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ELECTION LAW

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I INTRODUCTION

THE PRESENT survey is restricted to the analysis of judgments of the Supreme Court alone, leaving aside the decisions of the High Courts acting as the election tribunals in which statutory appeals to the apex court had not been availed of. This would also mean that the judgments of the Supreme Court delivered during the year 2009 but reported in 2010 have not found place in the present survey for the year 2010.[1] The following five facets of election law as emerging from cases have been taken up for analysis.

The first facet relates to the nature and ambit of section 151A of the Representation of the People Act, 1951 (the RP Act) that deals with the time limit for filling up a casual vacancy through bye-election within the stipulated period of six months from the date of occurrence of the vacancy.[2] On this count, it has been held by the Supreme Court that a vacancy becomes available after the conclusion of the pending election petition in case the election of the returned candidate has been challenged, and not from the date on which the resignation voluntarily made to the Speaker of the House is accepted. Such a view, it is submitted, instantly destroys the ploy of resignation for circumventing the impending disqualification on account of corrupt practices, if resorted to during the election.

The second facet deals with the consequence of non-compliance of rules requiring verification at the time of filing disqualification petition.[3] Although the question in this respect is not *res integra*, yet the reasoning of the apex court for upholding the decision of the High Court in the light of the given fact situation is instructive and, therefore, the same has been recapitulated on as many as following five distinct, and yet closely related counts: *one*, in relation to the nature of violated rules requiring verification of documents; *two*, whether the merger plea of the separated councillors with another political

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1 Excepting one case: *Ram Sukh* v. *Dinesh Aggarwal*, AIR 2010 SC 1227.

2 See part II, *infra*.

3 See part III, *infra*.

party is a valid defence to disqualification petition'; *three*, whether disobeying the whip issued to members of a political party incurs disqualification; *four*, whether failure of the collector to publish the summary of information in the government *gazette* and failure to maintain Form-I and Form-III based on information furnished under the election rules is fatal to the disqualification petition; and *five*, the consequence of the mismatch of the order and the provisions under which such an order is made by the competent authority.

Whether recrimination proceedings under section 97 read with section 101 of the RP Act are affected by the provisions of order VIII, rule 6A, CPC is the third facet that has been taken up in this survey.[4] In this respect, two diagonally opposite views have been expressed by the two judges of the apex court constituting the bench. The views of one of the judges is in conformity with the view hitherto adopted by the majority court in a five-judge constitution bench case of 1964, whereas the other judge opted to follow the minority view of the same case. In this split-views scenario, the core counts of conflict have been critically examined mainly in two respects. *Firstly*, it has been emphasized that for applying the *ratio* of the constitution bench case, what is crucially important to determine the right of the returned candidate to recriminate is whether or not the petitioner has claimed a declaration in favour of candidate other than the elected one. Non-exercise of the right to recriminate by the returned candidate, it is respectfully submitted, does not obliterate the fact of 'declaration', which, in fact, is the source of that right. In other words, in the absence of 'declaration' by the petitioner, there is no right in the returned candidate, as distinguished from the non-exercise of the vested right. *Secondly*, reasons have been adduced, both statutory and non-statutory, to show that when a recount is ordered at the instance of the election-petitioner, who has not impleaded all the candidates as a party in the election petition, its ambit cannot be extended from partial recount confined to the returned candidate to all the candidates.

The fourth facet relates to the evidentiary value of tape-records of speeches in proving the charge of corrupt practice. In this respect, the concern of the Supreme Court is, how to control frivolous litigation prompted by the possibility of abuse of the new emerging audio and video tape technologies. On the one hand, the court is acutely conscious of the fact that these emerging technologies are a powerful medium through which first-hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence. But, at the same time, the same technology is also susceptible to tempering and alterations by transposition, excision, *etc.* which may be difficult to detect and decipher, and, therefore, such evidence has to be received with utmost caution. As a general principle, the Supreme Court has emphasized that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence. In the case under

4 See part IV, *infra*.

reference, since the election-petitioner failed to produce any cogent evidence to prove his charge, the election tribunal had dismissed the petition with costs, and so has been done by the Supreme Court in statutory appeal.

The fifth and the final facet deals with the issue, whether an election petition lacking material facts as required to be stated in terms of section 83(1) could be dismissed summarily without trial, that is without giving due notice to the petitioner, and thereby affording an opportunity to him to adduce evidence in support of his allegations made in the petition.[5] For responding to this facet, the Supreme Court first culled out the applicable principles from the review of catena of case law. In the light of this exercise, the court held the absence of 'material facts', which are absolutely essential to prove that the result of the returned candidate was 'materially affected', as completely destructive of the election petition without doing anything more. Not doing so would unnecessarily encourage 'meaningless litigation', wasting precious judicial time of the courts. Otherwise also, in terms of sheer statutory provisions, the apex court has shown how section 83 of the RP Act, which deals with the contents of an election petition, is intrinsically linked with section 86 *via* section 87 that obliges the High Court to try election petitions as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908.

II TIME LIMIT FOR FILLING VACANCIES THROUGH BYE-ELECTION UNDER S. 151A, RP ACT, 1951: NATURE AND OPERATIONAL AMBIT

Section 151A, introduced by the amending Act 21 of 1996 (Act 21 of 1996)[6] into the RP Act, with effect from August 1, 1996, specifically states that any vacancy referred to in sections 147, 149, 150 and 151 of the said Act[7] shall be filled in by holding bye-election "within a period of six months from the date of the occurrence of the vacancy." This is to be done "notwithstanding anything contained" in other provisions of the said sections. Such a mandate is, of course, subject to two alternate exceptions, namely where the remainder of the term of a member in relation to a vacancy is less than one year, or where the Election Commission of India (ECI) in consultation with the central government certifies that it is difficult to hold the bye-election within the stipulated period.

Thus, the singular object of section 151A is that, subject to two noted exceptions in the alternative, no constituency should remain unrepresented for more than six months. However, for deciphering the nature and operational ambit of section 151A, at least two questions come to the fore. Whether the

5 See part VI, *infra*.

6 *Vide* s. 17 of the Amending Act, 1996.

7 The cluster of sections contained in part IX, titled "Bye-elections," deals with casual vacancies in the Council of States, the House of the People, the Legislative Assemblies and the Legislative Councils, respectively.

ambit of its *non obstante* clause should remain confined to the provisions of sections stipulated therein, namely sections 147, 149, 150 and 151; or would it equally affect the other provisions of the RP Act that have a bearing on defining a 'vacancy' available to be filled in through bye-election within the stipulated period of six months from the date of the occurrence of the vacancies.

This question came up before the Supreme Court in *Election Commission of India* v. *Telangana Rastra Samithi*.[8] In this case, in order to exert political pressure for a separate Telangana state, 12 members of different political parties submitted their resignation from the membership of the Andhra Pradesh state legislative assembly to the speaker of the assembly. On receipt of the resignations, the Speaker ordered that the resultant vacancies be notified. The said notification was duly published in the official *gazette*. However, the ECI issued a press note[9] notifying its decision to hold bye-elections to fill up only 10 "clear vacancies," and withholding its decision in respect of two vacancies because of the pending election petitions in which the petitioners had sought to be declared elected. This decision of the ECI not to hold bye-elections in respect of two seats, which in its view did not indicate 'clear vacancies', was challenged in the writ petition that was ultimately allowed by the division bench of the Andhra Pradesh High Court. On appeal, the Supreme Court upheld the decision of the ECI by reversing the judgment of the High Court. However, the analysis of the reasons of reversal of the decision of the High Court given by the apex court is instructive for deciphering the nature and operational ambit of section 151A of the RP Act.

In *Telangana Rastra Samithi*, the first crucial question for determination was when does a 'vacancy', which is required to be filled in by the ECI, occur? Is it from the date on which the resignation made to the Speaker of the House is accepted, or is it from the date when the vacancy becomes available after the conclusion of the pending election petition?

The Andhra Pradesh High Court held that vacancy occurs from the date of acceptance of the resignation, and ECI was bound to hold the election within the stipulated period of six months under the clear and categorical provision of section 151A. This very question was squarely considered by the Supreme Court in *D. Sanjeevayya* v. *Election Tribunal Andhara Pradesh*,[10] in the context of article 190(3)(b) and sections 84, 98(c), 101(b) and 150 of the RP Act, and answered by holding that only 'clear vacancies' were liable to be filled up and not the ones that were still subject to the outcome of election petition. The High Court, however, held that the said decision of

8 AIR 2011 SC 492, *per* Altamas Kabir and A.K. Patnaik JJ.

9 See s. 30 of the Act of 1951, which obliges the election commission to issue notification in the official *gazette* about the dates for nominations, *etc*.

10 AIR 1967 SC 1211 : 1967 (2) SCR 489. This case involved the causation of a casual vacancy on account of resignation by the elected candidate while an election petition under s. 84 was pending before the election tribunal.

the Supreme Court was inapplicable inasmuch as the same was rendered when the mandate of holding the election within the stipulated period of six months was not in existence.

The Supreme Court for its decision in *Telangana Rastra Samithi* re-visited the reasoning of *D. Sanjeevayya* as under:

> Article 190 of the Constitution relates to disqualification of members of both the Houses of the legislatures of a state and deals with vacation of seats. It provides, *inter alia*, that if a member resigns a seat and such resignation is accepted by the Speaker or the Chairman, his seat shall thereupon become vacant.[11] In such an event, it would result in the creation of a casual vacancy within the meaning of Part IX relating to bye-elections.[12] Section 150, dealing specifically with casual vacancies in the state legislative assembly, provides in its sub-section (1):
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> > When the seat of a member elected to the legislative assembly of a state becomes vacant or is declared vacant, or his election to the legislative assembly is declared void, the Election Commission of India shall, subject to the provisions of sub-section (2),[13] by a notification in the official gazette, call upon the Assembly constituency concerned to elect a person for the purpose of filling the vacancy so caused before such date as may be specified in the notification, and provisions of this Act and of the rules and orders made there under shall apply, as far as may be, in relation to the election of member to fill such vacancy.

However, the clear directive to the ECI to fill up the vacancy comes in conflict with the statutory right conferred on the petitioner by section 84 of the RP Act. In the exercise of this right under the provisions of this sub-section, in addition to claiming that the election of all or any of the returned candidates is void, he can also claim a further declaration that he himself or any other candidate has been duly elected. Obviously, in this conflicting situation, if the ECI proceeds to fill up the vacancy, the petitioner's right would become redundant. "It is this [conflict] question," the Supreme Court stated

11 See Constitution of India, art. 190(3)(6).

12 This part contains ss. 147 to 151A. However, s. 148, which dealt with casual vacancies in the electoral colleges from certain union territories had been repealed by the Territorial Councils Act (103 of 1956) w.e.f. 01-11-1956.

13 Sub-s (2) of s. 150 of the Act of 1951 merely stipulates that if the vacancy so caused be a vacancy in a seat reserved in any such constituency for the scheduled castes or for any scheduled tribes, the notification issued under sub-s. (1) shall specify that the person to fill that seat shall belong to the scheduled castes or to such scheduled tribes, as the case may be.

in *Telangana Rastra Samithi,* "which fell for consideration in *D. Sanjeevayya.*"[14] Abstracting the reasoning, it is observed: [15]

> In *D. Sanjeevayya*'s case although the provisions of Section 151A were not available, this Court felt that there was no finality in the vacancy caused by the resignation of a member of the House where an election petition was pending. If the election of the member who resigns is unchallenged, there is no difficulty in harmonizing the provisions of Section 151A with the rest of the Sections included in Part IX and Section 8A of the 1951 Act. It is only when an election petition is filed under section 84 of the Act that the latter part of the section comes into play and, thereafter, reflected in section 98(c) and 101(b) of the said Act. x x x x x
> Although not stated in the judgment, the ramifications of an order under Section 84 are felt in Section 8A dealing with the disqualification on the grounds of corrupt practices. Such an eventuality cannot be avoided by the returned candidate simply by resigning his seat in the Legislative Assembly and the provisions of section 150 would, therefore, have to be read in conjunction with section 84. Their Lordships, therefore, ultimately held that in such cases the Election Commission was not bound under Section 150 of the Act to hold bye-election forthwith, but it was entitled to suspend taking action under the said section till the decision in the election petition under section 84 was known.

Thus, the clear propounding of the Supreme Court in *D. Sanjeevayya* is that the vacancy caused by the decision of the Speaker did not become a vacancy available for being filled up and/or capable of being filled up till a declaration was either made or refused under the latter part of section 84.[16] Has this position been altered or changed by the subsequent amending Act of 1996?

The division bench of the High Court had reasoned that the binding value of the precedent of *D. Sanjeevayya* ceased to be an authority in view of the subsequent legislative change introduced through section 151A. Accordingly, the bench went on to the extent of holding "that even if the statement of objects and reasons of the Amending Act did not specifically refer to *D. Sanjeevayya*, the new legal regime alone must be looked into by the Court."[17] The Supreme Court negated this argument by observing that despite the introduction of section 151A by way of amendment with effect from 1st August

14 *Telangana Rastra Samithi*, *supra* note 8, paras. 26 and 27.
15 *Ibid*.
16 *Id*., para. 32.
17 *Id*., para. 29.

1996, "the position remains the same." "The only effect on account of such declaration under Section 190(3)(b) [*Sic*.] is that a time was fixed for holding bye-election in respect of casual vacancies."[18]

The lingering question, as raised by the apex court, still remains: "whether a vacancy caused on account of any of the contingencies contemplated in Sections 147 and 149-151 can be said to be an *available vacancy* for the purposes of Section 151A of the Act 1951 Act." This question has been answered by the Supreme Court on two distinct counts. One, the vacancy to be filled up should be a clearly 'available vacancy' (the effect of *D. Sanjeevayya*), and two, the effect of *non-obstante* clause of Section 151A is limited to the specifically stated sections therein, and not beyond that. "Any other interpretation of Section 151A would render the provisions of Sections 84, 98(c), 101(b) and 8A of the 1951 Act otiose, which could not have been the intention of the Legislature, which would otherwise have clearly indicated as such in the proviso to section 151A."[19]

For re-affirming the view taken in *D. Sanjeevayya*, the Supreme Court even revisited the Preamble of the RP Act, which reflects the objective of the Act in the following statement:[20]

> The Act to provide for the conduct of elections of the Houses of Parliament and to the Houses of the legislature of each State, the qualifications and disqualifications, the membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

In view of the broad ambit as stipulated in the Preamble of the RP Act, section 84 cannot be rendered inconsequential; it must "run its full course, particularly for the purposes of Section 8A of said Act."[21] "Simply by submitting his resignation, a successful candidate against whom allegations of corrupt practices are made, cannot escape the consequences of sction 8A of the Act, if the same are ultimately found to be proved."[22] Thus, "the firm view" of the apex court in *Telangana Rastra Samithi* is that the introduction of section 151A in the RP Act "did not alter the position as far as the provisions of section 84 and consequently 98(c) and 101(b) of the Act are concerned."[23] The Supreme Court, therefore, had "little hesitation in holding that such casual vacancies are not available for being filled up and the

18 *Id*., para. 32.
19 *Ibid*. Emphasis supplied.
20 *Id*., para. 34.
21 *Ibid*.
22 *Id*., para. 33.
23 *Id*., para. 35.

Commission will have to wait for holding elections in such constituencies until a decision in regard to the latter part of Section 84 of the 1951" is available.[24] Accordingly, the appeal was allowed by setting aside the decision of the High Court.

III NON-COMPLIANCE OF RULES REQUIRING VERIFICATION WHILE FILING DISQUALIFICATION PETITION: ITS CONSEQUENCES

Although this question is not *res integra*, yet it reached the Supreme Court in somewhat interesting fact situation in *Kedar Shashikant Deshpande* v. *Bhor Municipal Council*.[25] This case relates to the general elections for the Bhor municipal council in the State of Maharashtra, which was held under the relevant provisions of the state Act. Out of the 17 elected councillors, 8 belonged to the NCP and 8 to the Congress (I). One independent councillor joined the NCP immediately after his election, and thereby making NCP a majority party. Accordingly, with a majority of 9 : 8, the NCP succeeded in claiming two posts of president and vice-president of the council.

Not happy and satisfied with the election to the two posts, six of the councillors left NCP and formed a separate group, called Bhor Shahar Vikas Swabhimani Sanghathana (*sanghathana*). Anticipating the no-confidence move from the six separated councillors with the help of 8 Congress (I) councillors (in the present case, the appellants), the NCP issued a party whip directing all the separated members neither to support nor be a party to requisition of the no-confidence motion. The separated councillors, however, disobeyed the directive of the NCP. Consequently, no-confidence motion with 14 : 3 votes was passed for the removal of president and the vice-president.

The leader of NCP and others (in the present case, the respondents) filed disqualification petition against 6 separated councillors (who formed the *sanghathana*) for a declaration that they had defected from NCP and, thus, incurred disqualification under the relevant provisions of Maharashtra Local Authority Members Disqualification Act, 1986 (Act of 1986).

The appellants contested the petition. The major plank of their contention was that the disqualification petition filed by the respondents before the additional collector was not initially verified as per the relevant rules and that alone, as a preliminary objection, was enough to dismiss the disqualification petition *in limine*. They further contended that subsequently, granting of permission by the additional collector to the respondents to verify the documents filed along with the petition without any prior notice and without

24 *Ibid*.
25 AIR 2011 SC 463, *per* J.M. Panchal J (for himself and Gyan Sudha J).

hearing the appellants was patently illegal and should be regarded as no verification in the eyes of law. In response to the preliminary objection, the respondents filed an affidavit. The additional collector, however, passed the final order along with the disposal of the so-called preliminary issue and disqualified the appellants retrospectively as councillors of the *sanghathana*.

Feeling aggrieved, writ petitions were filed by the appellants before the High Court challenging the additional collector's order. The division bench of the High Court dismissed the petitions which was challenged before the Supreme Court. The reasons for upholding the decision of the High Court by the apex court are instructive and need recapitulation on the following counts:

One, in relation to the nature of non-compliance of rules requiring verification of documents: For determining the issue of non-compliance, the apex court considered the provisions contained in the related rules, *viz.* rule 6(3) and (4) of the Maharashtra Local Authority Members Disqualification Rules, 1987[26] (*Rules*), made under the Act of 1986. On a bare reading of the rules, the apex court found it abundantly clear that these provisions were "directory in nature, and defect in verification of the petition is curable."[27] Besides, the court also held that "the defect in verification does not affect the jurisdiction of the Collector to entertain and decide a disqualification petition."[28]

For this, the court drew supporting reasons from its earlier decisions rendered on the basis of analogous statutory provisions:

(i) Defect in verification of the election petition or in the affidavit accompanying it is 'curable and not fatal'.[29] In other words, neither the defect in verification is fatal to the maintainability of the

26 R. 6(4) of the rules, which deals with verification of disqualification petition and annexures thereto, provides: "(4) Every petition and any annexure thereto shall be signed by the Petitioners and verified in the manner laid down in the CPC for the verification of pleadings." Rule 6(3), however, lays down: "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 address of such person and the gist of such information as furnished by each of such person."

27 *Kedar Shashikant Deshpande*, *supra* note 25, para. 7.

28 *Ibid*.

29 See *H.D. Ravanna* v. *G. Puttaswamy Gowda*, AIR 1999 SC 768, in which the Supreme Court, after noticing the provisions of ss. 81, 82, 83, 86 and 117 of the RP Act, considered whether defect in verification of the election petition or in the affidavit accompanying the petition was fatal. In court's view, such a defect was "curable and not fatal."

petition nor a defect in affidavit was a sufficient ground for dismissal of the petition.[30]

(ii) "Substantial compliance" with the requirement of verification as envisaged under the provisions of section 81(3) of the RP Act was "sufficient," and that it was only in cases of total or complete non-compliance with the said provisions it could be said that the election petition was not presented in accordance with the provisions of relevant law.[31]

(iii) Rules requiring the verification of documents accompanying the petition, being in the domain of procedure, are intended to facilitate the holding of inquiry and not to frustrate or obstruct the same by introduction of innumerable technicalities.[32]

(iv) Rules, being subordinate legislation, cannot make any provision which may have the effect of curtailing the content and scope of substantive provisions of the Act.

(v) Verification rules are only directory in nature and on non-filing of an affidavit as required under the relevant rule[33] and order VI, rule 15, CPC, would neither render the petition invalid nor the assumption of jurisdiction by the chairman on its basis would adversely affect or render it bad in any manner.

30 See the constitution bench decision of the Supreme Court in *Murarka Radhey Shyam Ram Kumar* v. *Roop Singh Rathore* (1964) 3 SCR 573; see also *F.A. Sapa* v. *Singora* (1991) 3 SCC 375 to the same effect.

31 See the decision of the constitution bench in *Ch. Subbarao* v. *Member, Election Tribunal* (1964) 6 SCR 213. The principle of substantial compliance was followed in *K.M. Mani* v. *P.J. Antony* (1979) 2 SCC 221.

32 See *Mahachandra Prasad Singh* v. *Chairman, Bihar Legislative Council* (2004) 8 SCC 747. In this case, while interpreting the provisions of schedule X of the Constitution, in a petition involving the issue of disqualification of a member of legislative council belonging to the Indian National Congress under the Bihar Legislative Council Members (Disqualification of Ground of Defection) Rules, 1994, the Supreme Court considered the question whether infraction of those rules would render the entire proceedings initiated by the chairman invalid or without jurisdiction. After examining the scheme of the rules, the Supreme Court stated the given proposition. In the context of *Kedar Shashikant Deshpande*, it is pertinent to bear in mind that the Maharashtra Local Authority Members Disqualification Rules, 1987 are in *pari materia* with the Bihar Legislative Council Members Disqualification of Ground of Defection) Rules, 1994, and, therefore, the principles laid down by the Supreme Court in *Mahachandra Prasad Singh* would be equally applicable in the interpretation to be placed on the rules of 1987.

33 Sub-rule 4 of Bihar Legislative Council Members Disqualification on Ground of Defection) Rules, 1994.

(vi) There is necessarily no *lis* between the person moving the disqualification petition and the member of the House who is alleged to have incurred disqualification. In other words, filing of disqualification petition is not essentially an adversarial kind of litigation, because the avowed purpose of such a petition is to bring the relevant information about disqualification to the notice of the chairman, speaker or collector, as the case may be. Accordingly, even if the petitioner withdraws the petition, it will not make a difference as the duty is cast on him (chairman, speaker or the collector) to carry out the mandate of the constitutional provisions.[34]

(vii) Non-compliance with rule 6(3) and (4) of Maharashtra Local Authority Members Disqualification Rules, 1987 does not necessarily cause any kind of prejudice to the appellants.[35]

(viii) Moreover, Section 99 of the Code of Civil Procedure inter alia provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, say, on account of any error, defect or irregularity in any proceeding not affecting the merits of the case.

In view of the reasons as given above, the Supreme Court in the instant case summed up by observing that (a) section 7 of the Maharashtra Local Authority Members Disqualification Act, 1986 lays down that the collector has to decide the question of disqualification on a reference made to him; (b) the reference will have to be regarded as one of the modes of bringing the relevant information to the notice of the collector; (c) section 3(1)(a) and 3(1)(b) of the said Act operate on their own force and the moment the conditions prescribed therein are satisfied, a corporator stands disqualified; (d) section 7 of the Act does not contemplate a *lis* between the two private parties in a disqualification petition - it may be filed for a limited purpose of bringing the relevant information to the notice of the collector who is duty bound to decide the petition in accordance with law;[36] (e) it would, therefore, be a wrong exercise of discretionary powers to dismiss a petition for disqualification on the sole ground of defect in verification; (f) normally, when such defects are noticed, the applicant should be called upon to remove such lacuna.[37]

34 The Supreme Court has held that the provisions of tenth schedule of the Constitution read with arts. 102(2) and 191(2) operate on their own and the purpose of disqualification petition is to render the requisite information.

35 *Kedar Shashikant Deshpande*, para. 13.

36 *Id.*, para. 11.

37 *Id.*, para. 12.

Thus, non-compliance with rules 6(4) and (3) of the rules of 1987 at the initial stage by the respondents did not vitiate the disqualification petition nor affected the jurisdiction of the additional collector to decide the same.[38] The relevant rules in question were merely directory and not mandatory.

Two, whether the plea merger of the separated councillors with another political party is a valid defence to disqualification petition: Section 5 of the Maharashtra Local Authority Members Disqualification Act, 1986 contemplates the merger of the original political party or *aghadi* or front with another political party or *aghadi* or front and by virtue of such merger if a member of the original political party becomes a member of such other political party, he can avail the protection under sub-section (1) of section 5 from disqualification under section 3 of the Act.

In *Kedar Shashikant Deshpande*, the appellants throughout contended that they had voluntarily separated from NCP and formed a separate group/ *aghadi*/front. They also contended, *albeit* feebly, that their front had merged with Congress (I).[39] The question, therefore, arose whether the appellants could avoid disqualification by taking the benefit of the provisions of section 5(1) of the Act of 1986 in the light of the fact matrix of this case. Although factually there was nothing on record to indicate that Congress (I) party had permitted the front of the appellants to merge with the said party nor there was any other evidence to show the merger between the two, yet the Supreme Court counteracted the argument in the light of their analysis of the relevant provisions of law.

In the instant case, the original party of the appellants was NCP. Certainly, it was not the case of the appellants that their original party NCP had merged with the other political party, namely Congress (I), at any point of time;[40] all along the appellants admittedly stated that they had separated from the original political party (NCP) and formed a separate group known as *sanghathana*. Since the latter party, not being the original party as envisaged by section 5(1) of the Act of 1986, the plea of merger advanced by the appellants had not found favour with the apex court on the basis of "the proved facts on the record of the case."[41]

38 *Id*., para. 13. The plea of the appellants that the additional collector had no jurisdiction to entertain the disqualification petition filed by the respondents was clearly counteracted by the Supreme Court by showing that he had delegated powers of collectors under the Maharashtra Land Revenue Code of 1966, read with the relevant notification, see *id*., paras. 14, 15 and 16.

39 See *id.,* para. 18.

40 For the mere mention of the merger, see *id.,* para. 32, in which it is stated that from the record it was evident that one of the preliminary points raised by the appellants before the collector was that s. 5(2) of the Act of 1986 deals with merger and "in this case merger had taken place and, therefore, the disqualification petition was not maintainable."

41 *Ibid*.

Moreover, it was admitted by the appellants themselves that they had left NCP of their own volition. And the provisions of section 3(1)(a) stipulate, without any qualification or rider, that a councillor or a member belonging to any political party or *aghadi* or front, shall be disqualified if he has voluntarily given up his membership of such political party, *aghadi* or front. This implies that the disqualification provisions are "absolute in terms and are mandatory." Following this legislative mandate, the Supreme Court held that "[T]he legal effect of proved and admitted facts is that the appellants had incurred disqualification in terms of section 3(1)(a) of the Act and, therefore, they are not entitled to any relief in the present appeals."[42]

Three, whether disobeying the whip issued to members of a political party incurs disqualification: In the instant case, a whip was issued to the appellants requiring them not to favour any resolution or motion for removal of the president or vice-president of the Bhor municipal council or to sign any requisition for calling of the meeting for removal of the president or vice-president. The record, however, established that though the whip was duly served on the appellants, they had refused to acknowledge the same, and, therefore, whip was published in the newspaper. Despite the whip, the appellants had not only signed the requisition for calling the meeting for removal of the president and/or the vice-president, but also voted in favour of no-confidence motion. This was amply borne out by the record.[43]

For disobeying whip issued by the authorized person of the party, the resulting consequence is clearly provided in section 3 of the Act of 1986. Sub-section (1)(b) of section 3, *inter alia* provides that subject to the provisions of section 5 of the Act,

> [A] councillor or a member belonging to any political party or aghadi or front shall be disqualified for being a councillor or a member if he votes or abstains from voting in any meeting of a Municipal Corporation, Municipal Council, Zila Parishad or, as the case may be, Panchayat Samiti contrary to any direction issued by the political party or aghadi or front to which he belongs or by person or authority authorized by any of them in this behalf, without obtaining, in either case, the prior permission of such political party or aghadi or front, person or authority and such voting or abstention has not been condoned by such political party or aghadi or front, person or authority within fifteen days from the date of such voting or abstention: Provided that such voting or abstention without prior permission from such party, or aghadi or front at election of any office,

42 *Ibid*.

43 *Id*., para.. 19. In fact, it was pursuant to requisition letter addressed by the separated councillors constituting the separate group, called *Sanghathana*, the collector had convened a meeting for considering the motion of no-confidence against the president who was a member of NCP.

> authority or committee under any relevant municipal law or the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 shall not be condoned under this clause.

The Explanation appended to this section, *inter alia*, further clarifies that,

> (a) a person elected as a councillor, or as the case may be, a member shall be deemed to belong to the political party or aghadi or front, if any, by which he was set up as candidate for election as such councillor or member.

The provision of section 3(1)(b) read with the appended Explanation of the Act of 1986 reveals that since the appellants had patently disobeyed the whip issued by the political party by which they were originally set up as candidates for election, the court was constrained to hold that they (appellants) had incurred disqualification.[44]

Four, whether failure of the collector to publish the summary of information in the in the government gazette and failure to maintain Form-I and Form-III based on the information furnished under the election rules is fatal to the disqualification petition: Under rule 4(3) of the rules of 1987, the collector is required to publish the summary of information furnished by the councillor to him in the official *gazette*, which, in fact, was not done in the instant case. For deciphering the result of this omission, the Supreme Court examined the underlying purport of the relevant rules regulating the election to the municipal council.

Every councillor is required to make a statement containing his name and address in the prescribed Form-I under the relevant rules of 1987. Likewise, every councillor is to furnish to the collector a statement of particulars and declaration in Form-III, which*, inter alia*, contains the information relating to political party to which the councillor belongs. A declaration to this effect is required to be published by the collector in the official *gazette*.

On a critical study of the provisions of rule 3 read with rule 4(3) of the rules of 1987, the Supreme Court found that "it is evident that neither Rule 3 nor Rule 4, nor any other Rule of the Rules mentions that a political affiliation of the councillor would come into existence only upon submission of either Form-I, Form-III and/or publication of information in the Official Gazette."[45] These Forms and publication in the official *gazette* "have merely evidentiary value which would prima facie establish that a councillor belongs to a particular affiliation and nothing more" Since, apart from this mode of furnishing evidence, there is enough evidence elsewhere revealing the political affiliation of the councillor, say, for instance, in terms of Explanation to section 3 of the

44 *Id.*, paras. 20 and 21.
45 *Id.*, para. 24.

Act of 1986, it is clearly indicated that the councillor belong to the political party upon whose ticket the councillor has contested and won the election. Accordingly, the plea of the appellants based upon the alleged breach of rule (3) and rule (4) of the rules of 1987 was found to have no substance.[46]

Five, consequence of the mismatch of the order and the provisions under which such an order is made by the competent authority: In the instant case, the additional collector passed the order disqualifying the appellants as councillors purporting to exercise power under section 3(1)(c) of the Act of 1986, which states that "a nominated member, in relation to a Panchayat Samiti, includes an associate member referred to in Clause (c) of Sub-section (1) of Section 57 of the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1991."

A bare reading of the additional collector's order in terms of the provision of the cited section 3(1)(c) instantly reveals that there was some mismatch between the two. Apparently, the order of disqualification of the appellants fell under section 3(1)(a) instead of section 3(1)(c) of the said Act. Since the appellants had incurred disqualification under section 3(1)(a) when they left NCP, it was only inadvertently that the additional collector quoted the wrong provisions of the statute while exercising his powers. Otherwise too, it was never the case of the appellants that they were either associate members or nominated members in relation to Bhor municipal council. In this situational context, the Supreme Court attempted to locate the root cause of the error that crept in the collector's order by observing:

> "Thus reference made by the Collector to Section 3(1)(c) will have to be regarded as mistake on his part because of difference in Vernacular and English version of the Act of 1986."[47]
> "What is noticed by this Court is that the Act of 1986 is basically in vernacular, wherein the Sections are described as 3(ka), (kha) and (ga), but in English it is mentioned as 3(1)(a), (b) and (c)."[48]

Accordingly, the Supreme Court rightly held that owing to inadvertently mentioning a wrong provision of law, the appellants cannot be allowed to succeed in their appeal.

Thus, the net result of the analysis led the Supreme Court to hold that the appeal was bereft of any substance and, therefore, the same was dismissed.

46 *Id*., para. 25.
47 *Id*., para. 26.

IV RECRIMINATION PROCEEDINGS U/S. 97, R/W S. 101 OF RP ACT, 1951: WHETHER AFFECTED BY O. VIII, R. 6A, CPC

The provision of recrimination petition is made available in certain specified situations mentioned under section 97 of the RP Act. Sub-section (1) of section 97 stipulates that when in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void had he been the returned candidate and a petition had been presented calling in question his election. If the case falls within the ambit of the said provision, the appended proviso further lays down that the returned candidate or such other party, as aforesaid, shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the High Court of his intention to do so and has also given the security and further security referred to in sections 117 and 118, respectively. Sub-section (2) of section 97 puts the notice of recrimination on the same footing as the original election petition by stating, "Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner."

In the backdrop of specifically stipulated condition of prior 'declaration' by the election petitioner that any candidate other than the returned candidate has been duly elected is claimed, the question arises whether the returned candidate in his written statement is permitted to take up pleas which are in nature of counter claims with the aid of order VIII, rule 6A, CPC. This question came to the Supreme Court in *Md. Alauddin Khan* v. *Karam Thamarjit Singh*,[49] in which due to diagonally opposite views expressed by the two judges constituting the bench, the issue was referred by one of the judges to the Chief Justice of India for referring the matter to an "appropriate bench."[50] For having a second look through a meaningful analysis on the issue of recrimination, especially in the context of order viii, rule 6A, CPC that permits the filing of counter claim, one must look to the fact matrix of *Md. Alauddin Khan* in the first instance.

In *Md. Alauddin Khan*, the election of the appellant-returned candidate was challenged by the respondent through an election petition by seeking, *inter alia*, "to recount of the votes after excluding the void votes if required," "to declare the election of the Respondent No.1 [now the appellant] as void,"

48 *Id*., para. 27.

49 (2010) 8 SCR 525, *per* V.S. Sirpurkar and Mukundakam Sharma, JJ.

50 In view of the settled law that a two-judge bench cannot make a direct reference to seven-judge bench, Sirpurkar, J simply stated that "it would be worthwhile if the position [the majority decision of the five-Judge Bench in *Jabar Singh*] is reconsidered." *Id.*, para. 23.

and "to pass other and further orders as may be deemed fit by the Hon'ble High Court in the facts and circumstances of the case." The appellant, in response to the petition, filed his written statement, in which, apart from contesting the allegations made in the election petition, he made several statements which were in the nature of counter claims under order viii, rule 6A, CPC. However, the respondent-petitioner filed an application under order VI, rule 16, CPC praying for striking certain paragraphs (para. nos. 22-31) from the appellant's written statement, because they were in the nature of counter claim/recrimination.[51] The election court allowed the application. The appellant came to the Supreme Court through SLP for the negation of the order of the court. The critical question to be answered in this fact situation was whether the returned candidate in his written statement was permitted to take up pleas which were in nature of counter claims with the aid of order VIII, rule 6A, CPC[52] when there was no right vested in the returned candidate to file recrimination petition under section 97 of the RP Act in the absence of a prayer by the election petitioner in the petition seeking for his declaration (or any other candidate) as a returned candidate.[53]

In *Md. Alauddin Khan*, the views of one of the judges is in consonance with majority decision in the five-judges constitution bench in *Jabar Singh* v. *Genda Lal*,[54] whereas the view of the other judge follows the stance of the minority view taken in that very case. A similar deviating approach may be witnessed in the three-judge bench decision in *Bhagmal* v. *Prabhu*,[55] in which majority faithfully followed the majority view in *Jabar Singh*, and the views of Palekar and Alagiriswami, JJ in *P. Malai Chami* v. *M. Andi Ambalam*,[56] and those of R.N. Misra and A.N. Sen, JJ in *Arun Kumar Bose* v.

51 Order VI, rule 16, CPC was incorporated with the idea of empowering the courts to strike out or amend any matter in any pleading, including the statement in the written statement, at any stage of the proceedings when the same is found to be unnecessary, scandalous, frivolous and vexatious; or which may tend to prejudice, embarrass or delay the fair trial of the suit; or which is otherwise an abuse of the process of the court.

52 Order VIII, rule 6A, contains provision for counter-claim by the defendant: (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim of the plaintiff, any right or claim in respect of a cause of action according to the defendant against the plaintiff either before or after filing of the suit …(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court. (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

53 Under s. 84 of the Act of 1951, a petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

54 AIR 1964 SC 1200.

55 AIR 1985 SC 150.

56 AIR 1973 SC 2077.

Mohd. Fukan Ansari.[57] The deviating approach further precipitated to a certain extent when the two-judge bench of the Supreme Court in *N. Gopal Reddy* v. *Bonala Krishnamurthy,*[58] not finding themselves in agreement with the majority view in *Jabar Singh*, unanimously referred the issue regarding the recrimination petition under section 97(1) of the RP Act to a larger bench, preferably of seven Judges.

In this scenario, the whole issue may be examined afresh to understand the rationale underlying the two conflicting views expressed in *Md. Alauddin Khan.* The central issue here revolves around the question, 'whether the returned candidate could make counter-claims with the aid of Order VIII, Rule 6A of the CPC, in the absence of a right to file recrimination petition under section 97 of the Act of 1951.

Some of the statements in the written statement by the appellant-returned candidate, particularly in para. nos. 22-31, made in terms of the provision of order viii, rule 6A, CPC, "are by way of counter claim against the claim of the election petitioner and relate to the right of claim in respect of the same cause of action."[59] And, in order to support the assertion contained in these paragraphs "evidence should have to be laid to prove that if those allegations are established then the election of such candidate would be void."[60] However, this is permissible to the returned candidate only if his case falls within the ambit of section 97 of the RP Act, which clearly stipulates that such a course is permitted when and only when an election petition is filed claiming a declaration that any candidate other than the returned candidate has been duly elected.[61] This, in fact, was not the case of the election petitioner. He very cautiously pleaded for voiding the election of the returned candidate on the basis of recount of the votes after "excluding the void votes, if required," and "to pass other and further orders as may be deemed fit by the Hon'ble High Court in the facts and circumstances of the case."[62]

57 AIR 1983 SC 1311.

58 AIR 1987 SC 831, *per* K.N. Singh, J. (for himself and Venkataramiah, J).

59 *Md. Alauddin Khan*, para. 44, *per* Mukundakam Sharma, J.

60 *Id.*, para. 45.

61 Additional claim can be made by the petitioner under s. 84 of the Act of 1951: "A petitioner may, in addition to claiming that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected."

62 In fact, in order to find if there was any disguised claim of the election petitioner, the returned candidate, during the pendency of the case, filed an application seeking a direction to him to clarify the exact relief sought by him in his election petition, particularly whether his prayer included a direction in favour of the election petitioner in case, if, as a result of the recount, it was found that he had secured more votes than the returned candidate. On this count, it was clarified that under clause (v), namely "to pass other and further orders as may be deemed fit by the Hon'ble High Court in the facts and circumstances of the case", the court could grant only such reliefs "which were ancillary to the election petition and no specific declaration could be made in favour of the election petitioner or any other candidate…."; see *Md. Alauddin Khan*, para. 4.

In this fact situation, the question is whether despite the absence of the recrimination petition the returned candidate could still make the counter-claim under Order VIII, Rule 6A of the CPC "as to the maintainability of the total number of votes obtained by the election petitioner."[63]

Sirpurkar, J. has taken the view that the defence of the returned candidate by way of asking the recount of all the votes of all the candidates, and not just of the returned candidate, by excluding the void votes, is not a recriminatory plea, "which was barred under Section 97 of the Act."[64] In support of this stance, it is asserted that the recount prayed for by the election petitioner "is a general recount," implying thereby the recount of all the votes of all the candidates,[65] because that alone would be in consonance with "the principle of majority of votes for declaring the elected candidate."[66] "[O]btaining of majority valid votes is the soul of valid election."[67]

Since the proposition, 'count all the votes of all the candidates,' is in conflict with the majority decision in *Jabar Singh*, in which the specific statutory provision contained in Section 100(1)(d)(iii)[68] of the Act of 1951 had been interpreted in the context of Section 97 of the said Act to mean "count only the votes of returned candidate" and not of all the candidates,[69] the elected candidate, according to Sirpurkar, J., could still raise his defence by way of counter-claim" under Order VIII, Rule 6A of the CPC, and that "[t]he language of Section 97 of the Representation of the People Act, 1950 (sic), which is in the nature of positive language, does not bar raising on any such defence."[70]

Mukundkam Sharma, J preferred the opposite view, which is line with the catena of cases led by the majority decision in *Jabar Singh*. The basic premise for his approach is as under:[71]

63 *Id*., para. 6.
64 *Id*., para. 10.
65 See *id*., para. 28(4): "When a recount is ordered at the instance of an election petitioner, it cannot be partial recount. It has to be a general recount where the void votes can be located and ignored to arrive at a conclusion that this will also apply to the votes improperly accepted of other candidates than the elected candidates..."
66 *Id*., para. 13, read with para. 14.
67 *Id*., para. 12.
68 S. 100(1)(d)(iii) of the Act of 1951, while laying down the grounds for declaring election to be void, specifically provides: Subject to the provisions of sub-section (2), if the High Court is of opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected by improper reception, refusal or rejection of any vote or the reception of any vote which is void, then the High Court may decide that the election of the returned candidate is void.
69 *Md. Alauddin Khan*, para. 28(2), *per* Sirpurkar, J.
70 *Id*., para. 28(5).
71 *Id*., para. 46, citing *Jyoti Basu* v. *Debi Ghosal*, AIR 1982 SC 983 : (1982) 1 SCC 691.

> The Act of 1951 constitutes "a complete and self-contained code," and, therefore, an election petition is required to be considered and decided in accordance with the procedure prescribed in the said code.

Election petition is statutory proceeding with a special jurisdiction, and special jurisdiction has always to be exercised in accordance with the statute creating it.

Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied.

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, I any, concerning the election is regulated by the Act of 1951. In the light of this premise, it is held:[72]

> Now since there is a specific provision in the Act as to how a recrimination petition is to be dealt with, the same is required to be decided in the manner as provided therein. In the present case since there was no prayer in the election petition to declare the election petitioner or any other candidate as elected candidate, necessarily therefore, the provisions of Section 97 of the Act could not be said to be applicable or attracted. In fact, statements which are intended and could be made in light Section 97 of the Act are counter-claims, which are so stated in the Five-Judge Bench decision of this Court in *Jabar Singh*. When the specific provision which provides for raising a counter-claim is excluded and not attracted in terms of the provisions of Section 97 of the Act, it cannot be said that such counter-claim could be raised in terms of Order VIII, Rule 6A [of the Code of Civil Procedure].

The apparent confusion owing to overlapping between the provisions of section 97 of the RP Act and the amended provision of order VIII, rule 6A, CPC, which introduced in 1976 counter claim *after* the decision of the apex court in *Jabar Singh*, has been explained by observing that "Section 97 providing for considering recrimination/counter-claim under certain circumstances, and, therefore, the same being a provision under a special Act, would prevail over the provisions of Order VIII, Rule 6A of the Code which is a general law," on the basis of a maxim, *generalia specialibus non derogant*, which means general words do not derogate from the special.[73] This reasoning is further reinforced by stating, one, that "when the legislation inserted the provision of order VIII, rule 6A into the Code, it never intended to bring a corresponding

72 *Id*., para. 47, *per* Mukundkam Sharma, J.
73 *Id*., para. 48.

change in section 97 of the Act, despite being fully conscious of the change;"[74] and two, on the basis of the principle of statutory construction, *expressio unius est exclusion alterius* (express inclusion of one thing is the exclusion of all others), specific inclusion of a condition for filing a recriminatory petition under section 97 of the RP Act, namely that a declaration that the election petitioner or any other candidate is the returned candidate should be filed, excludes its filing in all other cases. Moreover, it is stated authoritatively in the light of the settled law that "whatever is prohibited by law to be done directly cannot be allowed to be done indirectly."[75]

There is yet another reasoning to show why the provisions of the CPC as contained in order VIII, rule 6A are inapplicable in case recrimination petition under section 97 is not allowed: it would amount to saying that limitation imposed by section 97 of the RP Act can be removed by resorting to another provision of the Code. Otherwise also, section 87 of the RP Act prescribing the procedure to be followed before the High Court clearly states in its sub-section (1): "Subject to the provisions of this Act and any other rules made there under every election petition shall be tried by the High Court as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 for the trial of suits." This implies that the application of order VIII, rule 6A, CPC is subject to the provision of section 97 of the RP Act and not *vice versa* and the expression used, "as nearly as may be," further limits the application of the said rule.[76]

For eschewing the criticism of the rule propounded in *Jabar Singh*, Mukundkam Sharma, J referred to the decision of the apex court in *T.A. Ahammed Kabeer* v. *A.A. Azees*.[77] In that case, the division bench of the apex court, after referring to the existing decisions of the Supreme Court on the issue in question including the ones subsequent to the *Jabar Singh* in which attempts made for seeking reconsideration of the majority opinion the

74 Apart from this, the concept of making counter-claim was raised even earlier to the year 1976 when it was inserted through the introduction of rule 6A, order VIII, CPC, and, therefore, it being a part of the general law, would not affect the special law contained in section 97 of the Act of 1951. See *id*. para. 53, *per* Mukundkam Sharma, J.

75 *Ibid.*, by citing the observations of the Supreme Court in *Jagir Singh* v. *Ranbir Singh* (1979) 1 SCC 560 (para. 5): "We do not think that it is permissible to do so. What may not be done directly cannot be allowed to be done indirectly; that would be an evasion of the statute. It is 'well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance' (*per* Abbot, C.J. in *Fox* v. *Bishop and Chester* (1829) 2 B&C 635)). 'To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined'." (Maxwell 11th Edition, p. 109).

76 *Id.*, para. 49, citing *Jabar Singh* (para. 11) for similar view.

77 (2003) 5 SCC 650.

constitution bench case through benches of lesser *coram* hitherto proved to be "abortive," summed up the legal position as emerged through the analysis of majority opinion and the view taken in several subsequent decisions of the Supreme Court. At least two of the propositions need to be reproduced in *verbatim*:[78]

> A recrimination by the returned candidate or any other party can be filed under Section 97(1) in a case where in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.
>
> [*T.A. Ahammed Kabeer*, para. 33(2)]

> For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the Election Court shall acquire jurisdiction to do so only on two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a recrimination petition under Section 97(1) is filed.
>
> [*T.A. Ahammed Kabeer*, para. 33(3)]

Thus, the interpretation of section 97 of the RP Act in relation to order VIII, rule 6A of the Code as adopted by the constitution bench of the Supreme Court in *Jabar Singh* represents "settled position of law," and, therefore, "[i]t would not be appropriate for the Court to go beyond the legislative intent as derived from the existing provisions and lay down its views on a particular matter although such a view could be a possible view."[79] Such stance is in line with the observations made by the constitution bench of the Supreme Court in the celebrated case of *Bachan Singh* v. *State of Punjab*:[80] "It is not legitimate for the court to create or evolve any standards or principles which are not found in the statute because enunciation of such standards or principles is a legislative function which belongs to the legislative and not to the judicial department."

On relative evaluation of the two opposite views expressed by the division bench of the Supreme Court in *Md. Alauddin Khan*, a few comments may be offered on the first opinion that deviates from the more or less settled view adopted by the majority court in the constitution bench decision in *Jabar Singh*.

78 Cited in *Md. Alauddin Khan*, para. 50.
79 *Id*., para. 51.
80 (1982) 3 SCC 24.

Firstly, as to the conclusion of Sirpurkar, J, wherein it was opined that the observations made in *Jabar Singh* amount to *obiter dicta*for two reasons: one, the factual position in that case; two, the observations made particularly in para. 10 were taken only by way of an example. "This position is all the more obtained because in that case though the declaration was claimed, there was no recrimination filed and, therefore, the observations in *Jabar Singh*'s Case would become a binding law only in case where though declaration is claimed in favour of other candidate than the elected one, yet the elected candidate has not claimed any recrimination." "In short, the observations made in para 10 thereof may not become a binding law in case where no declaration is sought for at all and, therefore, no recrimination is claimed by the elected candidate."[81]

It is respectfully submitted that while extracting the *ratio decidendi* of the case (that is, reasons for the decision) the judgment as a whole and not just a particular paragraph has to be read. And for applying the *ratio,* what is crucial to determine the right of the returned candidate to recriminate is whether or not the petitioner had claimed a declaration in favour of other candidate than the elected one. Non-exercise of the right to recriminate by the returned candidate does not obliterate the fact of 'declaration', which, in fact, is the source of that right. In other words, in the absence of 'declaration' by the petitioner, there is no right in the returned candidate, as distinguished from the non-exercise of the vested right. This is the *ratio* of *Jabar Singh* case. In *Md. Alauddin Khan*, no right ever accrued to the appellant-returned candidate because the respondent-petitioner had not sought 'declaration' at any point of time; rather he had assertively denied having sought any such claim in the proximity of 'declaration'.

Secondly, one may read the conclusion of Sirpurkar, J, in which he observed:[82]

> When a recount is ordered at the instance of an election-petitioner, it cannot be a partial recount. It has to be a general recount where the void votes can be located and ignored to arrive at a conclusion that this will also apply to the votes improperly accepted of the other candidates than the elected candidates. It is only then that a correct position could be arrived at as to which candidate has, in fact, secured majority of votes. It has to be remembered that securing of majority of votes is the basis of democratic election.

The reason for partial recount, as emerged from the interpretation put forth by the constitution bench in *Jabar Singh* to the provision of section

81 *Id*., para. 28(3).
82 *Id*., para. 28(4).

100(1)(d)(iii) read with section 97 of the RP Act, particularly where the election petition seeks recount, is also implicit in the statutory right of the petitioner under section 82 of the RP Act. Under the provisions of this section, all candidates to the election are required to be impleaded as a party in the election petition if the petitioner makes any prayer to declare himself or any other candidate as duly elected representative. In case, the petitioner does not want to implead candidate(s) other than the returned candidate, then he has no right to impinge upon the rights of others in their absence. This prompts one to confine the recount of votes only to the extent of votes of the returned candidate.

There is yet another reason for confining the concept of recount to the returned candidate. If the returned candidate had any complaint against other candidates including the petitioner, say, on ground of rampant impersonation, he had every opportunity to complain or raise objections while the election process was in progress. It is just possible that the ECI, if satisfied, might have suspended election and ordered re-polling. In case no such complaint surfaced, one is bound to assume that everything was in order. Even otherwise also, in the matters of conducting elections, the legislature seems to provide specific solution to the specific problem. Fish and roving inquiry is detested as a matter of public policy while considering election petitions. If the petitioner is successful, say, in proving that there was a large scale impersonation in relation to dead voters in favour of the returned candidate, should the returned candidate be allowed to counteract the proof by saying that he could also prove similar irregularity committed by the petitioner? The answer would clearly be in the negative. A person who is caught while stealing cannot be allowed to get away by alleging that the others are also thief!

V TAPE-RECORDS OF SPEECHES ON VHS CASSETTE: EVIDENTIARY VALUE

In the survey of election law cases in 1986, the issue of evidentiary value of the tape-recorded statements was prefaced as under:[83]

> The process of tape-recording offers an accurate method of instant storing and reproducing the same at leisure. The imprint on a magnetic tape is the direct effect of the relevant sounds. With this unique advantage, the tape-recorded statement is the recording of the statement directly in the very native language and accent of the person concerned - an advantage totally missing in the traditional method of recording statements in writing. Because of these remarkable features, the utility of the modern technological device, namely, the

83 See Virendra Kumar, 'Election Law' XXII *ASIL* at 533 (1986).

> tape recorder can hardly be overemphasized in the realm of law where the value of direct evidence is considered pivotal in the resolution of conflict problems is recognized in law all the world over, but with varying degree of emphasis.

However, after a lapse of a quarter of a century, without undermining the value of direct evidence furnished through the medium of modern technologies, it is also being increasingly realized that with the fast development in the electronic techniques the same technology is also susceptible to tempering and alterations by transposition, excision, *etc*. which may be difficult to detect and decipher and, therefore, such evidence has to be received with utmost caution. With this perspective in mind, the decision of the Supreme Court in *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*[84] may be analysed here. In this case, the appellant, who had lost to the respondent in election to the House of People, preferred an election petition in the High Court of Bombay. He challenged the election on several grounds for declaring the said election void in terms of sections 100(1)(b), 100(1)(d)(ii) and 100(1)(d)(iv) of the RP Act. He sought the relief of declaring himself as elected in terms of section 101(b) of the Act.

The appellant's main allegation was that the respondent and his agent had sought votes by delivering communal speeches. In support of his allegation, he placed heavy reliance on speeches recorded on the VHS cassette as evidence. This piece of evidence has been termed as 'public document', because he claimed to have obtained the recorded cassette from the ECI. Assertively, he stated that the VHS cassette contained a true reproduction of speeches delivered by the respondent and his supporters during election campaign. However, the election petition was dismissed by the High Court because, in its view, though the appellant had placed on record the VHS cassette, yet he failed to produce any evidence to show how and in what manner he had obtained the said cassette from the ECI and how it could be taken as a true reproduction of the original speeches.

In appeal, the central issue before the apex court was that even assuming that the said cassette was a 'public document', whether in order to attract the charge of corrupt practice under the provisions of section 123(3) of the RP Act, that is appealing the voters to vote on communal ground, the appellant-petitioner was still required to prove with cogent evidence that the speeches recorded therein were, in fact, made by the respondent and his agents.[85]

For dealing with this issue, at the very outset the Supreme Court deemed it necessary to reiterate that a charge of corrupt practice envisaged by the RP Act "is equated with a criminal charge and, therefore, standard of proof

84 AIR 2010 SC 965, *per* D.K. Jain, J (for himself and P. Sathasivam, J).
85 *Id*., para. 10.

therefor would not be preponderance of probabilities as in a civil action but proof beyond reasonable doubt as in a criminal trial." This indeed is a "stringent test of proof" and if such a standard of proof is not applied, "a serious prejudice is likely to be caused to the successful candidate whose election would not only be set aside, he may also incur disqualification to contest an election for a certain period, adversely affecting his political career."[86]

For amplifying the nature and extent of burden of proof, the Supreme Court reviewed its earlier decisions, reflecting the following propositions/ principles:

(a) The filing of an election petition is in the nature of a quasi-criminal action, "[a] grave and heavy onus, therefore, rests on the accuser to establish each and every ingredient of the charge by clear, unequivocal and unimpeachable evidence beyond reasonable doubt."[87]

(b) "Though the purity of the election process has to be safeguarded and the Court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but for the public at large inasmuch as re-election involves an enormous load on the public funds and administration."[88]

(c) "[T]he allegations relating to commission of a corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same," and "the charges when put to issue should be proved by clear, cogent and credible evidence."[89]

(d) "The appellate court attaches great value to the opinion formed by the trial judge more so when the trail judge recording findings of fact is the same who had recorded the evidence." The reason for attaching 'value' to the opinion of trail judge is that he may have had the benefit of watching the demeanour of witnesses and forming first-hand opinion of them in the process of evaluation of evidence." However, the appellate court "may reassess the evidence and come to its own conclusion on feeling satisfied that in recording findings of fact the High Court has disregarded settled principles governing the approach to evidence or committed grave or palpable errors."[90]

86 *Id.,* para. 11.
87 *Id*., para. 12, citing *Razik Ram* v. *Jaswant Singh Chouhan* (1975) 4 SCC 769, *per* Sarkaria J (speaking for the bench).
88 *Id*., para. 13(i), citing *Jeet Mohinder Singh* v. *Harminder Singh Jassi* (1999) 9 SCC 386.
89 *Id*., para. 13(ii).
90 *Id*., para. 13(iii).

In the light of these propositions, the Supreme Court examined the evidentiary value of the VHS cassette in question. Admittedly, under section 74 of the Indian Evidence Act, 1872, certified copy of the cassette issued by the ECI is a 'public document.'[91] The characterization of cassette-recorded speeches as 'public document' carries with it a certain advantage. Under clause (e) of section 65, in case the original document is a public document, secondary evidence is admissible even though the original document is still in existence and available. In the instant case, however, to treat VHS cassette as a 'public document' became somewhat suspect, because the appellant had failed to produce even the receipt stated to have been issued by the ECI's office. Mere production of cassette with the election petition would not lead to the inference that it had been produced in evidence, and being a public document, it was not required to be proved. Agreeing with this view of the election tribunal, the apex court observed that "in the absence of any cogent evidence regarding the source and the manner of its acquisition, the authenticity of the cassette was not proved and it could not be read in evidence despite the fact that the cassette is a public document."[92]

Apart from the quagmire of 'public' document, the Supreme Court considered yet another issue of greater importance, namely whether the tape records of speeches, which are undoubtedly 'documents' as defined in section 3 of the Evidence Act, stand on different footing than photographs.[93] The court answered this question in the negative.[94] Moreover, it also emphasized that "to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence." The reasons for the stringent conditions/requirements, as abstracted from the cited cases, are as under:[95]

(i) Since the tape records are prone to tampering, the time, place and accuracy of the recording must be proved by a competent witness, beyond reasonable doubt.[96]

(ii) The voice of the person alleged to be speaking in the tape-records must be duly identified by the maker of the record or by others who know it.

91 S. 74 of the Evidence Act defines what are known as 'public documents'. As per s. 75 of the said Act, all documents other than those stated in s. 74 are private documents.

92 *Id*., para. 19.

93 *Id*., para. 20.

94 *Ibid.*, citing *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehta* (1976) 2 SCC 17.

95 See *Yosufalli Esmail Nagree* v. *State of Maharashtra* (1967) 3 SCR 720; *R.* v. *Maqsud Ali* (1965) 2 All ER 464, *Ram Singh* v. *Col. Ram Singh*, 1985 (Supp) SCC 611, and *R.K. Anand* v. *Registrar, Delhi High Court* (2009) 8 SCC 106.

96 See *Tukaram S. Dighole*, para. 21.

(iii) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.
(iv) The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.[97]

Tested on the touchstone of the tests and safeguards, as enunciated above, the Supreme Court opined that in the instant case, the appellant had "miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the respondent."[98] He did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the respondent or his agent. Resultantly, finding no merit in the appeal, the same was dismissed.

VI ELECTION PETITION LACKING MATERIAL FACTS AS REQUIRED IN S. 83(1): WHETHER COULD BE DISMISSED SUMMARILY WITHOUT TRIAL

An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 of the RP Act to the High Court by any candidate at such election or any elector within a stipulated period. While doing so, it is required under section 81(1) that an election petition -

"(a) shall contain a concise statement of 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; and
(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908) (5 of 1908) for the verification of the pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof."

A perusal of the provisions of section 81(1) instantly reveals that inclusion of the statement of "material facts" along with their "full particulars" in the election petition is mandatory. The consequence of non-inclusion of

97 *Id*., para. 22, citing *Ziyauddin*, *supra*.
98 *Id*. para. 25.

material facts and full particulars thereof is categorically provided under sub-section (1) of section 86, which provides that the High Court trying the election petition shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117 of the RP Act. However, the procedure to be adopted before the High Court trying an election petition under the RP Act has been laid down in section 87, which, *inter alia*, provides that, subject to the provisions of the Act and of any rules made thereunder, "every election petition shall be tried by the High Court as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits."[99]

The cumulative effect of these statutory provisions is that if the material facts along with the particulars thereof are conspicuous by their absence in an election petition, the same is liable to be dismissed on that ground alone. For applying these provisions in a concrete fact situation, two questions come to the fore: one, whether or not the election petitioner has set out the requisite material facts in the election petition; and two, whether such an election petition devoid of material facts can be dismissed summarily without trial, that is without giving due notice to the petitioner. Both these questions came before the Supreme Court in *Ram Sukh v. Dinesh Aggarwal.*[100] In this case, the appellant filed an election petition against the respondent, the returned candidate, under section 80 read with section 100(1)(b) and (d) of the RP Act. The challenge was mainly on two grounds: one, that the returning officer, having obtained the signatures of the election petitioner as also of the polling/ election agent in the prescribed proforma, did not send the same to different polling stations, with the result that his polling agent was not permitted by the polling officer to act as such on the date of polling; and two, the returning officer deliberately delayed the distribution of the requisite proforma at various polling stations and on account of inaction on his part, election petitioner's supporters got confused and either they did not vote or voted in favour of the returned candidate, and this materially affected the result in favour of the returned candidate.[101] The respondent on being served with notice, instead of filing a written statement, filed an application under order vi, rules 16 and 17, and order vii, rule 11, CPC read with section 86 of the RP Act, raising a preliminary objection to the maintainability of the petitionon the ground, *inter alia*, that the petition was lacking in material facts and particulars, and was also defective for want of requisite affidavit in support of allegations of corrupt practice, and that since it did not disclose any cause of action, it

99 Sub-s. (1) of s 87. The proviso added to this sub-section further empowers the High Court that it shall have discretion to refuse, for reasons to be recorded in writing, to examine any witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

100 AIR 2010 SC 1227, *per* D.K. Jain, J. (for himself and H.L. Dattu, J).

101 *Id*., para. 2 read with para. 20.

deserved to be dismissed at the threshold. Finding that the concise statement of material facts was completely lacking and the mandatory requirement of an affidavit in support of the allegations was also not complied with, the High Court upheld the preliminary objection of the respondent. The appellant filed an appeal before the Supreme Court against the decision.

The Supreme Court abstracted the following basic principles from the decisions that the court must bear in mind while deciding the election petitions:[102]

(i) The election contest is not an action at law or a suit in equity, but a purely statutory proceeding unknown to the common law and that court possesses no common law power. The emerging legal proposition is that the statutory requirement of election law must be strictly observed.
(ii) The success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirement of the law.
(iii) It is also to be borne in mind that one of the essentials of the election law is to safeguard the purity of the election process and, therefore, the courts must zealously ensure that people do not get elected by flagrant breaches of that law or by indulging in corrupt practices as enumerated in the RP Act.

The Supreme Court, after a perusal of relevant statutory provisions, stated that "it is mandatory that all 'material facts' are set out in election petition and it is also trite that if the material facts are not stated in the petition, the same is liable to be dismissed on that ground alone."[103] However, the crucial question still remains as to how to find out whether or not the election petitioner had set out the requisite 'material facts' in his election petition. Since the phrase, 'material facts' has not been defined either in the RP Act or in the CPC, the court deciphered its connotation from the decided cases. In its view, this phrase in general terms means "the entire bundle of facts which would constitute a complete cause of action." In other words, 'material facts' "are facts upon which the plaintiff's cause of action or defendant's defence depends." Stated conversely, "all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or defence by the by the defendant are 'material facts'." In short, 'material facts' are facts "which, if

102 The observations have been taken from the constitution bench decision led by Mehr Chand Mahajan, CJ in *Jagan Nath* v. *Jaswant Singh* [1954] SCR 892 : AIR 1954 SC 210, cited in *Ram Sukh*, para. 7.

103 *Ram Sukh*, para.11. For this statement; see also *Samant N. Balkrishna* v. *George Fernandez* (1969) 3 SCC 238 : AIR 1969 SC 1201, M. Hidayatullah CJ, speaking for the three-judge bench decision, spelt out the requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure with reference to ss. 81, 83 and 86 of the RP Act, cited in *id*. para. 13.

established, would give the petitioner the relief asked for." The court has added that "what could said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down."[104]

However, in order to bring out "the object and purport" of the 'material facts', particularly with reference to election law, the apex court has differentiated this phrase, namely the 'material facts', as appearing in clause (a), from the phrase "particulars" appearing in clause (b) of section 83 of the RP Act:[105]

> 'Material facts' are primary or basic facts which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. 'Particulars', on the other hand, are details in support of the material fact, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear [sic] and more informative. Unlike 'material facts' which provide the basic foundation on which the entire edifice of the election petition is built, 'particulars' are to be stated to ensure that opposite party is not taken by surprise.

The distinction between 'material facts' and 'particulars' was also explained on the analogy of two corresponding phrases *facta probanda* and *facta probantia* used by C.K. Thakker, J in *Virender Nath Gautam* v. *Satpal Singh*:[106]

> There is distinction between facta probanda (the facts required to be proved, i.e. material facts) and facta probantia (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only facta probanda and not facta probantia. The material facts on which the party relies for his claim are called facta probanda and they must be stated in the pleadings. But the facts of by means of which facta probanda (material facts) are proved and which are in the nature of facta probantia (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial to establish the fact in issue.

Adverting to the fact situation in *Ram Sukh*, the Supreme Court examined whether the appellant, the election petitioner, in order to get the election of the respondent declared as void under the relevant provisions of the RP Act, had proved that on account of failure of the returning officer to circulate the

104 *Id.* para. 12.
105 *Ram Sukh*, para. 14.
106 (2007) 3 SCC 617, para. 50 at 631, cited *id*. para. 15.

attested signatures of his election agent to various polling stations, resulting in failure to comply with the provision contained in para. 12 of chapter VII of the handbook for returning officers and thereby materially affecting the result of the election insofar as it concerned the returned candidate.[107] The court observed that although there was no quarrel with the proposition that the instructions contained in the handbook for the returning officers were issued by the ECI in exercise of its statutory functions and, therefore, binding on the returning officers, yet the alleged omission on the part of the returning officers would not *ipso facto* 'materially' affect the election result. Averments made in the petition, read as a whole, particularly the pleading, which stated that "by the time specimen signature or the polling agent were circulated 80% of the polling was over and because of the absence of the polling agent the voters got confused and voted in favour of the first respondent [the returned candidate]," in the opinion of the Court, "to say the least," "is vague and does not spell out as to how the election results were materially affected because of these two factors." "These facts fall short of being 'material facts' as contemplated in Section 83(1)(a) of the Act to constitute a complete cause of action in relation to allegation under Section 100(1)(d)(iv) of the Act." Moreover, the court added:[108]

> It is not the case of the election petitioner that in the absence of his election agent there was some malpractice at the polling stations during polling. It needs little reiteration that for purpose of Section 100(1)(d)(iv), it was necessary for the election petitioner to aver specifically in what manner the result of the election insofar as it concerned the first respondent, was materially affected due to the said omission on the part of the Returning Officer.

In view of this position, the Supreme Court had little difficulty in holding that the election tribunal/High Court was justified in coming to the conclusion that the statement of material facts in the election petition was completely lacking, and, therefore, liable to be rejected at the threshold on that ground alone. The Supreme Court also specifically dealt with another related issue, namely whether the High Court in the exercise of its powers either under order vi, rule 16 or order VII, rule 11, CPC was justified in rejecting the election petition at the threshold without affording an opportunity to the election petitioner to adduce evidence in support of his allegation in the petition.[109] By virtue of section 87 of the RP Act, since the provisions of the CPC apply to the trial of an election petition, the court trying an election petition can, undoubtedly, act in exercise of its power under the Code, including order VI, rule 16 and order VII, rule 11. The rationale for the incorporation of these

107 *Ram Sukh*, para. 20.
108 *Id*. para. 21.

provisions in the CPC spelt out by the court is:[110]

> The object of both the provisions is to ensure that meaningless litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the courts. If that is so in matters pertaining to ordinary civil litigation, it must apply with greater vigour in election matters where the pendency of an election is likely to inhibit the elected representative of the people in the discharge of his public duties for which the electorate have reposed confidence in him.

Yet another argument that was raised before the court on behalf of the election petitioner was: since section 83 did not find a place in section 86 of the RP Act, rejection of petition at the threshold would amount to reading into sub-section (1) of section 86 an additional ground.[111] This argument was counteracted in the light of the reasoning propounded by the three-judge bench decision in *Hardwari Lal* v. *Kanwal Singh*.[112] The essence of that reasoning is that although section 86, which confers power on the High Court to dismiss the election petition which did not comply with the provisions of section 81 or 82 or 117 of the RP Act, yet the provision of section 83, which deals with the requirements of the contents of election petition, are linked with section 86 *via* section 87 that obliges the High Court to try election petition as nearly as may be in accordance with the procedure applicable under the CPC.[113] Accordingly, a suit which does not furnish a cause of action can be dismissed at the threshold.

This stance has been further reinforced by the court by relying on *Azhar Hussain* v. *Rajiv Gandhi*,[114] in which the Supreme Court had held that all the facts which were essential to clothe the petition with complete cause of action must be pleaded and omission of *even a single material fact* would amount to disobedience of the mandate of section 83(1)(a) of the RP Act and an election petition can, and must, be dismissed if it suffers from any such vice.[115] Consequently, the appeal, finding it devoid of any merit, was dismissed by the court.[116]

109 *Id.,* para. 16.
110 *Id.* para. 17.
111 *Id*, para. 16.
112 (1972) 1 SCC 214 : AIR 1972 SC 215.
113 See *Ram Sukh*, para. 17.
114 1986 (Supp) SCC 315 : AIR 1986 SC 1253, which referred to earlier pronouncement of the apex court in *Samant N. Balkrishna* v. *George Fernandez* (1969) 3 SCC 238 for its view.
115 Cited in *Ram Sukh*, para. 18.
116 *Id.*, para. 22.