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PEOPLE'S RIGHT TO KNOW ANTECEDENTS OF THEIR ELECTION CANDIDATES: A CRITIQUE OF CONSTITUTIONAL STRATEGIES*

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I

THE ISSUE whether people have the right to know the antecedents of their election candidates, although evidently emanates from their constitutional right to vote, has hitherto remained unexplored until very recently. Here, in point of time, reference is to two recent decisions of the Supreme Court rendered in two successive cases - *Union of India* v. *Association for Democratic Reforms*[1] and *Peoples Union for Civil Liberties (PUCL)* v. *Union of India*,[2] when this issue specifically as such has come to be agitated and considered for the first time in the constitutional history of electoral reforms.[3] But, why this delayed reaction

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1. AIR 2002 SC 2112, *per* MB Shah, Bisheshwar Prasad Singh and HK Sema JJ.

2. AIR 2003 SC 2363, *per* MB Shah, P Venkatarama Reddi and DM Dharmadhikari JJ.

3. Earlier, the issue relating to the right to receive and impart information had arisen in the context of confidential public documents. See *State of U.P.* v. *Raj Narain*, AIR 1975 SC 149 and *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149, in which question arose whether the privilege under section 123 of Indian Evidence Act could be claimed by the state in respect of blue book in the former case and the file throwing light on consultation process with the Chief Justice in the latter case. See also *Dinesh Trivedi* v. *Union of India*, (1997) 4 SCC 306, in which the court was likewise confronted with the issue whether the state could be compelled to make public the background papers and the investigatory reports that were referred to in *Vohra Committee's Report*. Ahmadi, CJI responded by observing: "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

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and response to such an important aspect of the right to vote?

As a prelude to the present analysis, at least three reasons may be given for the delayed response. First, under the traditional inertia one seems to think that right to vote is a right which is made available to one only by the courtesy of the state. One should, therefore, be contented with whatever little or more was made available to one by the state. The legal expression of this assertion finds echo in such statements as made by the Supreme Court in *Jyoti Basu* v. *Debi Ghosal*[4] to the effect that the right to vote is "neither a fundamental right nor a common law right;" it is a "statutory right, pure and simple."[5] The statement that 'right to vote is not a common law right' is akin to the assertion that it is not a customary right – an assertion that is consistent with the patriarchal notion of society. Consequently, the makers of the law – the political organization of the people in power at a given time and place, called the state – assume the power to decide and dictate the dimension of all that goes with the making of this right, the right to vote.

The second assertion for not agitating to know the past history of the prospective elected representatives is the blind faith in the wisdom of the state. Somehow or the other, it is believed that the state has already revealed in respect of election candidates by way of laying down the qualifications for standing at an election, and until or unless the state itself considers desirable to add anything to what is already given, the courts have no business to intervene.[6] The third proximate reason for not asking for more information is that, either one should know one's own election candidates oneself, or the information revealed by the election candidates themselves to the electorates about their

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."

4. AIR 1982 SC 983.

5. See *supra* note 2 at 2401 (para 101).

6. See the submission made by the Solicitor General appearing for Union of India in *Association for Democratic Reforms*, at 2117 (para 8). He vehemently pleaded that till suitable amendments are made in the Act and the rules thereunder, the high court should not have given any direction to the Election Commission over and above to that what was already provided under the law. Referring to the Representation of the People Act of 1951, he specifically submitted that section 8 provides for disqualification on conviction for certain offences and section 8A provides for disqualification on ground of corrupt practices; and section 32 provides nomination of candidate for election if he is qualified to be chosen to fill that seat under the provisions of the Constitution and the Act or under the provisions of the Government of Union Territories Act, 1963. He also drew attention to the elaborate procedure prescribed for presentation of nomination paper and requirements for a valid nomination. Finally, he also referred to section 36, which provides for scrutiny of nominations and empowers the returning officer to reject any nomination on the stipulated grounds.

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achievements should suffice for the judicious exercise of the right to vote. With these few prefatory remarks, one may now turn to the background considerations of the people's right to know the antecedents of their election candidates.

II

In our resolve to constitute India into a 'sovereign, socialist, secular, democratic republic', we have visibly failed in certain core respects. We have come to have persons in power, for instance, who are nowhere nearer to the conception of people's representatives in the service of society. Such a state of affairs in our polity is pithily described as 'criminalization of politics'. The *Report of the Vohra Committee* of the Government of India, Ministry of Home Affairs, gives a shrieking account of how, in what manner and to what extent our political system has been polluted.[7] It reveals, *inter alia*, that there has been a rapid spread and growth of criminal gangs, armed *senas*, drug mafias, drug peddlers, smuggling gangs in the country.[8] Over the years, the people associated with such criminal organizations involved in illegal activities have developed an extensive network of contacts with bureaucrats or government functionaries, politicians, media persons and strategically located individuals in the non-state sector. The Director, Intelligence Bureau, provides an alarming insight about such 'contacts' when he says:[9]

> In certain States like Bihar, Haryana and UP, these gangs enjoy the patronage of local politicians, cutting across party lines and

7. The committee established by the Union of India on 09.07.1993 under the chairmanship of the then home secretary NN Vohra has come to be popularly known as Vohra Committee. The report of the committee came into public glare when the Supreme Court in *Dinesh Trivedi, M.P. and Others* v. *Union of India*, (1997) 4 SCC 306 dealt with a petition for disclosure of this report. This happened in the wake of a murder of a known political activist Naina Sahani in July 1995, when one of the persons arrested happened to be an active politician who had held important political posts, and newspaper report published a series of articles on the criminalisation of politics within the country, and the growing links between political leaders and mafia members. Since the government seemed to be reluctant to make the report public, the court held that withholding of the report would amount to violation of the citizen's right to freedom of information by observing that "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, seek to formulate sound policies of governance aimed at their welfare." In short, the court added that "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant."

8. See *Report of the Vohra Committee* para 6.2.

9. *Ibid.*

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> the protection of Governmental functionaries. Some political leaders become the leaders of these gangs, armed senas and over the years get themselves elected to local bodies, State assemblies and the national Parliament. Resultantly, such elements have acquired considerable political clout, seriously jeopardizing the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people.

However, perhaps the most disturbing dimension of such developments is that any delayed response to cleanse the electoral system of the persons with dubious record amounts to making 'criminalization of politics' entrenched into our system. Once entrenched, it starts assuming an 'institutionalized character', and, thereby, signifying the tacit acceptance of the people at large. Thenceforth, the eradication of the malice becomes extremely difficult. One of the difficulties in overcoming this problem is that the true colour and character of the people's representatives is revealed only after they have been elected, and not prior to their election. Genesis of the problem shows that our electoral system is deficient in some material respects. This obviously raises the question of electoral reforms. How to make our elections clean, fair, transparent, equitable and responsive?

III

There is no gainsaying that Parliament is the most appropriate forum for initiating electoral reforms by reviewing the existing laws, primarily reflected in the enactments of the central government, namely, the Representation of the People Act, 1951, and the Conduct of Election Rules, 1961. But, then, precisely it is this what is not happening. The political parties and the elected representatives seem to be reluctant to go in for any significant changes, as if that would either directly or indirectly impinge upon their own vested interests, or seriously affect their political configurations. This is evident from the on-going debate on the exclusion of tainted ministers. In this predicament, to subdue the saner voice, however, what the political parties in power readily do is to instantly agree to the formation of committees and commissions to undertake comprehensive study of the various measures required to reform the law. Their reports, however, would often remain buried in the confidential files of the government.

Realizing the proximity of the executive and legislature in our parliamentary system of government, the only alternative forum that is available to the people for activating the electoral reforms is judiciary. This is what has happened recently in the precipitant form in the two

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cases before the Supreme Court.[10] Such steps could be taken through public interest litigation initiated at the instance of two NGOs – 'Association for Democratic Reforms' and 'Peoples Union for Civil Liberties'. The endeavour here is to explore and analyze the constitutional strategies that have been evolved by the Supreme Court towards strengthening the people's right to know the antecedents of their election candidates. The present author has been able to decipher and locate at least three constitutional strategies that are critical to put the people's right to vote on sound footing.

IV

First and foremost constitutional strategy is the one that empowers the court to make the state responsive to people's right to know the antecedents of their election candidates. This has been done quite ingeniously by linking the people's right to vote under article 326 with the fundamental right of speech and expression contained under article 19(1)(a) of the Constitution. How? Since the people's right to know the antecedents of their election candidates hitherto remained unexplored, it was not yet certain if that right could be considered a fundamental right. Accordingly, by way of abundant precaution, the petitioner – the Association for Democratic Reforms – approached the high court in a public interest litigation under article 226, instead of approaching the Supreme Court directly under article 32 of the Constitution. The ambit of the power of the high court under article 226 is wider than that of the Supreme Court under article 32, inasmuch as its jurisdiction can be invoked for the enforcement of all kinds of rights, including fundamental rights. In case, the right to know the antecedents of the election candidates as a sequel to the right to vote were to be held not a fundamental right, moving the Supreme Court under article 32 for the enforcement of the same would have been an exercise in futility. The singular attempt of the petitioner before the high court was, therefore, first to establish that the voter had the right to know the antecedents of the election candidates. To this extent there was not much difficulty, because such a right flows directly from the constitutional right contained in article 326. The provisions of this article provide for the elections to the House of the People and to the legislative assemblies of the states on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 18 years of age on a stipulated date,[11] and is not otherwise disqualified under the Constitution or any

10. See *supra* notes 1 and 2.

11. Substituted by the Constitution (Sixty-first Amendment) Act, 1988, s. 2 for 'twenty-one years' (w.e.f. 28-3-1989).

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law made by the appropriate legislature on the ground of non-resident, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to vote at any such election. However, mere recognition of the existence of the right to vote is not enough. Its true meaning lies in the manner in which it is exercised. In functional terms this means that a corresponding duty lies on the election candidates to reveal the relevant information about themselves to the voters. But how to enforce this duty is the crucial question?

In *Association for Democratic Reforms*, this issue arose before the High Court of Delhi slightly in a broader perspective. It arose in the context of implementation of certain recommendations made by the Law Commission of India in its *170th Report* that hitherto had remained dormant. The commission made, *inter alia*, three related recommendations:[12] first, debarring candidates from contesting elections if charges were framed against them by a court in respect of certain offences; second, directing the election candidates to furnish details regarding criminal cases, if any, pending against them in the courts; and third, requiring the election candidates to file a true and correct statement of assets owned by them or their spouses and dependant relations. The question to be answered was, 'Could the High Court issue directives to the Election Commission that it should make it mandatory for the election candidates to reveal relevant information about themselves to the voters by making necessary changes in the provisions of the Conduct of Election Rules, 1961?'

Recognizing that the past of the candidate should not be kept in the dark for making a 'right choice', the high court directed the Election Commission to secure to the voters the following information about the election candidates:[13]

(a) Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof.

(b) Assets owned by a candidate, his or her spouse and dependant relations.

(c) Facts giving insight into the candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications.

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12. At the behest of the Government of India, the Law Commission made a comprehensive study of the measures required to expedite hearing of election petitions. The commission was also intended to have a thorough review of the provisions of the Representation of the People Act, 1951, for removing distortions and evils that had crept into the Indian electoral system, and recommend measures for its improvement.

13. See *supra* note 1, at 2116-17 (para 4).

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(d) Information, which the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

The above order of the high court was challenged by the Union of India by filing an appeal before the Supreme Court. This appeal was heard along with writ petition (no. 294 of 2001) initiated by the Peoples Union for Civil Liberties, praying that writ, order or direction be issued to the Government of India for granting a similar relief by amending the relevant provisions of the election law, and also requesting the Supreme Court to frame such guidelines under article 141 of the Constitution as are necessary to implement the recommendations made by the Law Commission of India in its 170th Report. It is this background that has led the Supreme Court to evolve its first constitutional strategy of linking the right to vote with the fundamental right of speech and expression. The whole logic on this count, on an analysis, may be abstracted as follows:

- The right to vote is a constitutional right, as it emanates from article 326 of the Constitution.
- This right has been conferred on all citizens on the basis of adult suffrage; that is all those citizens who have attained the age of 18 years are considered legally responsible for their actions.
- Since this right is further "shaped by statute," namely, the Representation of the People Act, 1951, it is *also* termed as 'statutory right'. It is not very accurate to describe it as a "statutory right, pure and simple".[14]
- This right is an integral part of democratic system of government, in which free and fair elections are periodically held:

> The right of election is the very essence of the Constitution. It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.[15]

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14. *Supra* note 2 at 2401 (para 101) *per* Reddi J.
15. *Supra* note 1 at 2122 (para 29) citing *Mohinder Singh Gill* v. *The Chief Election Commissioner, New Delhi*, AIR 1978 SC 851 (para 23).

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- The exercise of this right presupposes that the right to vote is a matter of voter's own volition, in which "the voter does a social audit of his candidate;"[16] that is, vote is cast by him or her in favour of one candidate or the other on the basis of his or her own judgment.
- For making this judgment, the voter must have all the necessary details about the past of the contesting candidates.[17]
- Jurisprudentially, it is invoking the right-duty relationship; that is, if the voter has the *right* to know the details about the contesting candidates, the corresponding *duty* lies upon them to furnish the same to the voter.
- Here the crucial question is, 'how to compel the candidates to reveal their own past for facilitating the exercise of the 'right to vote' vested in voters?'
- This difficulty has been overcome ingeniously by first treating 'freedom of voting' as an aspect of the 'right to vote', and then distinguishing the former from the latter for the purpose of linking it with the fundamental right of speech and expression. In *Peoples Union for Civil Liberties* Reddi J clearly states that 'right to vote' is conferred on a citizen on fulfilment of requisite criteria, and "the culmination of that right [results] in the final act of expressing choice towards a particular candidate by means of ballot,"[18] implying the 'freedom of voting'. He links the 'freedom of voting' with the fundamental right of freedom of speech and expression by observing:

> Though the initial right [that is, 'right to vote'] 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,

16. *Id*. at 2123 (para 32).
17. *Ibid*.
18. See *supra* note 2 at 2401 (para 101).

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> such as right to secure information about the candidate, which are conducive to the freedom…. [Thus], the fundamental right to freedom of expression sets in when a voter actually casts his vote….

- Once it is established that the constitutional right to vote for its effective exercise is also a fundamental right, it becomes the special concern of the court under article 13(2) of the Constitution to ensuring that the state does not do anything that takes away or abridges this right directly or indirectly. Stated conversely, since the non-revealing of the antecedents by the election candidates infringes the fundamental right, the direction given by the court to the Election Commission that it should ensure the availability of relevant information regarding the past history of the election candidates becomes constitutionally sustainable.
- Moreover, the exercise of such a power by the Supreme Court, which is though essentially legislative in character, is also constitutionally sanctioned. Speaking generally, it is an aspect of the power of judicial review inherent in the court as a guardian of the Constitution.[19] Specifically speaking, article 142 of the Constitution empowers the Supreme Court in the exercise of its jurisdiction to pass "such decree or make such order as is necessary *for doing complete justice in any cause or matter pending before it*."[20] For the enforcement of any

19. See *A.R. Antulay* v. *R.S. Nayak*, AIR 1988 SC 166.

20. *Emphasis added*. The Supreme Court in the exercise of powers under art 32 read with art 142 of the Constitution has hitherto issued guidelines and directions in a number of cases in different contexts. In *Erach Sam Kanga* v. *Union of India,* (W.P. No. 2632 of 1978, decided on 20.03.1979), the constitution bench of the Supreme Court laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey* v. *Union of India,* (1984) 2 SCC 244, *In re Foreign Adoption*, guidelines for adoption of minor children by foreigners were spelled out. Similarly in *State of W.B.* v. *Sampat Lal,* (1985) 1 SCC 317, *K. Veeraswami* v. *Union of India,* (1991) 3 SCC 655, *Union Carbide Corporation* v. *Union of India,* (1991) 4 SCC 584, *Delhi Judicial Service Association* v. *State of Gujarat (Nadiad* case*),* (1991) 4 SCC 406, *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.,* (1996) 4 SCC 622 and *Dinesh Trivedi , M.P.* v. *Union of India,* (1997) 4 SCC 306, guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates-on-Record Association* v. *Union of India (IInd Judges* case*)*, (1993) 4 SCC 441, a nine judge bench laid down guidelines and norms for the appointment and transfer of judges, which are being rigidly followed in the matter of appointments of high court and Supreme Court judges and transfer of high court judges. In *Vishaka* v. *State of Rajasthan,* (1997) 6 SCC 241, elaborate guidelines were laid down for observance in workplaces for avoiding sexual harassment of working women.

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decree so passed or order so made, the Supreme Court enjoys a very wide power. Its directions shall be enforceable throughout the territory of India "in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."[21]

- Besides, subject to the provisions of any law made in this behalf by Parliament, "the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, of the investigation or punishment of any contempt of itself."[22]

The strategy of the Supreme Court to link the right to vote with the fundamental right of speech and expression was not without resistance both from the government and the political parties in the opposition. The Solicitor General, representing Union of India, for instance, vehemently argued "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."[23] He seems to have drawn support from the observation that the Supreme Court made earlier in *Jyoti Basu* v. *Debi Ghosal*,[24] wherein it was pointedly stated 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." Moreover, the thrust of their resistance was that the issue of linkage bore far reaching consequences and, therefore, required to be decided at least by a constitution bench. The Supreme Court repelled this argument in *Peoples Union for Civil Liberties* on three main counts. One, the propounding of the linkage was done earlier by the Supreme Court in *Association for Democratic Reforms* for the first time[25] with full participation of the Union of India, and that there was no appeal against that decision on any counts. Accordingly, that decision had attained finality. Two, since this issue of linkage had not directly arisen earlier and, therefore, there could not be a case or an issue of conflicting precedents; that is, all the earlier decisions dealt with issues other than

20. Art 142 (1).
21. Art 142 (1).
22. Art 142 (2).
23. *Supra* note 2 at 2401 (para 101).
24. AIR 1982 SC 983.
25. See *supra* note 3 and the accompanying text.

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the issue of linkage.[26] Three, the established linkage bears its own rational justification. It is just "not ipse dixit;"[27] "unpolluted healthy democracy" does envisage "well-informed citizens – voters," emphasizes Shah, J (for himself and Dharmadhikari, J).[28]

One minor comment may be proffered here. Once it is realized that 'the fundamental right of freedom of expression sets in when a voter actually casts his vote,' isn't the actual casting of vote merely an aftermath of the freedom of expression, implying thereby that 'actual casting' inheres or even presupposes the freedom of speech? Such an exposition causes no injury to the freedom of the legislature to lay down the criteria for regulating the right to vote, because the only constitutional constraint in the exercise of that freedom is not to violate the fundamental freedom of speech and expression in the guise of regulating the right to vote.

V

The second strategy involves the exploration, as to whether the Election Commission is *directly* empowered by the constitutional design to protect people's right to know the antecedents of their election candidates? Part XV of the Constitution of India is specifically devoted to the subject of 'Elections'. The very first article in this part, namely, article 324, vests in most clear and categorical language the power of 'superintendence, direction and control of elections' in the Election Commission,[29] which shall consist of "the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."[30] When any other election commissioner is so

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26. In none of the cases starting from *N.P. Punnuswami* v. *Returning Officer*, AIR 1952 SC 64, which characterized the 'right to vote' as a 'statutory right', considered the question whether the citizen's freedom of expression is or is not involved when he or she is entitled to cast his or her vote in favour of one or the other candidate. According to Reddi J in *Peoples Union for Civil Liberties*, all such cases "fall broadly within the realm of procedural or remedial aspects of challenging the election or the nomination of a candidate" at 2401 (para 101). "None of these decisions, in my view, go counter to the proposition accepted by us that the fundamental right of expression sets in when a voter actually casts his vote," *ibid.* In view of this exposition, the plea for referring the issue of linkage to a larger bench did not arise.

27. 'Ipse dixit' literally implies, something just asserted but not proved.

28. *Supra* note 2 at 2370 (paras 16, 17 and 18).

29. Cl (1) of art 324.

30. Cl (2) of art 324.

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appointed, the Chief Election Commissioner shall act as the chairman of the Election Commission.[31]

The unqualified use of such terms as "superintendence, direction and control of elections" under article 324 tends to confer a very wide range of powers on the Election Commission in the matters of elections. However, the difficulty arises about the sweep of this power when a similar power is conferred on Parliament under article 327 of the Constitution. Dealing specifically with the power of Parliament to make provision with respect to elections to legislatures, article 327 provides:[32]

> Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to *all* matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Pursuant to the provision of article 327, Parliament has already passed several Acts, including the Representation of the People Act, 1950 and the Representation of the People Act, 1951 along with the elaborate statutory rules such as the Conduct of Election Rules, 1961.[33] In view of this overlapping of powers in relation to one and the same subject, namely, the elections, apparently there arises a conflict situation. On the basis of the well-established principles of interpretation of statutes, such a conflict is resolved by applying the principle of harmonious construction. In functional terms this principle means that, when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect be given to both.[34] In the application of this principle in the arena of election laws, the author has been able to decipher as many as three distinct, and yet closely related, responses that broadly correspond to three phases of constitutional development. These responses/phases have

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31. Cl (3) of art 324.

32. State legislature is also empowered to make provision with respect to elections to such legislature under art 328 of the Constitution, but subject to the provisions of this Constitution and insofar as provisions in that behalf is not made by Parliament.

33. There are several other Acts and statutory rules and orders enacted by Parliament, like the Presidential and Vice-Presidential Elections Act, 1952, the Union Territories (Direct Election to the House of the People) Act, 1965, the Jammu and Kashmir Representation of the People (Supplementary) Act, 1968, the Presidential and Vice-Presidential Elections Rules, 1974, , and the Government of National Capital Territory of Delhi Act, 1991.

34. See *per* Venkatarama Aiyar J, in *Sri Venkataramana Devaru* v. *Mysore*, (1958) SCR 895 at 918.

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been considered in relation to the powers of the Election Commission under article 324 *vis-à-vis* the power of Parliament under article 327 of the Constitution. Specifically the issue to be addressed here is, whether the Election Commission in the exercise of its powers under article 324 of the Constitution could compel the candidates standing for election to reveal their past history to the voters on stipulated counts. In other words, what is the ambit of the power of the Election Commission under article 324?

First response/phase - The Election Commission is empowered to exercise only the defined or enumerated powers.

This implies that the Election Commission's powers under article 324 are as much as these are defined or specifically enumerated by Parliament in the exercise of its power under article 327. This is what the Supreme Court confirms as an "accepted legal position" while responding to the issue, whether Election Commission is empowered to issue directions for securing people's right to information against the election candidates in *Association for Democratic Reforms*:[35]

> 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 the 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.

This position seems to be supported by the basic constitutional scheme in which the law-making function is entrusted to the legislature, and the task of the executive is to faithfully carry out its mandate. Here, undeniably the Election Commission is in the position of an executive, and Parliament has elaborated its functions as envisaged under article 324 through the enactment of the Representation of the People Acts of 1950 and 1951 along with rules made thereunder. What is, therefore, not specifically spelled out or inferentially mentioned in the Acts and rules, the same should not be read within the ambit of the provisions of article 324.

Second response/phase – The Election Commission is also empowered to exercise residuary powers.

This is another "accepted legal position," which is premised again on the established constitutional practice, wherein the legislature and the executive, both being the creature of the Constitution, are supposed to promote the constitutional values by bearing in mind the functionality of the broad division of powers under the Constitution. The Supreme Court affirms this position when it is stated categorically:[36]

35. *Supra* note 1 at 2121 (paras 20 and 21).
36. *Id*. at 2121 (paras 19 and 22).

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> 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.

Here the power of the Election Commission under article 324 is considered "wide enough to supplement the powers [of Parliament] under Act."[37] Such an exposition widens the ambit of the powers of the Election Commission by observing: "The silence of a statute has no exclusionary effect except where it flows from necessary implication."[38]

Literally construed, this cryptic statement widens the ambit of powers by stipulating that the Election Commission under article 324 not only has the enumerated powers as spelt out by Parliament by virtue of the provision of article 327, but also the powers not so spelt out unless or until it is prohibited to do so either directly or indirectly. The incorporated following clause, "except where it flows from necessary implication," also reveals that the Election Commission in the exercise of its powers under article 324 acts only as a delegate of Parliament. It does only those things that would have been done by Parliament itself.

Third response/phase: The Election Commission enjoys "plenary" powers under article 324.

The third "settled" proposition is that the power of the Election Commission is "plenary in character in exercise thereof."[39] Literally construed, 'plenary' means 'complete' or 'unlimited'. While expounding the need for conferring the 'complete' or 'unlimited' power of the Election Commission under article 324, the Supreme Court says that comprehensive provision is made to enable the Election Commission "to take care of surprise situations."[40] "In statutory provisions or rules, it is known that every contingency could not be foreseen or anticipated with precision; [and] therefore, Commission can cope with situation where the field is unoccupied by issuing necessary orders."[41] The distinguishing feature, unlike in the case of 'residuary power', is that in the exercise of 'plenary power' the Election Commission can issue directions in areas left unoccupied by the legislation, which are not even traceable to the Act or the rules. This implies that in matters of

37. *Id*. at 2122 (para 28), citing para 41 of *Mohinder Singh Gill*, *supra* note 15.
38. *Id*. at 2122 (para 29), citing para 77 of *Mohinder Singh Gill*, *ibid*.
39. *Id.* at 2123 (para 32).
40. *Id.* at 2125 (para 35), citing *Common Cause (A Registered Society)* v. *Union of India and others*, AIR 1996 SC 3081 (para 26).
41. *Id*. at 2123 (para 32).

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'superintendence', 'direction' and 'control' as well as 'conduct' of all elections, the Election Commission enjoys 'complete' or 'unrestricted' power under article 324, which is quite independent of the power of Parliament under article 327.[42]

The inference of conferring 'plenary power' on the Election Commission under article 324 is deducible on the following counts:

(a) The power of the Election Commission under article 324, unlike the power of Parliament under article 327, is not controlled by such arresting clause as "subject to the provisions of this Constitution," implying thereby the conferment of power of the widest possible amplitude.

(b) Such a wide power is conferred on the Election Commission to cover several situations, which could not be either anticipated, or even amenable to 'proper legislation'. On this count, the Supreme Court states very perceptively:[43]

> …. while construing the expression, 'superintendence, direction and control' in Article 324(1), one has to remember that every norm which lays down a rule of conduct *cannot possibly be elevated to the position of legislation or delegated legislation*. There are some authorities or persons in certain grey areas who may be sources of rules of conduct and at the same time cannot be equated to authorities or persons who can make law in the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept, which many may have to follow. It may be a specific or a general order ….

(c) The power of 'superintendence', 'direction', 'control' and 'conduct' of all elections is entrusted to especially created constitutional body, namely, the Election Commission, and not to any executive body in general, for achieving a specific purpose - the smooth conduct of elections. Alluding to this special aspect, the Supreme Court says:[44]

> One has also to remember that the source of power in this case is the Constitution, the highest law of the

42. See *Mohinder Singh Gill* v. *The Chief Election Commissioner, New Delhi*, AIR 1978 SC 851 and *A.C. Jose* v. *Sivan Pillai*, AIR 1984 SC 921.

43. See *supra* note 1 at 2124 (para 33), citing *Kanhiya Lal Omar* v. *R.K. Trivedi and others*, AIR 1986 SC 111 (para 16).

44. *Ibid.*

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> land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved.

A clear example of the exercise of 'plenary power' under article 324 is furnished when the Election Commission issued the Election Symbols (Reservation and Allotment) Order, 1968. Its constitutional validity was questioned in *Kanhiya Lal Omar* mainly on the ground that the said order, providing specification, reservation and allotment of symbols that may be chosen by the candidates at elections in parliamentary and assembly constituencies, was essentially legislative in character and, therefore, beyond the power of an executive body like the Election Commission. This contention was negated by the Supreme Court mainly on three counts: one, that the word 'elections' occurring in article 324 (1) is used in wide sense so as to include the entire process of election, which consists of several stages and embraces many steps, impinging upon the result of the entire election process; two, the provision of symbols is of critical importance in Indian elections, because a large percentage of voters are still illiterate; three, the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are "the broadest terms", which would include the power to make all such provisions relating to symbols, even if this power, for any reason, is held not traceable to the Act and the rules of Parliament.[45]

Likewise, in the exercise of its wide powers under article 324, the Election Commission issued an order asking the election candidates about the expenditure incurred by them and other individuals, including their political parties, for them. The background of passing such an order was that, on a rough and ready estimate, about one thousand crore of rupees were spent by the political parties in the parliamentary elections alone, and yet nobody accounted for the bulk of money so spent. Nobody disclosed the sources of that money. In the absence of accounting and audit, nobody knew from where the money came. Elections, thus, became the fertile field of generation and use of black money. Since the legislature hitherto had made no law on this particular count, the Election Commission issued the relevant orders. Those orders were challenged in *Common Cause (A Registered Society)*, saying that the same were beyond the powers of the Election Commission under article 324. The Supreme Court upheld the orders by observing that article 324 permitted the Election Commission to issue suitable directions to maintain the

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45. *Ibid.* See also *A.C. Jose*, *supra* note 42.

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purity of elections and in particular to bring transparency in the process of election.[46]

On the analogy of the use of plenary powers, there seems to be little difficulty in holding that the Election Commission under article 324 could compel the election candidates to reveal their past to the voters on specified counts. This leads us to the third constitutional strategy.

VI

The third constitutional strategy explored by the Supreme Court relates to broadening the ambit of the people's right to know the antecedents of their election candidates. On this count we need to recapitulate that initially when the writ was filed before the High Court of Delhi by the Association of Democratic Reforms, the Election Commission was directed to secure to voters information about the contesting candidates on certain stipulated counts.[47] The various political parties, both inside and outside the government, contested that order. The then NDA Government, for instance, immediately filed an appeal before the Supreme Court for the reversal of the court's directions. Likewise, the Indian National Congress, the main opposition in the *Lok Sabha*, intervened in the appeal by contending, *inter alia*, that the high court ought to have directed the writ petitioners to approach Parliament for appropriate amendments to the Representation of the People Act, 1951, instead of directing the Election Commission of India directly to carry out the requisite changes through its own directions.[48]

The Supreme Court, as if with the objective of re-examining the whole issue *de novo*, specifically raised the issue: "Whether a voter – a citizen of this country – has a right to receive information, such as, assets, qualification and involvement in offences for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?"[49] To this specific issue, the response of the Supreme Court is in the affirmative:[50]

> …. For maintaining purity of elections and healthy democracy, voters are required to be educated and well informed about the

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46. "The expression, 'conduct of elections' is wide enough to include in its sweep the power to issue directions – in the process of conduct of an election – to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorised by the parties in connection with the election of their respective candidates." *Id*. at 2125 (para 35), citing *Common Cause (A Registered Society)* [para 26].

47. See *supra* note 13.

48. See I.A. No. 2 of 2001.

49. See *Supra* note 1 at 2121 (para 19).

50. *Id*. at 2121-22 (para 24).

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> contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided – its result, if pending – whether the charge is framed or cognizance is taken by the Court? There is no necessity of suppressing the relevant facts from the voters.

Realizing that hitherto there was void in this respect, inasmuch as there existed no legislative provision, the court issued directions to the Election Commission to fill the void by requiring the prospective candidates to provide information on certain specified counts while filing their nomination papers:[51]

> The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Art. 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature –
>
> (1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past - if any, whether he is punished with imprisonment or fine?
>
> (2) Prior to six months of filing of nomination, whether the candidate is 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. If so, the details thereof?
>
> (3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.
>
> (4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.
>
> (5) The educational qualifications of the candidate.

A perusal of these directions shows that, thenceforth, all the candidates seeking elections are obliged to file information regarding their criminal background, pending criminal cases against them, their assets and liabilities, and also their educational qualifications.

The government instantly responded and reacted to this initiative of the Supreme Court by promulgating an ordinance – the Representation

51. *Id.* at 2130 (para 56).

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of the People (Amendment) Ordinance, 2002 on 24.08.2002. This was soon repealed and replaced by the Representation of the People (Amendment) Act, 2002 on 23.10.2002,[52] which came into force with retrospective effect. The legislative response or reaction is contained mainly in sections 33-A and 33-B of the amended Act of 1951.

Section 33-A, dealing with the right to information, provides:[53]

(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.

The extent of this right to information is limited under section 33-B, which specifically requires a candidate to furnish information only as provided under the Act and rules.[54] It opens with a *non-obstante* clause:

> Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.

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52. Inserted by Act 72 of 2002.
53. *Id.*, s. 2, (w.e.f. 24-8-2002).
54. *Id.*, s. 3.

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A bare comparison of the statutory provisions with the directions issued by the Supreme Court in the case of *Association for Democratic Reforms* reveals that only some of the aspects and not all of the right to information raised by the court are incorporated by the legislature. In fact, the remaining aspects, relating to acquittal or discharge in criminal offences, or amassing of assets and incurring liabilities, or educational attainments, are clearly excluded, for it is specifically stated that no candidate shall be liable to disclose or furnish any such information which is not required to be disclosed or furnished under the Act or the rules made thereunder despite the directions issued by the court on the contrary. In this backdrop, the provisions of the amending Act that have the effect of limiting the right to information have been challenged before the three-judge bench of the Supreme Court under article 32 of the Constitution in *Peoples Union for Civil Liberties*.[55]

The pivotal point of challenge is that section 33-B of the Act, on the face of it, is void, because it unduly restricts the rights of the voters to information, which is an aspect of fundamental right to speech and expression under article 19(1)(a) read with article 19(2) of the Constitution. The issue to be considered here relates to the scope or ambit of this right: whether Parliament, while enacting section 33-B, has deviated from the directions given by the Supreme Court in the case of *Association for Democratic Reforms*, and thereby acted beyond its legislative competency. According to Shah J (Dharmadhikari J concurring), the legislature cannot act in a manner as it has done in the enactment of section 33-B, directing the instrumentalities of the state to disregard the decision of the Supreme Court in certain particular respects. Instead, the legislature is entitled to change the law, even with retrospective effect, that forms the basis of a judicial decision. However, even in this respect, since the power of the legislature is subject to constitutional constraints, it cannot enact a law, which is violative of fundamental rights.[56] In other words, not following the directives issued by the Supreme Court in their entirety would necessarily be considered a violation of the fundamental right guaranteed under article 19(1)(a) of the Constitution, and accordingly section 33-B of the Act of 1951 is liable to be held as unconstitutional.

Reddi J in *Peoples Union for Civil Liberties* has looked at this issue with a slightly, but significantly, different perspective. In his opinion:[57]

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55. See *supra* note 2.

56. See, *id. per* Shah J (for himself and Dharmadhikari J) at 2373 (para 9), 2385 (para 39), and 2395-96 (para 81), and *per* Dharmadhikari J (concurring) at 2412 (para 137).

57. *Id.* at 2404-05 (para 111).

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> 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, 'protempore' 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.

Following this, once the legislature enters the field, as has happened in the instant case in the enactment of section 33-A and section 33-B by the amending Act of 2002, the reviewing role of the Supreme Court assumes a different complexion. Seen from this perspective, "*a fresh look has to be necessarily taken by the Court and the validity of the law has to be tested on a clean slate*."[58] In other words, "[O]nce 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."[59] However, while having a 'fresh look' or making an 'independent assessment', the court is not precluded to take into account all that what has been laid down by the court earlier, even 'tentatively'. Pursuing this perspective, Reddi J instantly adds: "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."[60] In his opinion, "the points of disclosure spelt out by this Court in *Association for Democratic Reforms* should serve as broad indicators or parameters in enacting the legislation for the purpose of securing the right to information about the candidate."[61]

What, then, is the difference between the two opinions or approaches of the majority and minority court? According to Shah J (for himself and Dharmadhikari J), any dilution or departure from the entirety of directives issued by the Supreme Court to the Election Commission of India would, *ipso facto*, be considered unconstitutional; whereas, in the opinion of Reddi J the same directive should serve as "broad indicators," and "certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible,"[62] and, thereby, any dilution of those directives would not necessarily make the enacted law unconstitutional.

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58. *Id.* at 2405 (para 112). *Emphasis added.*
59. *Id.* at 2411 [para 129(3)].
60. *Ibid.*
61. *Id.* at 2405 (para 113).
62. *Ibid.*

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It is submitted that Reddi J's approach is worthy of serious consideration at least for two reasons. One, it saves one in treating the contents of disclosure enunciated by the court as 'absolute' and does not foreclose the possibility of further consideration by the legislature. Two, it enables the court to stay put within the ambit of constitutionally assigned role of judicial review, while at the same time leaving the full range of law-making activity to the legislature that unarguably belongs to it. On the basis of this approach, Reddi J holds that the right to information about candidate's antecedents (so far as these are relevant to the holding of public office) - an aspect of 'freedom of voting' as distinct from 'right to vote' – forms an integral part of article 19(1)(a) read with article 19(2) of the Constitution. In this respect, he agrees with Shah J and Dharmadhikari J agreeing with him (Reddi J).[63] Since section 33-A introduced by the amending Act does not wholly cover the directives issued by the Supreme Court in *Association for Democratic Reforms,* particularly in relation to assets and liabilities of the candidate and also in regard to criminal cases in which a person is acquitted or discharged, the directions issued by the Supreme Court in that case will stay put, for their non-inclusion causes violation of the fundamental right guaranteed by article 19(1)(a).[64] On this count, in *Peoples Union for Civil Liberties* there is complete unanimity of views amongst the three judges.

However, there is difference of opinion as to whether the failure to provide for disclosure of educational qualifications infringes the freedom of expression. Shah J (Dharmadhikari J agreeing with him) holds the view that since the amended Act does not 'wholly cover' the directions issued by the court in *Association for Democratic Reforms,* this absence itself amounts to violation of the freedom of expression. Reddi J on the contrary, views that inclusion of education is not an essential component of the right to information flowing from article 19(1)(a) and, therefore, its non-disclosure does not necessarily infringe the freedom of expression.[65] In support of his stand, he advances a few cogent reasons.[66] One, consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being member of the House of People or a state legislative assembly. Two, most of the candidates elected to Parliament or state legislatures are fairly educated, even if they are not graduates or post-graduates, and that "to say that well educated persons such as those having graduate and post-graduate

63. See, *id. per* Shah J at 2395 [para 81(B)], and *per* Reddi J at 2411 [para 129(1)].

64. *Ibid.*

65. *Id.* at 2410, 2411 [paras 128, 129(8)].

66. *Id.* at 2410-11 (para 128).

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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."[67] Three, 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, and that these characteristics are not the monopoly of the so-called formally well-educated Persons. Four, it may be that certain candidates having exceptionally high qualifications in specialized field may prove useful to the society, but in that eventuality 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. Five, at any rate, if two views are reasonably possible on the issue whether or not disclosure as to educational qualifications is necessarily an aspect of freedom of expression, then Parliament's decision not to make provision for disclosure of information regarding educational qualifications of the candidates required to be upheld. Perhaps, it is on this premise that the direction of the Election Commission insofar as it related to 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 has been held not to be enforceable.[68]

In sum, it is submitted that the basic design of our Constitution is still sound. By linking the right to vote with the fundamental right, the Supreme Court has provided a new dynamism as well as a new protective dimension to this right. Both for the reasons of conceptual clarity and functional utility, one needs to bear in mind the subtle distinction between 'right to vote is a fundamental right' and 'right to vote is *also* a fundamental right'. It is the latter statement, which is sound both conceptually and constitutionally, for it leaves enough room for all the instrumentalities of the state to operate and function – the Supreme Court, the Election Commission and Parliament – without one organ of the state unduly impinging upon the constitutional jurisdiction of another.

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67. *Id.* at 2410 (para 128).
68. *Id. per* Reddi J at 2412 (para 129), and *per* Dharmadhikari J (concurring) at 2412 (para 138).

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