in the affidavit is correct but leaving the contents blank would fulfill the objective behind filing the same. The reply to this question is a clear denial. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India. The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting. When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory.

21) For that purpose, the Returning Officer can very well compel a candidate to furnish information relevant on the date of scrutiny. We were appraised that the Election Commission already has a standard draft format for reminding the candidates to file an affidavit as stipulated. We are of the opinion that along with the above, another clause may be inserted for reminding the candidates to fill the blanks with the relevant information thereby conveying the message that no affidavit with blank particulars will be entertained. We reiterate that it is the duty of the Returning Officer to check whatever the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

22) We also clarify to the extent that in our coherent opinion the above power of rejection by the Returning Officer is not barred by Para 73 of *People's Union for Civil Liberties (PUCL)* which reads as under:-

“73. While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in Assn for Democratic Reforms case, the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the 'documentary proof'. Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time prima facie it appears that the Election Commission is required to revise its instructions in the light of directions issued in Assn for Democratic Reforms case and as provided under the Representation of the People Act and its third Amendment.”

23) The aforesaid paragraph, no doubt, stresses on the importance of filing of affidavit, however, opines that the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary inquiry at the time of scrutiny of the nominations cannot be justified since in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. This Court was of the opinion that if sufficient time is provided, the candidate may be in a position to produce proof to contradict the objector's version. The object behind penning down the aforesaid reasoning is to accommodate genuine situation where the candidate is trapped by false allegations and is unable to rebut the allegation within a short time. Para 73 of the aforesaid judgment nowhere contemplates a situation where it bars

the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank. Therefore, we hereby clarify that the above said paragraph will not come in the way of the Returning Officer to reject the nomination paper if the said affidavit is filed with blank columns. The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank, if he desires that his nomination paper be accepted by the Returning Officer.

24) At this juncture, it is vital to refer to Section 125A of the RP Act. As an outcome, the act of failure on the part of the candidate to furnish relevant information, as mandated by Section 33A of the RP Act, will result in prosecution of the candidate. Hence, filing of affidavit with blank space will be directly hit by Section 125A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning officer, we find no reason why the candidate must again be penalized for the same act by prosecuting him/her.

25) If we accept the contention raised by Union of India, viz., the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank should be treated at par, it will result in breach of fundamental right guaranteed under Article 19(1)(a) of the Constitution, viz., 'right to know', which is inclusive of freedom of speech and expression as interpreted in *Association for Democratic Reforms*.

26) In succinct, if the Election Commission accepts the nomination papers in spite of blank particulars in the affidavits, it will directly violate the fundamental right of the citizen to know the criminal antecedents, assets and liabilities and educational qualification of the candidate. Therefore, accepting affidavit with blank particulars from the candidate will rescind the verdict in *Association for Democratic Reforms* (supra). Further, the subsequent act of prosecuting the candidate under Section 125A(i) will bear no significance as far as the breach of fundamental right of the citizen is concerned. For the aforesaid reasons, we are unable to accept the contention of the Union of India.

27) What emerges from the above discussion can be summarized in the form of following directions:

- (i) The voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament/Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.
- (ii) The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

(iii) Filing of affidavit with blank particulars will render the affidavit nugatory.

(iv) It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

(v) We clarify to the extent that Para 73 of *People's Union for Civil Liberties* case will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.

(vi) The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

(vii) Filing of affidavit with blanks will be directly hit by Section 125A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her.

28) The Writ Petition is disposed of with the above directions.

T H E E N D