15
ELECTION LAW

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I INTRODUCTION

THE JUDGMENTS delivered by the apex court in the survey year may broadly be divided into two categories: Firstly in which the judgments of the high courts have been reversed by the Supreme Court by allowing the appeal;[1] secondly in which the appeals against the judgements of the high courts that have been dismissed by the Supreme Court by sustaining their decisions.[2] The present survey focuses more on the cases falling in the first category.[3] As far as cases falling in the second category are concerned,[4] the law of precedents needs to be strengthened through critical analysis by deciphering how and in what manner the designated election courts have faulted in the first instance.

II ELECTION PETITIONER'S BURDEN OF PROOF: WHEN IT IS SAID TO BE DISCHARGED?

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 Representation of the People Act, 1951 (herein after, simply the Act of 1951) 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) of the Act of 1951 that an election petition -

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1 Six out of the ten judgments delivered by the apex court in the survey year fall in this category.

2 Four out of the ten judgments fall in this category.

3 Out of six judgments falling in the first category of cases that have been included in the present survey, one case, i.e., *Election Commission of India* v. *Telangana Rastra Samithi,* AIR 2011 SC 492 has been left out in the present survey as the same was already covered in the survey of Election Law for the year 2010. See, Virendra Kumar, "Election Law" XLVI *ASIL* 331-363 (2010).

4 In this category, cases not included in the present survey are: *Kalyan Kumar Gogoi* v. *Ashutosh Agnihotri*, AIR 2011 SC 760; *Kalyan Singh Chouhan* v. *C.P. Joshi,* AIR 2011 SC 1127; *D.N. Jeevaraju* v. *D. Sudhaka*, AIR 2011 SC 1158; and *Nandiesha Reddy* v. *Kavitha Mahesh, with N.S. Nandish Reddy* v. *Kavitha Mahesh*, AIR 2011 SC 2639.

(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 sub-section (1) of section 81 instantly reveals that it is incumbent upon the election petitioner that he must clearly and unambiguously set out in his petition all the 'material facts' along with their 'full particulars', revealing a clear and complete picture of all the circumstances that disclose a definite cause of action during the trial. The consequence of non-inclusion of material facts and full particulars thereof is categorically provided under sub-section (1) of section 86, which directs the high court trying the election petition that it "shall dismiss an election petition which does not comply with the provisions of section 81, or section 82 or section 117" of the Act of 1951.

However, the procedure to be adopted before the high court trying an election petition under the Act of 1951 has been laid down in section 87 of the said Act, which *inter alia*, provides that, subject to the provisions of this Act and of any 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 (5 of 1908) to the trial of suits".[5]

The cumulative effect of these statutory provisions is that if the material facts along with the particulars thereof are found to be missing by the court in its scrutiny of the averments and pleadings taken up by the party, the election petition is liable to be dismissed on that ground alone.[6]

Why are there stringent requirements as conditions precedent in an election petition? The underlying reason is that an election result, where the people elect their representatives cannot be taken lightly. For an election result to be annulled there must be positive evidence to prove illegality of the election. The natural corollary, therefore, is that the person, who files an election petition, must have a clear and definite case to prove that the election was illegal. This implies that the

5 Sub-section (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.

6 After the time limit prescribed for filing the election petition is over, no amendment of the pleadings is permissible to introduce any material facts. See, *V.S. Achutanandan* v. *P.J. Francis*, AIR 1999 SC 2044.

burden of proof shall lie on the petitioner who is filing the election petition. However, the critical question that often arises in this context is, when can it be said that the election petitioner has discharged this burden? This issue has been considered, clarified and answered by the Supreme Court in *M. Chandra* v. *M. Thangamuthu*.[7]

There is no dearth of judicial precedents expounding clearly and categorically that such a burden lies on the person who challenges the validity of the election of the returned candidate. Yet in the discharge of this burden a question has come to the fore how heavy is this burden in the situation in which the election of the returned candidate has been challenged on the ground that she, being a Christian on the basis of her birth certificate, was not eligible to contest election from a constituency reserved for the scheduled castes? In this respect, how, in what manner, and with what in-depth and insight the issue of burden of proof is required to be dealt with while determining the religious persuasion of the appellant, the perspective presented by the Supreme Court is indeed instructive.[8]

To elaborate upon the case, the facts are as follows. The appellant was the returned candidate in an election to the state legislative assembly from a constituency reserved only for candidates belonging to scheduled caste. Her election was challenged[9] on the ground that she, being a Christian by birth, was not eligible to contest the election from such a constituency. Accordingly, a prayer was made for two-fold relief: The election of the returned candidate declared as void and to declare the candidate with next highest number of votes as the successful candidate.[10]

This information about the appellant being a Christian was based upon the copy of the voters list for the relevant constituency, which was obtained by filing an application under the Right to Information Act. In the voters list, her name had been mentioned as Glory Chandra. The use of the prefix 'Glory' was referred to by the respondent as being a definite proof that the appellant at the time of filing her nomination papers was still professing Christianity.

The appellant counteracted this plea by contending that though her father was Christian, she was brought up as Hindu by her separated Hindu mother, and her own marriage was solemnized as per Hindu rites. Moreover, it was further pleaded by the appellant that although the birth register did show her Christian name, which was further carried into the voters list as such without any change even after her so-called conversion to Hinduism, and yet as a matter of fact she was all along a practicing Hindu and that the community certificate of her belonging to the category of scheduled caste (SC) was issued in her favour by the appropriate authority by following the prescribed procedure. Moreover, she also contended that though "she was following Hindu customs, traditions, ceremonies and the other customs prevailing in Hindu Pallan community, in order to reaffirm her faith in Hinduism, she went through various rituals in Arya Samaj, Madurai on 27.08.1994".[11]

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7 AIR 2011 SC 146.

8 *Ibid*.

9 The election petition was filed under section 81 read with ss.5(a), 100(1)(a) and 125-A of the Representation of the People Act, 1951.

10 *Supra* note 7 at 149.

11 *Id.* at 165.

On the fact matrix of the case, though it is true that the initial burden of proving that the appellant is Christian by religion and, therefore, not a person belonging to the category of SC, lies on the election petitioner to substantiate his stand. Nevertheless, the moment he was able to show that the appellant was born of Christian parents (father was undoubtedly a practicing Christian), and that her initial name was also Christian (Glory Chandra), in the opinion of the high court, the election petitioner had discharged his burden. In other words, the burden instantly shifted to the appellant to prove the contrary, which, again, she could not prove to the satisfaction of the high court. Resultantly, her election was set aside by the High Court of Madras by declaring it null and void.[12] However, for the second sequential relief, namely, "whether the election petitioner is entitled for a further declaration as duly elected"[13] the high court disposed of by categorically stating the "the election law in this country does not recognize such a recourse to be adopted".[14]

However, in appeal, the Supreme Court reversed the decision of the high court mainly on two grounds. One, it was erroneous on the part of the high court to say that by mere relying on the voters list the election petitioner had discharged the heavy burden to prove that the returned candidate was not a Hindu, and thereby shifting the burden on the appellant to prove that she had renounced Christianity. Two, the high court did not take into account the fact that the appellant was professing and practicing Hinduism and being accepted as such (and thereby as a person belonging to the SC category) by the people of the constituency she was representing.

In the matters of determining status of a person that entitles him to hold an office and if one wish to dismantle that status, there is a very heavy burden on him to prove his charge. Such a burden is neither light nor can be shifted lightly on the respondent. In *M. Chandra*, admittedly, the appellant was born of couple in which the father was a Christian and the mother a Hindu, who, after her separation in marriage brought up the appellant as a Hindu.[15] The appellant's undergoing certain rituals in Arya Samaj *mandir* were simply "to reaffirm her faith in Hinduism",[16] and "in proof of it she has produced the duplicate copy of the certificate".[17] Thus, in short, the factum of birth alone cannot determine whether the child is Christian or Hindu by religion.

To understand as to how, in what manner, and with what in-depth and insight the issue of burden of proof is required to be dealt with in determining the religious persuasion of the appellant , the following perspective may be abstracted from the holdings/observations of the Supreme Court.

(a) A mere theoretical allegiance to the Hindu faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism.[18]

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12 See the decision reported in 2009 (1) Mad LW 153.
13 *Supra* note 7 at 151.
14 *Id.* at 152.
15 *Id.* at 156.
16 *Ibid*.
17 *Ibid*.
18 *Supra* note 7 at 157, citing *Perumal Nadar* v. *Ponnuswami*, AIR 1971 SC 2352: 1970 (1) SCC 605 (para 6).

(b) No formal ceremony of purification or expiation is necessary to effectuate conversion.[19]
(c) The "sufficient evidence" of conversion to Hinduism is "a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention".[20]
(d) "Acceptance of the converted person by the members of the "community and co-religionists without demur", even in the absence of evidence of rituals relating to conversion, is the true test of conversion.[21]
(e) 'Community or co-religionists' acceptance of the convert "without demur" is the view that has prevailed in India for "almost a century", said the Supreme Court in 1976, and that "(t)here is no reason either on principle or on authority which should compel us to disregard this view".[22]

In the light of the perspective as abstracted above, on the fact matrix of *M. Chandra* the Supreme Court has, inter alia, held:[23]

> The determination of religious acceptance of a person must not be made on his name or his birth. When a person intends to profess Hinduism, and he does all that is required by the practices of Hinduism in the region or by the caste to which he belongs, and he is accepted as a Hindu by all persons around him.

Since the prime purpose of the Supreme Court is not just to decide the *lis* between the parties presented before it, but also to lay down the law as obligated under article 141 of the Constitution. It becomes all the more imperative when in the exercise of its appellate jurisdiction there is a reversal of the high court decision by the apex court. Accordingly, the Supreme Court enunciated the following "settled principle of law" which is required to prove a conversion from one religion to another:[24]

> (T)wo elements need to be satisfied. Firstly, there has to be a conversion and secondly acceptance into the community to which the person (is) converted.

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19 *Ibid*. See also *Id*. at 158, citing. *Anbalagan* v. *B. Devarajan* (1984) 2 SCC 112: AIR 1984 SC 411: "… unless the caste makes it necessary, no expiatory rites need be performed and, ordinarily, he regains his caste unless the community does not accept him".

20 *Ibid*.

21 *Id*., citing *Goona Durgaprasada Rao* v. *Goona Sudarasanaswami*, AIR 1940 Mad 513.

22 *Id.* at 157, citing *Kothapalli Narasayya* v. *Jammana Jogi*, AIR 1976 SC 937. Observance of any particular mode of practice of Hinduism is not required, for "Hindu religious practices (are) so varied and eclrectic that one would find it difficult to say whether one is practicing or professing Hindu religion or not". *Id*. at 157 (para 22), citing *Ganpat* v. *Returning Officer* (1975) 1 SCC 589: AIR 1975 SC 420. See also *C.M. Arumugam* v. *S. Rajgopal* (1976) 1 SCC 863: AIR 1976 SC 939, cited in *M. Chandra*, at 159 (para 26).

23 *Id.* at 159.

24 *Ibid.*

For bringing out the requisite clarity, a brief analysis of the 'settled principle of law' on conversion would be in order here. The use of conjunction 'and' implies that the two elements that need to be invoked for proving the legitimacy of conversion from one religion to another are not in the alternative but make a continuum. That is, the first element of conversion must culminate into the second one else 'conversion' remains incomplete or inchoate. This, does not reflect entirely the correct position.

The correct position may be summed up as follows. There are two distinct modes of conversion: formal and informal. In case of formal mode, conversion is instantaneous and becomes complete and binding the moment pre-laid conditions including the prescribed form are observed. In case of latter mode, namely informal, conversion as such is not visibly pronounced but deciphered from the conduct of the converted person and acceptance of the same by the community amongst whom his assimilation or integration is sought to be seen.

In *M. Chandra*, on its facts matrix, the case of the appellant is not truly the case of conversion, inasmuch as she was brought up by her separated Hindu mother as a Hindu right from the very beginning and certainly during her infancy.[25] In fact, it has been categorically stated by her that "since her birth she has been living as a Hindu and following Hindu customs and tradition and her relatives are also treating her as Hindu and all relatives are Hindu".[26] The people in her constituency knew her only as 'Chandra' and not by the Christian name bearing the pre-fix of 'Glory' Chandra.[27]

Her going through certain ceremonies or rituals at Arya Samaj when she came of age was simply re-affirmation of her being a Hindu, though the certificate issued to her is termed, erroneously as 'certificate of reconversion to Hinduism".[28] This fact of 'reaffirmation' has been alluded to by the Supreme Court by stating as follows:[29] "In the instant case, it is the specific case of the appellant that in the year 1994, that is much before the assembly elections which has held in the year 2006, she had undergone all the rituals in Arya Samaj *'only for the purpose of reaffirmation of Hindu faith'* and the conversion certificate issued by Arya Samaj was received and acknowledged by her uncle Santnakumar who had accompanied her". If it was simply a case of 'reaffirmation' of Hindu faith, where was then the need of terming the same as 'conversion' to Hinduism?

However, such confusion continues to persist even in the observation of the Supreme Court, when it is stated:[30] "In our view, a perusal of the conversion certificate would amply demonstrate that the appellant has successfully proved her claim of re-affirmation of Hindu faith by undergoing rituals of conversion in the

25 It was confirmed by witnesses that the appellant's father left the appellant, her mother and her two younger brothers to marry another woman. See, for instance, the testimony of the maternal uncle of the appellant, *Id*. at 163.

26 *Id.* at 160.

27 *Ibid*.

28 *Ibid*.

29 *Id.* at 160-161.

30 *Id.* at 161.

Arya Samaj, Madurai". This confusion becomes still more pronounced when the apex court distinguished the present case from one of its earlier decisions, *Satrucharla Vijaya Rama Raju* v. *Nimmaka Jaya Raju*[31] on which the high court relied for shifting the burden of proof on the appellant. In order to make the point clear, the observations of the Supreme Court are required to be quoted in full:[32]

> On a careful perusal of the judgment, it is possible to distinguish the present case on the basis of the facts and circumstances. In the above mentioned case, which the high court has relied upon, there was no conversion from one religion to another. The question was whether the person belongs to Kshatriya Caste or a Scheduled Tribe. The question relates to caste within a religion as opposed to the present case, *where there has been conversion from one religion to another*. Therefore the reasoning given by the high court to reverse and discharge the burden of proof should lie on the election petitioner to prove that the appellant still professes Christianity. (Emphasis added)

The present case being distinguished from the earlier one on ground of conversion from one religion to another is invidious, nevertheless the apex court is right in disregarding the application of the earlier case, because the appellant had instantly explained that there was no duality in her statements at any point of time. On this count, after appreciation of disposition of witnesses of both sides, the Supreme Court, *inter alia*, has held:[33]

> …. It looks to us that an honest and true statement made by the appellant that she had undergone the rituals in the Arya Samaj for the re-affirmation of her faith in Hindu religion has put her in a black spot and the same has persuaded the learned Judge who decided the *lis* between the parties to shift the burden of proof. In our view, the pleadings and the evidence adduced in support of the same requires to be read conjointly and not by applying the hyper-technical approach of reading between the lines to arrive at a finding against a candidate in an election petition *who has support of the majority of the people in the constituency*. This approach in our view would defeat the entire election process. Hyper-technicality requires to be eschewed and the ground realities require to be kept in view while deciding these types of cases….(Emphasis added)

In the instant case, the apex court had accordingly held that the election petitioner "has not produced any acceptable evidence to disapprove the evidence adduced by the appellant and her witnesses".[34] "Therefore, issue of parentage which was sought to be projected as a factor which would prove that the appellant is a Christian and brought up as a Christian cannot be accepted".[35]

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31 AIR 2006 SC 543.
32 *Ibid*.
33 *Id*. at 165-166.
34 *Id*. at 166.
35 *Ibid*.

Apart from this, in the instant case, the Supreme Court has advanced this reasoning further in the light of its earlier decision in *Kailash Sonkar* v. *Mayadevi*[36] by emphatically stating that when a child is born, "neither has he any religion nor is he capable of choosing one until he reaches the age of discretion and acquires proper understanding of the situation".[37] "Hence, the mere fact that the parents of a child who were Christians, would in ordinary course get the usual baptism certificate and perform other ceremonies without the child knowing what is being done but after the child has grown up and becomes fully mature and able to decide his future, he ought not to be bound by what his parents may have done".[38] Following this line of reasoning, in *M. Chandra*, appellant's undergoing certain ceremonies in Arya Samaj, Madurai, in the year 1994, much earlier than her standing for election in 2006, clearly demonstrated and proved that she was Hindu by religion at the time of filing her nomination. Therefore, it was further held that she was eligible to be a candidate and contest the election from the reserved constituency, and the High Court of Madras was not right either in shifting the burden of proof from the election petitioner nor in eventually setting aside the election of the appellant by not taking into account the 'settled principles' of election law.[39]

However, there is one count which has remained untouched by the Supreme Court while reversing the decision of the high court. This is in terms of the second consequential relief, namely, "whether the election petitioner is entitled for a further declaration as duly elected".[40] The high court had disposed of this point by categorically stating that the "the election law in this country does not recognize such a recourse to be adopted".[41]

The Supreme Court had no occasion to deal with this issue, because setting aside the election of the returned candidate by the high court was reversed in the instant case. Nevertheless, the categorical statement of the high court that "the election law in this country does not recognize" such a second sequential relief, militates against the clear provisions of section 101 of the Act of 1951, which specifically provides grounds on which a candidate other than the returned candidate may be declared to have been elected. Of course, without making such an additional plea specifically, the election petitioner is not entitled to be declared elected merely on the strength of declaring the election of the returned candidate void.[42]

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36 (1984) 2 SCC 91: AIR 1984 SC 600.

37 *Supra* note 31.

38 *Ibid*.

39 *Id.* at 169 (para 60). While reversing the decision of the high court, the Supreme Court also disapproved its various other findings in favour of the election petitioner, such as appellant's school record, issuance of community certificate, reliance placed on birth record, entrance in telephone application, voters list, in order to prove that the appellant was a Christian and not a Hindu, see, *Id.* at 166-69 (paras 48-58).

40 *Id.* at 151.

41 *Id.* at 152.

42 Virendra Kumar, "Candidate other than returned candidate being declared elected," XXXVIII *ASIL* 293-297 (2002).

III VILLAGE LAMBARDAR: WHETHER HE HOLDS AN 'OFFICE OF PROFIT'

The question whether a village Lambardar holds an office of profit[43] has come up before the apex court in two appeals in *Anokh Singh* v. *Punjab State Election Commission* with *Harchand Singh* v. *State of Punjab*,[44] arising out of a common judgment of the Punjab and Haryana High Court disposing of several writ petitions taken up together in a case.[45]

The case deals with the issue of construing the term 'honorarium' in the context of deciphering the expression "office of profit" as a test of eligibility to be an election candidate. Since the expression 'office of profit' under the government, which disqualifies a person to contest election has not been defined either constitutionally or statutorily nor it finds any mention even in the General Clauses Act, 1897. For determining the true nature of this term, therefore, the Supreme Court in this case analysed and has derived the following meaningful directions/ propositions from some of the analogous judicial decisions that would assist the lay public as well as the courts in their decision-making.[46]

To wit, the plain meaning of the expression 'office of profit' under the government means that an 'office' must be held under the government to which any pay, salary, emoluments or allowance is attached; the word 'profit' connotes the idea of some 'pecuniary gain', the quantum of that gain is immaterial; the amount of money receivable by the person in connection with the office he holds for discharging the stipulated functions/duties would, thus, be material in deciding whether the office really carries any 'profit', or it is simply a mode or means to meet 'out of pocket expenses'; while deciphering the true nature of the payment, "the matter must be considered as a matter of substance rather than of form, the essence of payment rather than its nomenclature"; "The law regarding the question whether a person holds an office of profit should be interpreted reasonably having regard to the circumstances of the case and the times with which one is concerned, as also the class of person whose case we are dealing with and not divorced from reality"; and finally, the courts must be mindful of the consequences of disqualifying a candidate for being chosen as, and for being, a member of the legislative body on the ground of his holding an office of profit under the state at the relevant time. Accordingly, the apex court commended that for strengthening the democratic set-up "a practical view, not pedantic basket of tests" must guide the courts to arrive at an appropriate conclusion.

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43 Virendra Kumar, "Holding an office of profit under the government," in XXXIII *ASIL* 303-308 (1997-98). See also, Virendra Kumar, "Contract for sale of liquor with state government – whether disqualification," in XXXV *ASIL* 266-268 (1999); Virendra Kumar, "Holding an office of profit under the government," in XXXVII *ASIL* 253-258 (2001); Virendra Kumar, "Contract for execution of works between returned candidate and Government," in XXXVIII *ASIL* 280-286 (2002).

44 AIR 2011 SC 230.

45 AIR 2009 P & H 63.

46 *Ibid*.

For a detailed analysis of the case, the fact situation depicting the scenario may be abstracted by simply stating that a person holding the position or status of a village *lambardar* wished to contest election to the gram sabha or village panchayat. In this context, the issue arose whether under the relevant law he is debarred to contest election.

The law regulating election to village bodies is regulated by the Panchayati Raj Act. Under section 208 of the Act, a person would be disqualified to contest the election as a member of panchyat if he is a whole-time employee of the state government. However, under clause (g) of section 11 of State Election Commission Act, a person is disqualified to seek the said election if he holds an 'office of profit' under the state government. Again, these provisions need be considered along with the law laying down the rules of exemptions as spelled out in article 243-F (1) of the Constitution read with the provisions of section 2(a) of the Punjab State Legislature (Prevention of Disqualifications) Act, 1952.

What is the cumulative effect of all these provisions of law seen in the light of relevant judicial precedents for the purpose of determining eligibility of a lambardar intending to contest election to any of the village bodies that are statutorily recognized? In order to provide a definite direction to the lay public, State Election Commissioner, Punjab (A.K. Dubey) circulated a memorandum to all the deputy commissioners-cum-district electoral officers in the state.[47] The singular objective of the memo was to issue clarification "regarding contesting of election by Lambardars and Anganwari Workers" in the matter of "General Elections to Panchayat Samitis and Zila Parishads". Since this official memo became the subject of ensuing litigation, it needs to be reproduced in full for the purpose of analysis:

> Some of the Deputy Commissioners-cum- District Electoral Officers have raised the question whether the Lambardars and Anganwari workers are eligible to contest Panchayati Raj Institution elections. The answer to this question depends upon whether the aforesaid functionaries are holding 'office of profit' under the State Government. The Hon'ble Supreme Court of India has laid down certain tests for determining the question whether a particular office is an 'office of profit' under the State Government or not: particularly in *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanaappa* as follows:
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> i) Whether the government makes the appointment;
> ii) Whether the government has the right to remove or dismiss the holder;
> iii) Whether the government pays remuneration;
> iv) What the functions of the holder are and does he perform them for government; and
> v) Does the government exercise any control over the performance of these functions.

Therefore, the question whether a person is holding an office of profit under the Government of India or State has to be decided by applying these tests to the

47 Memo No. SEC-2008/4365, Chandigarh, dated the 30.4.2008.

facts and circumstances of each case. Applying these questions to the instant case, it is well established that both the above mentioned functionaries are appointed by the government and the government has the right to remove them. They are also paid remuneration. However, it has been said that the remuneration is of the nature of honorarium. Here, on 'office of profit' the Supreme Court of India held in *Ravanna Subanna* v. *G.S. Kaggeerappa*[48] that the word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carried any profit. Further, it is also well established that functions performed by both Lambardars and Anganwari are for the government and the government also exercises control over the performance of these functions. A similar point has been decided by the Supreme Court in *M. Ramappa* v. *Sangappa*[49] where Supreme Court observed that the appointments of Patels and Shanbhogs was made by the Mysore Village Offices Acts, 1908 and though it may be under the statute it has no option but to appoint the heir to the office, if he fulfils the statutory requirements, but the office was held by them by reason of the appointment by the government and not simply because of hereditary right to it. They worked under the control and supervisions of the government and were paid by the government.

Accordingly, the commission is of the view that the lambardars and anganwari workers held 'office of profit' and thus are ineligible to contest.

When this circular memo came to the attention of the people through a news item,[50] conveying clearly that lambardars and anganwari workers have been debarred from contesting election as member of panchayat, it was instantly challenged by the affected persons before the high court through two sets of writ petitions, one on behalf of the lambardar[51] and another representing the anganwari workers.[52]

The high court responded differently to the two sets of writ petitions. With regard to the writs by anganwari workers, the high court held that since the anganwari workers did not hold either any civil post or any 'office of profit' under the government, they could not be debarred, as contemplated under the circular memo under consideration, to contest election to village panchayat.[53] Accordingly, their writ petitions were allowed and the impugned memorandum was quashed so far as it pertained to them.[54]

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48 AIR 1954 SC 653.

49 AIR 1958 SC 937.

50 Published in the newspaper *Daily Ajit,* dated May 5, 2008,

51 Civil Writ Petition No. 7727 of 2008, filed by a Lambardar, who was seeking election to the Gram Sabha, Village Ladpur, Tahsil Amloh, Distt. Fatehgarh Saheb (Punjab).

52 Civil Writ Petitions Nos. 8264 of 2008, 8270 of 2008, 8279 of 2008 and 8310 of 2008 filed by Anganwari workers claiming that they could not be debarred to contest election to the body of Village Panchyat.

53 *Supra* note 44 at 232.

54 *Ibid*. In pursuance of this decision, another writ petition no. 11724 of 2008, which sought a direction to the state government not to permit a person who was an Anganwari worker to participate in the election of Sarpanch of Gram Panchayat of Village Ghaloti was dismissed. See, *id*. at 232 (paras 5 and 8).

However, in respect of writ petition of the lambardars, the high court, in view of the judgment of the Supreme Court in *Som Lal* v. *Vijay Laxmi*,[55] held that since the lambardars were holding an 'office of profit' under the government in terms of the provisions of section 11(g) of the State Election Commission Act, they were rightly disqualified from contesting the election.[56] To this extent, the impugned memorandum was held valid, and, consequently, the writ petition of the lambardars was dismissed.[57]

In special leave to appeal against the dismissal of the petition by the high court, the central concern of the Supreme Court in *Anokh Singh* was whether an incumbent lambardar would hold an 'office of profit' under the Government.[58]

Although the issue regarding the lambardars is "no longer *res integra"*[59] as it had already been resolved by the Supreme Court in its recent judgment, *Mahavir Singh* v. *Khiali Ram,*[60] nevertheless in *Anokh Singh* the Supreme Court specifically examined afresh the application of the tests enunciated by the apex court in *Shivamurthy Swami Inamdar* v. *Veerbhadrappa Veerappa*,[61] which had been "erroneously distinguished" by the high court in their application particularly in respect of the "honorarium" paid to the lambardars.[62] On this count, the high court had "concluded that the honorarium received by the lambardar is not compensatory in nature" and, therefore, the office held by him is the 'office of profit' under the government.[63]

Since the high court did not show how it concluded that the honorarium received by the lambardar was not compensatory in nature, the Supreme Court was "unable to endorse the approach adopted by the high court".[64] In turn, the Supreme Court stated that though it is admittedly true that the lambardar may not be holding a civil post, yet he would be holding an office under the government.[65] But, still besides the monthly honorarium of Rs. 900.00, he receives "no salary, emoluments, perquisites or facilities" for performing multifarious duties and numerous functions

55 (2008) 11 SCC 413: AIR 2008 SC 2088. Hereinafter simply, *Som Lal.*
56 *Supra* note 44.
57 *Ibid*.
58 *Id.* at 242.
59 *Supra* note 44 at 233.
60 (2009) 3 SCC 439: AIR 2009 SC 176 by observing: "Although the post of Lambardars is governed by the provisions of the Punjab Land Revenue Act and the Rules framed there under, holder of the said post is not a Government servant. He does not hold a civil post within the meaning of art. 309 of the Constitution of India".
61 (1971) 3 SCC 870.
62 *Supra* note 44 at 235.
63 *Id.* at 236.
64 *Ibid*.
65 *Ibid*.

as stipulated under the relevant provisions of the Punjab land revenue rules.[66] As the apex court pin pointed that sufficient to conclude that he holds an 'office of profit'

The term 'office of profit' under the government, which disqualifies a person to contest election, has not been defined either constitutionally or statutorily. It finds no mention even in the General Clauses Act, 1897. For determining the true nature of this term, therefore, the Supreme Court has derived the following directions from some of the analogous judicial decisions.[68]

(a) The plain meaning of the expression, 'office of profit' under the government means that an 'office' must be held under the government to which any pay, salary, emoluments or allowance is attached.[69]
(b) The word 'profit' connotes the idea of some 'pecuniary gain,' the quantum of that gain is immaterial.[70]
(c) The amount of money receivable by the person in connection with the office he holds for discharging the stipulated functions/duties would, thus, be material in deciding whether the office really carries any 'profit', or it is simply a mode or means to meet 'out of pocket expenses'.[71]
(d) While deciphering the true nature of the payment, "the matter must be considered as a matter of substance rather than of form, the essence of payment rather than its nomenclature".[72]
(e) "The law regarding the question whether a person holds an office of profit should be interpreted reasonably having regard to the circumstances of the case and the times with which one is concerned, as also the class of person whose case we are dealing with and not divorced from reality".[73]

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66 Rule 20, for instance, enumerates as many as 15 distinct duties/functions of the Lambardar as Headman of the village, which include all and sundry duties, such as collection of land revenue, collection of rents and other income of the common land and account fore them to the person entitled thereto; acknowledge every payment received by him in the books of the land owners and tenants; report to the Tahsildar the death of any assignee of land revenue or government pensioner residing in the estate, or the marriage or re-marriage of a female drawing a family pension and residing in the estate, or the absence of any such person for more than a year; attend the summons of all authorities having jurisdiction in the estate, report to the Patwari any outbreak of disease among animals; report any breach or cut in a government irrigation canal or channel to the nearest canal officer.

67 *Supra* note 44 at 236.

68 *Id*. at 236-239 citing *Gatti Ravanna, son of Gatti Suanna, Gubbi Taluk, Mysore State* v. *G S. Kaggeerappa, Merchant, Gubbi*, AIR 1954 SC 653 (Hereinafter *Gatti Ravanna)*; *S. Umrao Singh* v. *Darbara Singh* (1969) 1 SCR 421: AIR 1969 SC 262 (hereinafter *S. Umrao Singh);* and *K.B. Rohamre* v. *Shanker Rao Genuji Kolhe* (1975) 1 SCC 252: AIR 1975 SC 575 (hereinafter *K.B. Rohamre).*

69 *Id*. at 236.

70 *Ibid*.

71 *Ibid*.

72 *Id*. at 238.

73 *Ibid*.

(f) Finally, the courts must be mindful of the consequences of disqualifying a candidate for being chosen as, and for being, a member of the legislative body on the ground of his holding an office of profit under the state at the relevant time. Accordingly, the apex court commended that for strengthening the democratic set-up, "a practical view, not pedantic basket of tests" must guide the courts to arrive at an appropriate conclusion.[74]

In the light of this exposition, the Supreme Court in *Gatti Ravanna* considered whether a person holding the position of chairman of Gubbi Taluk development committee, who is paid Rs. 6/- per sitting of the committee, could be said to be holding an 'office of profit' under the government. Such a payment, in court's view, "is not meant to be a payment by way of remuneration or profit, but it is given to him as a consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the committee". Likewise, in *S. Umrao Singh*, the payment of Rs.100/- per month to the chairman of panchayat samiti as a monthly consolidated allowance in lieu of all other allowances for performing all official duties and journeys concerning the panchayat samiti within district, including attending meetings, supervision of plans, projects, schemes and other works, and also for discharge of all lawful obligations and implementation of government directives was held by the apex court to be "out-of-pocket expenses" and not an amount "in excess of the expenses", and, thus, not falling within the ambit of 'office of profit'. Similarly, in *K.B. Rohamre*, the Supreme Court held that "mere withdrawal of the daily allowance and travelling allowance could not make membership of the board an 'office of profit, as the allowances drawn by such member would be merely compensatory in nature".[75] In coming to this conclusion, the court took into account all the relevant factors.[76]

Against this backdrop, in *Anokh Singh* the Supreme Court has found that the high court had given "no reason for concluding that the honorarium received by a lambardar is not compensatory in nature".[77] "The high court has erred in not analyzing the real and substantive nature of the honorarium".[78] Moreover, by virtue of section 2(a) of the Punjab State Legislative (Prevention of Disqualifications) Act, 1952, a lambardar would be qualified to contest the elections for legislative assembly. If so, how come in view of this very specific exemption, he is not eligible to contest election to the grass root democratic body of panchayat? The distinction made on this count both by the state election commission while issuing the circular memorandum debarring the lambardars to contest panchayat elections, and the high court dismissing the writ petition challenging the said memorandum, is invidious. This erroneous distinction, as the Supreme Court has pointed out, "is based on a misinterpretation of the law laid down by this court in the cases of *Shivamurthy* and *Ravanna Subanna*".[79]

74 *Id.* at 239.
75 *Id.* at 238.
76 *Ibid*.
77 *Id.* at 237.
78 *Ibid*.
79 *Id.* at 240.

Accordingly, while setting aside the impugned judgment of the high court in so far as it relates to lambardars, and also the impugned circular memorandum issued by the state election commission both in respect of the lambardars and the anganwari workers debarring them to contest panchayat elections, the Supreme Court adopted the pragmatic approach. In view of the Supreme Court, "it would seem a little incongruous that a lambardar would not be permitted to seek election to the panchayat", for "(t)he village level democracy is the bedrock of the Indian National Democracy".[80] "Being a member of panchayat can be the beginning of a long career in public life".[81] "Therefore, the disqualification introduced through the impugned circular could prove disastrous to democracy at the grassroots level in Punjab".[82]

IV ROLE OF THE SUPREME COURT AS THE FIRST APPELLATE COURT: ITS AMBIT UNDER SECTION 116A OF THE REPRESENTATION OF THE PEOPLE ACT, 1951

Normally the Supreme Court as the final court of appeal is slow in interfering with the finding of fact arrived at by the high court. However, in the matters of elections under the Act of 1951, it enjoys a wider jurisdiction. Under section 116A of the said Act, the Supreme Court as the first court of appeal, hears appeal both on law and fact. It is entitled to reassess and re-appreciate the entire pleading and evidence on its own and come to an independent conclusion. An instance of such an opportunity was presented before the Supreme Court in *Govind Singh* v. *Harchand Kaur*.[83]

In this case, for instance, the Supreme Court has taken a very functional approach while dealing with the preliminary objection which is invariably stated in the standard form as "the averments of the election petitioner are vague, general and omnibus and thus cannot be looked into and were fit to be ignored". Such an approach is necessitated especially when the same proposition is arguable with equal vehemence by both the opposing parties, citing precedents of the highest court in support of their respective stands. Likewise, in this case, the Supreme Court has taken a very balanced view in applying the well-accepted test that insists upon the standard of "strict proof beyond a reasonable doubt", while proving the charge of corrupt practice under section 123 of the Act of 1951. Such a balanced view is reflected when the Supreme Court enters a caveat by observing that "the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well nigh impossible to prove any allegation of corrupt practice", that would "defeat and frustrate the very laudable object of the Act for maintaining purity of the electoral process".

The various functional facets of 'corrupt practice' of publication of objectionable material in relation to the conduct or character of any candidate have been brought

80 *Id*. at 241.
81 *Ibid*.
82 *Ibid*.
83 AIR 2011 SC 570, reversing 2006 (3) Rec. Civ. R.100 (P & H).

out in another Supreme Court case included in the current survey.[84] In this case, the apex court's analysis of the counts on which the decision of the high court had been reversed is indeed very telling. It *inter alia*, revealed how and in what respect the high court had faulted in applying the standard of proof required under section 123 of the Act of 1951. Further, it also showed how the evidence of witnesses was bereft of any cogent analysis, leading the high court to reach the wrong decision; in what way the oral evidence while deciding issue of corrupt practice within the meaning of section 123(4) of the Act of 1951 was not properly evaluated; how the high court misdirected itself in placing reliance on contemporaneous newspaper publications; how the high court had recorded a finding that the offending pamphlets were distributed by the appellant without any factual basis; how the high court had wrongly recorded the finding that the pamphlets in question were distributed by the workers of the party to which appellant belonged; how the high court had wrongly recorded the finding that the alleged distribution of the offending pamphlets by the party workers was done with the consent of the appellant; how the high court's erroneous misunderstanding of the law that the appellant would be liable for penalty under section 99 of the Act of 1951 for the acts of his agents without conviction of such agents led it to decide wrongly; and that was how the high court committed an error in holding that distribution of the offending pamphlets, though already published, amounted to 'publication' for the purposes of section 123(4) of the Act of 1951.[85]

To elaborate the case at hand further, the election of the returned candidate, appellant in this case, to the Punjab Legislative Assembly, was challenged by the respondent, the defeated candidate, who secured the third position in the polling. The responents main allegation against the appellant was that he indulged in corrupt practice within the meaning of section 123 (1)(A) read with section 100 (1) (b) of the Act of 1951.[86]

The essential details of the election petition which formed the basis of challenge to the election of the appellant[87] included the fact that before filing his nomination on January 23, 2002 as an independent candidate he was functioning as a Minister of Social Security, Women and Child Development, Punjab, (from which position he resigned on January 12, 2002 as a mark of protest for being denied party nomination). While holding that office with a view to secure votes in the ensuing election he misused his power of sanctioning and releasing the old age/widow/handicapped pensions in favour of residents of his constituency. Her another allegation was that the appellant, even after filing his nomination, disbursed money on certain named dates (February 10, 11 and 12, 2002) among the voters in exchange of their promise to vote for him directly as well as through his agents with his consent in the presence of respectable village persons who stood surety on their behalf.

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84 See generally part V: "Corrupt practice of publishing objectionable material prejudicing the prospect of an election candidate: Its scope and ambit under s.123(4) of the Representation of the People Act, 1951".

85 *Ibid*.

86 *Supra* note 83 at 572.

87 *Id.* at 572-573.

The appellant responded to the election petition by filing his written statement wherein he initially took the preliminary objection that no material facts and particulars had been pleaded in the petition concerning the allegations of corrupt practice. On this count alone, the contents were liable to be struck off as no cause of action was disclosed by the petitioner-respondent.[88] In so far as the merits of the allegations in the petition were concerned, the appellant contended that he had already resigned as Minister of Social Security at the relevant time, and all the disbursement of pensions to the named persons, even if the allegations were taken to be true (which in fact they were denied vehemently), were recommended by him in the discharge of his official duties as a minister and acted upon as per rules by the district level authorities.[89] Moreover, the appellant further contended, that all the documents annexed by the petitioner-respondent with her election petition in the high court pertained to the period much before the time when the appellant filed his nomination.[90]

Since in the rejoinder filed to the written statement the respondent-petitioner reiterated the facts already stated in the election petition in order to contend that the appellant in fact had indulged in corrupt practices to ensure his victory in the election, the high court proceeded with the trial of the petition.[91] The election judge scrutinized the oral evidence led by the contesting parties as also the documents produced and on his scrutiny recorded a finding that the returned candidate Govind Singh "had used the tool of payment on pension to bribe the voters".[92] Accordingly, he went on record to hold that the election petitioner had succeeded in establishing that the returned candidate had committed corrupt practice by inducing the voters to vote for him in consideration of payment of cash named as pension on the eve of election.[93] Thus, it stood established that the corrupt practice committed by the returned candidate was fully covered by section 123(1)(A) of the Act of 1951, prompting the high court to set aside the election by declaring it void.[94] The election petition was thus allowed with cost which was determined at Rs. 50,000/-.[95]

In appeal by the returned candidate, the appellant herein, recognizing the critical role of the first appellate court, the Supreme Court has examined the impugned judgment of the high court by re-assessing and re-appreciating afresh the entire gamut of pleadings and evidence, both oral and documentary, adduced by the contesting parties. For undertaking this exercise in the arena of election law, however, the Supreme Court has reminded that some of the following "well settled" principle of law "laid down in a catena of decisions of the Supreme Court" must be borne in mind by the high court which has "the jurisdiction and competence to declare the election of the returned candidate to be void on the allegation of corrupt practice".[96]

88 *Id*. at 573.
89 *Ibid*.
90 *Id*. at 573-74.
91 *Id*. at 574-75.
92 *Id*. at 575.
93 *Ibid*.
94 *Ibid*.
95 *Ibid*.
96 *Id*. at 580.

(a) "[T]he mandate of the people in a democracy as expressed by the result of the election must prevail and be respected by the courts".[97] This implies that "heavy burden lies on the election petitioner seeking the setting aside of the election of a successful candidate and, therefore, he has to make out a clear case for such relief both in the pleadings and at the trial".[98]
(b) The burden of proof "is not discharged merely on preponderance of probabilities but the standard of proof required is akin to that of proving a criminal or a quasi criminal charge".[99]
(c) If the court arrives at a finding of commission of corrupt practice by a returned candidate or his election agent, then the election of the returned candidate shall be declared to be void "since the underlying principle is that the corrupt practice having been committed, the result of the election does not echo the direct void of the people".[100]

Bearing these broad principles in mind, the Supreme Court in the instant case carefully scrutinized the evidence led by the contesting parties and critically considered the submissions of the counsel for the respective parties in the light of the settled law laid down, before the election of a returned candidate is allowed to be quashed and set aside by the high court.[101] This is required to be done by the apex court as the court of appeal, because it is just possible that the high court though bearing in mind the settled principles and yet in the process, "misappreciation of evidence and hence error of judgment in coming to a definite conclusion cannot be ruled out due to which appeals are preferred against the judgment and order of the high court delivered in election petitions".[102]

On the basis of this premise, the Supreme Court has critically examined the judgment of the high court on the following two major counts.

A. Maintainability of the election petition on the plea of lack of 'material facts' and 'material particulars'

Such a plea is often raised as a formidable defence to an election petition in the form of an innocuous so-called preliminary objection stating that 'the averments of the election petitioner are vague, general and omnibus and thus cannot be looked into and were fit to be ignored'. Whether or not such a statement is justified in a given fact situation is not easy to determine, for it is often arguable with equal vehemence from two opposite angles, each party relying upon catena of judicial decisions.

For instance, in the said case, the appellant-respondent has argued that respondent-petitioner had filed the election petition without disclosing 'material facts' with 'material particulars' as envisaged under section 83(1)(a)(b) of the Act

97 *Ibid*.
98 *Ibid*.
99 *Ibid*., citing *R.P. Moidutty* v. *P.T. Kunju Mohammad* (2000) 1 SCC 481: AIR 2000 SC 388.
100 *Ibid*.
101 *Id.* at 580-81.
102 *Id.* at 581.

of 1951, and, therefore, the same was not maintainable in view of the cited precedents.[103]

This stand was counteracted by the respondent-petitioner by stating that the "election petition should be read in its entirety and not in isolation", and that "even if the election petition lacked extensive details regarding 'material particulars,' the same was not enough to reject a petition" and this was the view reiterated in several Supreme Court cases.[104]

In view this ambivalence stand,[105] the Supreme Court has observed that it is "appropriate to bear in mind that although the expression 'material facts' has neither been defined in the Act of 1951 nor in the Code of Civil Procedure, it has been understood by the courts in general terms to mean the entire bundle of facts which would constitute a complete cause of action".[106] But what sort of 'material facts' would reveal 'a complete cause of action' "would depend upon the facts of each case and no rule of universal application can be laid down".[107] Accordingly, since in the instant case, the respondent-petitioner "has categorically stated the date, time and place of occurrence of the alleged corrupt practice at the instance of the appellant and has also given out the names of the witnesses who were to support the election petition filed by the respondent", it would not be "legally correct and justified" to reject the petition outright "on the ground of lack of material facts and material particulars".[108] However, non-rejection of the petition should not be taken to mean the court's concurrence about the legitimacy of the petitioner's stand, for the Supreme Court has stated clearly and categorically: "But what exactly would be the worth of the evidence of witnesses relied upon by the counsel [for the respondent-petitioner] was a matter to be considered at the appropriate stage during trial".[109]

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103 *Ibid*. citing *Ram Sukh* v. *Dinesh Aggarwal* (2009) 10 SCC 541: AIR 2010 SC 1227; *Anil Vasudev Salgaonkar* v. *Naresh Kushali Shigaonkar* (2009) 9 SCC 310: AIR 2009 SCW 6812; *Ananga Uday Singh Deo* v. *Ranga Nath Mishra* (2002) 1 SCC 499; AIR 2001 SC 2992 and *Azhar Hussain* v. *Rajive Gandhi* (1986) Supp. SCC 315: AIR 1986 SC 1253.

104 *Id*. at 582 (para 36) citing *Ram Sharan Yadav* v. *Thakur Muneshwar Nath Singh* (1984) 4 SCC 649; AIR 1985 SC 24; *Mohan Rawale* v. *Damodar Tatyaba @ Dadasaheb* (1994) 2 SCC 392: AIR 1994 SCW 2028; *Mahadeorao Sukaji Shivankar* v. *Ramaratan Babu* (2004) 7 SCC 181; *Regu Mahesh* v. *Rajendra Pratap Bhanj Dev*, AIR 2004 SC 38, at 42, 43 and *Ram Sukh* v. *Dinesh Aggarwal* (2009) 10 SCC 541 at 548, 549: AIR 2010 SC 1227.

105 The judicial precedent of *Ram Sukh* has been cited to support the two opposite stands.

106 *Supra* note 102.

107 *Ibid*. Citing *Ram Sukh*, *supra* note 102 at 548 that took note of the ratio emanating from the three-judge bench decision led by the then Chief Justice M. Hidayatullah in *Samant N. Balkrishna* v. *George Fernandez*, AIR 1969 SC 1201. Similar stand has been adopted by another three-judge bench decision in *Mahadeorao, supra* note 102.

108 *Supra* note 83 at 583-84.

109 *Id*. at 583.

B. Corrupt practice of bribery under section 123(1) of the Act 1951: When does this charge become operational?

The allegation of corrupt practice of bribery by way of distribution of pensions for the purpose of examining its impact on the election of the appellant-returned candidate needs to be divided into two parts: distribution of pensions prior to the date of filing nomination papers and distribution of pensions after the date of filing nomination papers.

So far as the allegation of distribution of pensions prior to the date of nomination is concerned, "the same cannot by any legal yardstick or even ordinary prudence would constitute indulgence in corrupt practice by the appellant as he was duly holding the portfolio of Social Security as Minister who had the legal authority to approve distribution of pension as part of his official duty".[110] This view is amply supported by the ratio of *Mohan Rawale*, in which it was held that the expression 'candidate' in section 79(b) of the Act of 1951 completely excludes the acts by a candidate up to the date he is nominated as candidate.[111] Accordingly, the Supreme Court in the instant case has concluded that the allegations of corrupt practice "relating to the period anterior to the commencement of the candidate cannot be relied upon to establish corrupt practice *proprio vigore*".[112] As per the apex court, the contrary view taken by the high court was "illogical, bereft of reasoning and hence illegal".[113]

However, the allegation of distribution of money under the garb of pension by the appellant-respondent after filing his nomination, if proved, "will have to be treated clearly and unambiguously as corrupt practice within the meaning of section 123 of the Act of 1951".[114] But the onus of proving such an allegation "lies heavily on the election petitioner", and that "the standard of proof generally speaking is that of a criminal trial, which requires strict proof of the charge beyond reasonable

110 *Id.* at 585.

111 *Ibid*.

112 *Ibid.* Similar view was taken earlier by the Supreme Court in *Prabhakara Rao* v. *M. Seshagiri Rao* (1982) 1 SCC 442: AIR 1981 SC 658, wherein it was contended that any act attributed to the appellant in his capacity as a minister, even if assumed to be correct although the same are disputed, would not come within the ambit of corrupt practice as sanction, approval or grant of pension by a Minister during his tenure as a Minister cannot amount to bribery under clause (1) of s.123 of the Act of 1951 as it is not gift, offer or promise of any gratification which is a sine qua non for attracting the said provision.

113 *Supra* note 83 at 586. However, by way of abundant caution, the Supreme Court has observed, as if by way of appending a footnote, that they "do not wish to be understood so as to endorse that even if any illegal act has been done by a candidate prior to his filing of nomination which is not within the legal discharge of duty, would not amount to corrupt practice so as to protect himself from the charge of corrupt practice".

114 *Ibid*.

doubt", and that "that burden does not shift".[115] Moreover, "in case of any doubt the benefit goes to the returned candidate".[116]

While accepting the most "well accepted test" that insists upon the standard of "strict proof beyond a reasonable doubt", the Supreme Court has entered a caveat by observing that "the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well nigh impossible to prove any allegation of corrupt practice", that would "defeat and frustrate the very laudable object of the Act for maintaining purity of the electoral process".[117]

Taking the balanced view emanating from the well-settled juridical principles, the Supreme Court has examined and analyzed the allegations of corrupt practice in the light of totality of the evidence on record, including the one relied upon by the high court, both oral and documentary.[118] In their analysis, the apex court has found that the high court had solely relied upon only on one set of witnesses, "who are clearly interested witnesses as they themselves have admitted their link to the respondent Smt. Kaur",[119] and "brushed aside" the other set of witnesses who were "competent authorities for distribution of pension and hence independent witnesses, who were more trustworthy in comparison to the" other set of witnesses relied upon by the high court.[120] In fact, depositions of the ignored set of witnesses "unambiguously" have been found to be "in the nature of rebuttal of the evidence" of the witnesses relied upon by the high court.[121]

In this predicament, the Supreme Court wondered how "the high court has not given any weightage to the depositions of the witnesses [PWs 1-7], who can "clearly be treated as non-partisan witnesses and were competent to depose as to how the pension applications were sanctioned", but instead had chosen to rely witnesses

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115 *Id*. at 587. For this "well-settled legal position," see, *Gajanan Krishnaji Bapat* v. *Dattaji Raghobaji Meghe* (1995) 5 SCC 347: AIR 1995 SC 2284, relying upon *Nihal Singh* v. *Rao Birendra Singh* (1970) 3 SCC 239; *Om Prabha Jain* v. *Charan Das* (1975) 4 SCC 849: AIR 1975 SC 1417, *Daulat Ram Chauhan* v. *Anand Sharma* (1984) 2 SCC 64: AIR 1984 SC 621 and *Quamarul Islam* v. *S.K. Kanta*, 1994 Supp (3) SCC 5: 1994 AIR SCW 1598. However, non-shifting of the burden of proof "should not be understood to mean or imply that the returned candidate is absolved from his liability to bring forth the evidence on the record to revert the case of the petitioner and particularly prove such facts which are within the special knowledge of the elected candidate". *Ibid.*

116 *Ibid*.

117 *Id*. at 587 (para 49), citing *S. Harcharan Singh* v. *S. Sajjan Singh* (1985) 1 SCC 370: AIR 1985 SC 236.

118 *Id*. at 587-89 (paras 50-55).

119 The high court placed reliance on the evidence of PWs-9, 10, and 11, who wee found to be "highly interested" inasmuch as they either belong to the village or the political party of the respondent-petitioner. *Ibid*.

120 The set of witnesses whose testimony was ignored by the high court included PW-1 (Child Development Project Officer, Dhuri; PW-2 (Superintendent Social Security in the Office of District Programme Office, Sangrur; PW-4 (Assistant Manager, State Bank of Patiala, Ghanauri Kalan; PW-5 (District Social Security Officer, Sangrur; PW-6 (C.D.P.O. Block Malerkotla-II and PW-7 (C.P.D.O. Block Sherpur).

121 *Id*. at 589.

(namely PW 9, 10, and 11) in whose evidence were noticed "serious infirmities" and "inconsistencies".[122]

In view of the unsatisfactory analysis of the evidence and erroneous approach of the high court while recording the finding of corrupt practice, the Supreme Court felt that this indeed was the "appeal fit to be allowed" as no conclusive inference can be drawn that the respondent had succeeded in proving the charge of corrupt practice against the appellant-returned candidate.[123] "Since the charge of corrupt practice has to be proved beyond reasonable doubt and not merely by preponderance of probabilities, the evidence relied upon by the high court cannot be held to be of such probative value which do not reflect on the credibility of the witnesses relied upon by the high court, so as to interfere with the election result by which the appellant had been elected".[124] Consequently, the appeal has been allowed by setting aside the judgment and order of the high court.[125] Though the parties in this case were left "to bear their own cost", yet by reason of the reversal of "judgment and order" of the high court, the appellant would have the satisfaction of receiving back Rs. 50,000/- that was awarded against him by the high court to the election petitioner as "cost" of litigation.

V CORRUPT PRACTICE OF PUBLISHING OBJECTIONABLE MATERIAL PREJUDICING THE PROSPECT OF AN ELECTION CANDIDATE: ITS SCOPE AND AMBIT UNDER SECTION 123(4) OF THE REPRESENTATION OF THE PEOPLE ACT, 1951

Section 123 of the Act of 1951, which deals with 'corrupt practices' for the purposes of the Act, in its sub-section (4) it specifically deals with the corrupt practice of publication of objectionable material in relation to the conduct or character of any candidate. It provides thus:

> The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

The various functional facets of this 'corrupt practice' in the matters of election have come to light in *Joseph M. Puthussery* v. *T.S. John*.[126] In this case, the election of the appellant, the returned candidate, was set aside by the Kerala High Court on ground of corrupt practice as defined under section 123(4) of the Act of 1951. On fact matrix, the whole case revolves around the publication and distribution of a

122 *Id.* at 590-91, 592.
123 *Id.* at 593.
124 *Ibid*.
125 *Ibid*.
126 AIR 2011 SC 906.

pamphlet which allegedly contained false statements of fact in relation to the personal character and conduct of the first respondent having tendency to prejudice the prospects of his election. This pamphlet was allegedly distributed by the appellant, his election agent and workers of his party with his consent as well as with the consent of his election agent on certain named dates in the proximity of the date on which election was held. This, according to the respondent-petitioner, allegedly amounted to the corrupt practice within the meaning of section 123(4) of the Act of 1951.[127]

The appellant-returned candidate in his written statement vehemently resisted the election petition.[128] He specifically denied that either he or his election agent or any one with his and/or their consent had distributed the said pamphlet.[129] He went to the extent in stating that neither the distribution of the said pamphlet amounted to "any publication", nor the statement contained in it was calculated "to prejudice the prospects of the respondent no. 1 in the election held on May 10, 2001".[130]

After considering the evidence adduced and hearing the parties, the high court concluded that the appellant was guilty of corrupt practice under section 123(4) of the Act of 1951, and accordingly set aside his election, giving rise to the statutory appeal before the Supreme Court.[131]

The Supreme Court, after hearing the counsels for both the parties "at length and in great details", and also considering the "voluminous oral as well as documentary evidence produced by the parties and read before it",[132] set aside the judgment of the High Court of Kerala by allowing the appeal.[133] However, the apex court's analysis of the counts on which the decision of the high court has been reversed is indeed very instructive.

A. Wrong approach of the high court regarding. the standard of proof required under section 123 of the Act of 1951

The high court spelled out the following standard of proof which was to be made applicable to election disputes: It is the standard which is "higher than the one applicable to the civil cases but certainly lesser than one applicable to the criminal cases".[134] In this context, the Supreme Court's cryptic comment is, "there is no manner of doubt that the high court *misdirected* itself on the point of standard of proof under section 123 of the Representation of the People Act, 1951".[135] This indeed is "a new standard of proof to be made applicable to election disputes", which had been "invented" by the high court without any explanation.[136] The

127 *Id.* at 908.
128 *Id*, at 909.
129 *Ibid*.
130 *Ibid*.
131 *Id*. at 910.
132 *Ibid*.
133 *Supra* note 126 at 922.
134 *Id.* at 910.
135 *Id*. at 910. Emphasis added.
136 *Ibid*. Such a newly invented standard, says the apex court, "neither gets recognition/ stamp of authority either from the provisions of the Indian Evidence Act or from any other statute or from judicial precedents". *Id.* at 911.

Supreme Court has expressed its dismay by observing that "[e]ven with the ablest assistance of the learned counsel for the parties", it "could not comprehend as which is that standard of proof which is higher then the one applicable to civil cases and lesser than the one applicable to criminal cases".[137]

Such an approach of the high court is "contrary" to the "settled" principle of law, according to which, "an election trial where corrupt practice is alleged is to be conducted as a criminal trail".[138] Worse still, the Supreme Court has noted with anguish: "Unfortunately, the high court has not referred to any decision of this court on the point though the learned counsel for the appellant claimed that several decisions were cited by the learned counsel for the parties to guide the high court as to which standard of proof should be adopted while deciding an election dispute".[139] As an instance of the 'settled law,' the Supreme Court has cited an observation of the five-judge constitution bench of the Supreme Court in *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta*,[140] which unmistakably reiterates that the allegation of corrupt practice is required to be proved by the election petitioner "not by preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt", else "the petition must fail". The inevitable consequence of the "wrong standard of proof while determining the election dispute" is that the "other findings recorded by the learned Judge (of the high court) will have to be viewed in the light of this fundamental error committed by him".[141]

B. Evidence of witnesses is bereft of any cogent analysis enabling the high court to reach the right decision

For instance, in the said case, the appellant had stated in his written statement that he was not aware of any such distribution of objectionable pamphlet, and in the alternative it was mentioned that even if the distribution has taken place, neither he nor his agent or any of the workers of his party was/were involved in the distribution of the said pamphlet.[142] From this, Supreme Court has pointed out, the high court had wrongly inferred that since "the appellant has not expressly denied distribution" of the said objectionable document on the stipulated dates "in his written statement", he would discard the related "overwhelming and satisfactory oral evidence" on the contrary.[143] The correct position in this respect is that "in an election trial it is not permissible to the high court to discard substantive oral evidence on account of defect in the pleadings".[144]

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137 *Ibid*.

138 *Ibid*. "Normally, standard of proof applicable to civil cases is preponderance of probabilities and the one made applicable to criminal cases is proof beyond reasonable doubt". *Ibid*.

139 *Ibid*.

140 (1964) 6 SCR 750: AIR 1965 SC 183.

141 *Supra* note 126 at 911.

142 *Ibid*.

143 *Id.* at 911-12. There is clear oral evidence on the point that the distribution had taken place in March, 2001 and not in May, 2001.

144 *Id.* at 912. This is so in view of the Supreme Court decision in *Dr. Jagjit Singh* v. *Giani Kartar Singh*, AIR 1966 SC 773.

C. The value of the oral evidence while deciding issue of corrupt practice within the meaning of section 123(4) of the Act of 1951

It is well settled that oral evidence "ordinarily, is inadequate especially if it is of indifferent quality or easily procurable".[145] It, therefore, needs to be "analyzed by applying common sense test".[146] In this respect, the apex court has stated: "It must be remembered that in assessing the evidence, which is blissfully vague in regard to the particulars in support of averments of undue influence, cannot be acted upon because the court is dealing with a quasi-criminal charge with serious consequences and, therefore, reliable, cogent and trustworthy evidence has to be led with particulars".[147] "If this is absent and the entire case is resting on shaky *ipse dixits*", it is further added, "the version tendered by witnesses examined by election petitioner cannot be accepted".[148]

However, in the case in hand, it was neither explained nor analyzed "as to why the high court was inclined to prefer testimony of a particular witness as against the reliable evidence tendered by the appellant himself and the evidence tendered by DW-10".[149] Likewise, the finding recoded by the high court that "there is overwhelming and satisfactory oral evidence" that the offending pamphlet was distributed in May, 2001 and not in March, 2001 "is not borne out from the record of the case".[150] "In fact", the Supreme Court has noted, "there is no discussion as to which witness has testified to this fact and why the high court has preferred that testimony as against the evidence tendered by the appellant".[151]

D. The high court misdirected itself in placing reliance on contemporaneous newspaper publications

In its analysis on this aspect of the case, the Supreme Court has found that the finding of the high court that contemporaneous newspaper publication produced as exhibits "corroborate the testimony of the respondent no. 1 is also not supported by the evidence on record".[152] The reporters of the exhibits, in their examination, "categorically, and in no uncertain terms, stated that they had no personal knowledge

145 *Id*. at 913, citing the decision of the three-judge bench of the Supreme Court in *Abdul Hussain Mir* v. *Shamsul Huda*, AIR 1975 SC 1612.

146 *Ibid*.

147 *Ibid*.

148 *Ibid*.

149 *Ibid*. DW-10 is one Mr. Shaji P. Jacob, who testified that it was he who got the said objectionable document published from one PW-88, the owner of the Press on March 8, 2001. PW-88 produced Ext. 17, the Bill Book maintained by him in the ordinary course of business to substantiate that Mr. Jacob (DW-10) had entrusted him the printing of the said document. Again, DW-10 had also deposed before the court on March 6, 2002 that he had got printed the said document from the press of DW-88 and that he himself had distributed the same in the month of March, 2001. The high court "without assigning cogent and convincing reasons… had chosen to disbelieve the evidence of PW-88 and DW-10". *Id.* at 912 (para 11)

150 *Id*. at 915.

151 *Ibid*.

152 *Ibid*.

of the events published in (exhibits on record)".[153] From this it could be easily inferred that "what was reported in the newspapers could not have been regarded anything except hearsay", and that on the hearsay evidence could not have used by the high court "for coming to the conclusion that contemporaneous newspapers publications … corroborate the testimony of the respondent no. 1".[154]

E. The high court had recorded a finding that the offending pamphlets were distributed by the appellant without any factual basis

The Supreme Court has found that the high court had recorded a finding to the effect that pamphlets in question were distributed by the appellant by observing that that allegation was 'found to be established satisfactorily by evidence tendered'. While recording such a finding, however, the high court 'has not taken trouble of referring to any evidence on the record'. In fact, 'most of the findings recorded by the high court,' the Supreme Court has opined, "are based on surmises and inferences and have no factual basis at all".[155] In sum, "[t]here is absolutely nothing on the record to show that the appellant had indulged in the act of distribution of pamphlets and thus committed a corrupt practice".[156]

Again, after perusing the related evidence the Supreme Court finds that "the high court has placed reliance on unreliable and scanty evidence to find the appellant guilty of corrupt practice and, therefore, the finding that the appellant is disqualified under section 99 of the Act is completely unsustainable".[157]

F. The high court had wrongly recorded the finding that the pamphlets in question were distributed by the workers of the party to which appellant belonged

According to the high court, "the official documents, which have come from proper custody, corroborate the ocular version of the witnesses about distribution of the Ext. 4 (the offending document) on May 8, 2001 and May 9, 2001".[158] "On scrutiny of the whole evidence on record", however, the Supreme finds "that the high court has not pointed out as to which were the official documents" referred to in the relevant paragraph of the impugned judgment.[159] The learned counsel for the respondent no. 1 also could not point out any document which can be termed as official document, which, in turn, corroborated the ocular version of the witnesses regarding distribution of" offending documents on the stipulated dates.[160]

Further more, while concluding that the pamphlets were distributed by no other but the party workers of United Democratic Front (UDF)] of the appellant, the high court observed "that the benefit of the distribution would have ensured to none other than the appellant and, therefore, inference can be drawn that UDF workers had distributed the pamphlets with the consent of the appellant".[161] On such a

153 *Ibid*.
154 *Id.* at 913.
155 *Id.* at 916.
156 *Ibid*.
157 *Ibid*.
158 *Ibid*.
159 *Ibid*.
160 *Ibid*.
161 *Id.* at 917.

conclusion, the Supreme Court had opined, "based on unwarranted inferences and surmises, is recorded only because high court had misdirected itself on the question of standard of proof required to be adopted to resolve a dispute raised under section 123 of the Act".[162] Hence such a finding of the high court, being against the weight of evidence, had been set aside by the Supreme Court.[163]

G. The high court had wrongly recorded the finding that the alleged distribution of the offending pamphlets by the party workers was done with the consent of the appellant

It is well-settled proposition that to prove that the corrupt practice by a third person is attributable to a candidate under section 123 of the Act of 1951 it must be shown that the candidate consented to the commission of such act.[164] In this respect, the high court gave the finding that the appellant had given his consent, and that such a consent was imputed to him because the benefit of such distribution would accrue to him and, therefore, he kept silent despite the knowledge of such distribution. Imputing consent to the appellant in this manner, according to the Supreme Court, "is nothing else but an unwarranted inference and surmise on the part of the high court".[165] In this fact situation, "the finding that UDF workers had distributed the pamphlets with the consent of the appellant being against evidence on record is liable to be set aside and is hereby set aside".[166]

H. The high court's understanding of law that the appellant would be liable for penalty under section 99 of the Act of 1951 for the acts of his agents without conviction of such agents is completely erroneous in law

On the appreciation of the evidence adduced, the high court has recorded a clear finding that no reliable evidence was led by the respondent no. 1 to establish that the appellant's validly appointed election agent had distributed the offending pamphlet or that the UDF workers had distributed the said document with the consent of that agent.[167] However, despite this finding, the high court had held that distributor of objectionable pamphlet need not be named nor a finding with name of the distributor be recorded for holding the appellant liable for penalty under section 99(1)(a)(ii) of the Act of 1951.[168] This, indeed, according to the apex court, "to say the least" contrary to the law laid down by the Supreme Court in *Chandrakanta Goyal* v. *Sohan Singh Jodh Singh Kohli*,[169] The principle spelled out is that when a candidate is held for an act done by any person other than his agent with his consent, then the ultimate finding to this effect has to be recorded and that too only after notice under section 99 to that other person and an inquiry must be held as contemplated therein naming the other person simultaneously for commission of

162 *Ibid*.
163 *Ibid*.
164 *Id*. at 917-18.
165 *Id*. at 918.
166 *Ibid*.
167 *Ibid*.
168 *Ibid*. Conviction under s.123(4) may lead to disqualification of the candidate concerned for a period of six years under s. 99 of the Act of 1951.
169 (1996) 1 SCC 378: AIR 1996 SC 861.

such corrupt practice.[170] Accordingly, the Supreme Court held that in the instant case, "there is no manner of doubt that making of an order under section 98 against the appellant, who is returned candidate, without complying with the requirements of section 99 when the corrupt practice against the appellant is held to bed proved vicariously for the act of another person, by itself vitiates the impugned judgment".[171] In fact, in view of this propounded principle, "the court has no option in this matter and it is incumbent to name such a person in the final verdict given in the election petition under section 98 of the Act after making due compliance of section 99 of the Act of 1951".[172]

Evidently, the high court has not only acted contrary to the law and ignored the mandate of section 99 of the Act but has taken the view that there was an option available to the court to ignore the requirements of section 99 to give notice to the distributors of the pamphlets and to name them as persons guilty of the corrupt practice even though the distribution of pamphlets by the UDF workers is made the foundation of the corrupt practice, allegedly committed by the appellant.[173] Thus, according to the Supreme Court, this finding of the high court "is not only perverse but contrary to the facts proved and, therefore, the same is liable to be set aside".[174]

I. The high court committed an error in holding that distribution of the offending pamphlets, though already published, amounted to 'publication' for the purposes of section 123(4) of the Act of 1951

In the instant case, it is an admitted fact that the objectionable pamphlets contained statements, which were previously published in the three editions of the *Crime* magazine which has the circulation in the constituency concerned.[175] The question, therefore, arose whether distribution of the material which is already published amounted to 'publication' within the scope of section 123(4) of the Act of 1951.

The high court held that on the analogy of the law of defamation, the republication of statements of fact also amounts to publication for the purpose of section 123(4) of the Act of 1951.[176] This view has been negated by the Supreme Court on the following counts:

> One, the application of the analogy of defamation law is misplaced inasmuch as a trial under section 123 is a criminal trial entailing disqualification of the candidate concerned for a period of six years. This implies that the term 'publication' under section 123(4) of the Act of 1951 should be construed strictly and not mere 'distribution' or 'republication' as 'publication,' especially when the reproduction and distribution of the

170 *Supra* note 126 at 198.
171 *Ibid*.
172 *Ibid*.
173 *Id.* at 918-19.
174 *Id.* at 919.
175 *Ibid*.
176 *Id.* at 920.

> reproduced material took place "within the space of few months" from the date of initial publication.[177]

Two, because of the prior publication of the offending material in the *Crime* magazine, the appellant had believed the imputations made against the respondent to be true. However, for the purpose of proving the offence of corrupt practice under section 123(4) of the Act, the respondent-petitioner is obliged to establish that the returned candidate believed the published statement "to be an untrue statement".[178] Moreover, unlike the law of defamation, where truth is defence, section 123(4) of the Act not only recognizes truth as a defence by using the words, "publication of any statement of fact … which is false…", but additionally protects the maker of the statement by stipulating that the maker believed the statement the statement to be false.[179] And the onus of proving that the maker of the statement believed the statement to be false rests with the elect ion petitioner.[180] The high court had not explained "how and by way of what evidence led by the respondent no. 1 it stands proved that the appellant believed that the contents of the pamphlets were false, especially more when the respondent himself had not initiated any action in law by way of criminal complaint or suit against the printer and publishers of the *Crime* magazine for defamation.[181]

In sum, it has been held by the Supreme Court that in view of "the fundamental mistake committed by the high court in the matter of standard of proof while resolving dispute of corrupt practice and faulty appreciation of evidence by applying wrong standard of proof as also the fact that the election of the appellant is set aside on the basis of broad probabilities and presumptions, without even referring to any of the evidence adduced by the parties, the impugned judgment is liable to be set aside".[182] Accordingly, by reversing the judgment of the high court, the appeal has been allowed.

VI SUBSISTING CONTRACT WITH THE GOVERNMENT: WHEN IT COULD BE SAID TO BE TERMINATED?

In the arena of election law, a person having a subsisting contract with the government entered by him during the course of trade or business is disqualified to contest an election. Such a disqualification is enunciated under section 9A of the Act of 1951, which specifically provides disqualification for government contracts:

> A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government.

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177 *Ibid*.
178 *Ibid*.
179 *Ibid*.
180 *Ibid*, citing *Dr. Jagjit Singh* v. *Giani Kartar Singh*, AIR 1966 SC 773.
181 *Id*. at 920-22.
182 *Id*. at 922.

In order to save a person intending to stand for election from the disqualification if he has completed his part of the contract, an explanation has been statutorily added to the above provision that expounds:

> For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the government has not performed its part of the contract either wholly or in part.

Naturally, a person who is desirous to stand for election, he would be keen to get his subsisting contract with the government terminated to avoid the disqualification. But the question is how he should proceed in the matter. Surely, it is not an ordinary termination of contract in the course of business, in which a contract entered into between two parties could be put to an end by pursuing any one of the traditional modes, such as by performance, express agreement, breach, novation, or under the doctrine of frustration. Normally, all such modes are in contemplation while negotiating a contract between two parties in the ordinary course of business.

However, this is not the case in the matters of election. Surprisingly, in this respect, there exists no enactment, statutory rule or any constitutional provision as to how a contractor, who has entered into contracts with the government, should be permitted to get his contract terminated so that he could stand for election without bearing the shadow of disqualification on this count. For instance, in relation to the construction of government orders that are often issued and bear special significance in the absence of legislative enactments, regulations, and statutory rules, should be construed in answering such basic questions as, who is the competent authority to terminate the existing contracts under the Government Order of 1951, and how to decipher the true nature of the Government Order of 1951? It is indeed interesting to examine the whole approach of the apex court on the premise that how in a social welfare state the functions of Executive power becomes coterminous with the power of the legislature, especially "to fill up the gaps" left by the latter, namely, the legislature.[183] In this predicament, the decision of the Supreme Court in *P.H. Paul Manoj Pandian* v. *P. Veldurai*,[184] is illuminating.

In this case, both the appellant and the respondent filed their nominations for a seat in the Tamil Nadu Legislative Assembly. Both the nominations were accepted by the returning officer as valid. However, at the time of scrutiny, the appellant raised an objection that since the respondent had subsisting contract with the relevant government, his nomination papers should not be accepted. The respondent filed his counter stating that the contracts entered into by him with the government were terminated before filing of the nomination papers and, therefore, his candidature was not liable to be rejected. The returning officer passed an appropriate order by overruling the objections of the appellant.

183 *Ibid*.
184 AIR 2011 SC 1660.

In the ensuing election, the respondent was declared elected. Feeling aggrieved by the election result, the appellant filed an election petition challenging the election of the respondent under sections 80 to 84, read with section 199(1)(a) and section 9A of the Act of 1951. The challenge was directed chiefly on the ground that the respondent was disqualified from submitting his nomination papers and consequently from contesting the election as he had subsisting contracts with the government. The respondent's counter plea that he got his subsisting contracts with the government terminated prior to filing his nomination papers was repelled by the appellant by stating that the same was not got done in terms of the conditions specifically spelled out in the order passed by the government of Madras issued way back in 1951.[185]

The Madras High Court, agreeing with the reasoning of the respondent, the returned candidate, eventually held that mere "failure to follow the procedure of breach of the said order would not nullify the order terminating the contracts passed by the Divisional Engineer and subsequently ratified by the superintending engineer".[186] Accordingly, the election petition was dismissed, giving rise to the appeal before the Supreme Court.[187]

Since the whole controversy centred around the Government Order of 1951, the apex court considered the same along with all the relevant documents forming part of the appeal 'at length and in detail'.[188] After a thorough and searching analysis, the Supreme Court has found that "on the date of submission of nomination papers by the respondent as well as on the date of scrutiny of the nomination papers, the contracts entered into by the respondent with the government were subsisting and, therefore, the respondent was disqualified from filing the nomination papers and contesting the election".[189] Accordingly, the election of the respondent, who had incurred disqualification under section 9A of the Act of 1951, has been declared to be illegal and, therefore, null and void.[190]

A critical analysis of the decision of the Supreme Court yields the following points/propositions that might serve as valuable precedents in analogous fact situations, especially in relation to the construction of government orders that are often issued and bear special significance in the absence of legislative enactments, regulations, and statutory rules.

A. Who is the competent authority to terminate the existing contracts under the Government Order of 1951?

This indeed was the crucial point for determination of the election petition by the high court and also the reversal of the decision of the high court on this count by the Supreme Court. It would, therefore, be in order to consider the background that led to the passing of the Government Order of 1951.

185 G.O.Ms. No. 4682 of Public Works Department, dated November 16, 1951. Hereinafter, Government Order of 1951. *Id*. at 1665–66.
186 *Supra* note 184 at 1664-65.
187 *Id*. at 1665.
188 *Ibid*.
189 *Id*. at 1674.
190 *Ibid*.

Realizing the absence of any statutory enactment, rules or/and regulations, the chief engineer (Highways) had reported to the state government that several contractors in the state, who had got subsisting contracts under the government and district board, had applied for closing their accounts and for removal of their names from the list of approved contractors in order to enable them to stand for election as a candidate. This became relevant because the then existing provisions in the preliminary specification to Madras detailed standard specifications did not permit the contractors to withdraw from their existing contracts so as to enable them to contest the election. Therefore, the chief engineer, vide his letter dated November 13, 1951, requested the government "to issue instructions and general policy to be adopted in such cases".[191] Accordingly, after considering the said proposal, on November 16, 1951 the Government of Madras issued the Government Order of 1951,[192] informing the chief engineer, inter alia, that he should consider the following three points before terminating the contracts existing:[193]

1. There should be final and complete settlement of rights and liabilities between the government and the existing contractor.
2. Substitution of a fresh contract with regard to the unfinished part of the work should not involve the government in loss or extra expenditure with a view to enabling any particular person to stand for election as a candidate; and
3. The contractor who is allowed to back out of his contract should do so at his own risk and should be made liable to make good any loss to the government arising out of the necessity to enter into a fresh contract.

A reasonable reading of the "stipulations and conditions" mentioned in the government order dated November 16, 1951 makes it evident", says the Supreme Court, "that *only* the chief engineer was competent to terminate the existing contracts where the contractor was desirous of contesting election".[194] "It is wrong to say that an instruction had been issued to the chief engineer to see that another contractor was available as substitute to perform the remaining part of the contract without any loss to the government and that the order dated November 16, 1951 did not provide that an order of termination of a subsisting contract should be issued only when the chief engineer had accepted a person, who was available and was willing to enter into a contract on the same terms and conditions to which the existing contractor had agreed".[195]

The Supreme Court has emphatically stated that the power to terminate the contract in terms of the said order rested "only with the chief engineer", and that unlike the holding of the high court, "neither the divisional engineer was competent to terminate the contracts awarded to the respondent nor the superintending engineer

191 *Id.* at 1666.
192 The order was issued under the signature of one M. Gopal Menon, Deputy Secretary to Government.
193 *Ibid*.
194 *Id.* at 1668. Emphasis added.
195 *Ibid*.

was competent to ratify an order passed by the divisional engineer canceling the contracts awarded to the respondent".[196] The apex court has based this interpretation of the said order on one of the "accepted principles of interpretation", which guides us "as to how those, who are conversant with government order and are expected to deal with the same, construe and understand the order".[197] Following this principle, it is held by apex court that "[t]here is no manner of doubt that the contracts entered into between the superintending engineer … and the respondent were not terminated as required by government order dated November 16, 1951 and, therefore, it will have to be held that they were subsisting on the date of filing of the nomination papers by the respondent as well as on the date on which those papers were scrutinized".[198]

B. How to decipher the true nature of the Government Order of 1951?

While taking the view as the high court did in the construction of the government order that the contract of the respondent with the government stood terminated by the divisional engineer if the same was duly ratified by the superintending engineer described the said Order as mere "administrative instruction" circulated to the engineers (Highways) NABRAD and rural roads for their information and guidance.[199] The implication of the said description is that such a circular, "having no statutory authority", in itself carries "no legal effect whatever".[200] Invariably, it is used "as a vehicle in conveying instructions to which some statute gives legal force".[201] Rather, it seems to confer a lot of discretionary powers on the persons whom it is addressed.

This view of the high court has been counteracted by the Supreme Court in so far as it relates to the Government Order of 1951. In the opinion of the apex court, this order is not simply "an administrative order for the guidance of the engineers (Highways) NABARD and rural roads in various hierarchies", but "would also apply to the termination of the contracts under similar circumstances entered into with the public works and electricity department".[202] The clear implication of this statement, in our view, is that the Government Order of 1951 is not merely an

196 *Id*. at 1670.

197 *Id*. at 1668.

198 *Id*. at 1670. This holding is further supported by the finding that the substituted contractor was appointed much beyond the last date of filing of the nomination papers and scrutiny thereof, and not prior to those dates, only showing that the substitute was not provided by the respondent, the returned candidate, right at the time of termination of the contract as a condition precedent to the satisfaction of the chief engineer. See, *id*. at 170-71 (para 16). Nor there was "final and complete settlements of rights and liabilities between the Government and the existing contractor" prior to the date of termination, because the deposit of the amount of more than two lakh "in kind-IV deposit can hardly be said to be compliance of clause 1 of the government order dated November 16, 1951". *Id*. at 1671.

199 *Id*. at 1671.

200 See the exposition given by the Supreme Court of the departmental circulars, which are generally identified by serial number and published. *Ibid*.

201 *Id*. at 1671-72.

202 *Id*. at 1671.

'administrative instruction' but carries the 'policy statement' of the government, which cannot be 'brushed aside'. Therefore, it needs to be followed both in letter and spirit.

The reasons for raising the status of an order issued by the Executive to that of a policy document framed/enunciated by the legislature may be abstracted from the holding of the Supreme Court as follows:

(a) Under Article 162 of the Constitution, the power of Executive wing of the State extends to matters with respect to which the State Legislature has power to make laws, subject to two limitations;[203]
   (i) If any law has been enacted by the State Legislature conferring any function on any other authority, in that case the State Executive (that is, the Governor) is not empowered to make any order in regard to that matter in exercise of executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him.
   (ii) Vesting the Governor with the executive power of the State does not create any embargo for the State Legislature from making any law conferring functions on any authority subordinate to the Governor. From this it follows that "the executive power of the State would, in the absence of legislation, extend to making rules or order regulating the action of the Executive".[204] It is of course understood here that "such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate Legislature".[205] Subject to these limitations, it is permissible to the Executive to make such rules or orders as "may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State".[206]
(b) In a welfare State the functions of Executive are ever widening, which cover within their ambit various aspects of social and economic activities, and are not limited merely to the carrying out of the laws enacted by the Legislature.[207]
(c) The executive power of the State is coterminous with the power of the legislature, especially "to fill up the gaps" left by the legislature.[208]

Since there was neither an enactment nor any statutory rules or any constitutional provision providing how the subsisting contract with the government could be terminated by the contractor intending to contest election, the Government Order of 1951 was promulgated by the executive head, namely the Governor of the

203 *Id.* at 1672.
204 *Ibid*.
205 *Ibid*.
206 *Ibid*.
207 *Ibid*.
208 *Ibid*.

Madras State to 'fill the gap'. The status of this order, therefore, was not that of a mere 'executive instruction' to the state functionaries, but a 'policy document' that need to be adhered fully, both substantively and procedurally. As the respondent, the returned candidate, failed to get his subsisting contracts with the government terminated by strictly following the conditions stipulated in the Government Order of 1951 before or on the date of filing his nomination papers as well on the date of scrutiny, he was held to be disqualified from filing his nominations and contesting the election.

VII CONCLUSION

In the survey year the court clarified certain issues such as discharge of burden of proof of the election petitioner, role of the apex court as the first appellate court, corrupt practice of publication of objectionable material in relation to the conduct of the candidate etc. These decisions have undoubtedly broadened the jurisprudence of election law.