15
ELECTION LAW

*Virendra Kumar**

I INTRODUCTION

IN OUR survey of Election Law for the year 2012, we have culled certain broad legal propositions from the decisions of the Supreme Court reported in *All India Reporter* (AIR) during the calendar year. The following ten propositions, continuing to be somewhat contentious in nature, and, therefore, in our view, need focussed attention, are: whether an election petition lacking in proper verification is liable to be dismissed *in limine*; whether acceptance of nomination papers without affidavits in prescribed format is invalid; when can a 'cause of action' is said to be disclosed in an election petition; whether denial of common symbol to a 'de-recognized' political party for its candidates violates citizens' constitutional fundamental rights; who can substitute the original petitioner on withdrawal of election petition; whether election can be declared void solely on grounds of non-compliance with statutory provisions without proving that the result of that election has been materially affected; who can substitute the original petitioner on withdrawal of election petition; whether election can be declared void solely on grounds of non-compliance with statutory provisions without proving that the result of that election has been materially affected; when can an order for production and inspection of election papers including the record of register of voters' counterfoils (in form 17-A) be made; whether display of the name of independent candidate when he died after the date of withdrawal of nomination amounts to materially affecting the result of returned candidate; whether rejection of nomination paper by the returning officer simply on the plea of non-filing of duly signed forms in original seeking nomination of recognized political party without giving him the opportunity to rebut is illegal; and whether an elected director of state corporation amounts to 'holding an office of profit' within the ambit of section 10 of the act of 1951 read with article 102(1)(a) of the constitution. These propositions have been analysed in the light of fact-matrix of the respective cases presented before the court for their judicial determination.[1]

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1 See Parts II to XI, infra.

II ELECTION PETITION LACKING IN PROPER VERIFICATIONWHETHER LIABLE TO BE DISMISSED *IN LIMINE*[2]

This question has arisen before the Supreme Court in *P.A. Mohammad Riyas* v. *M.K. Raghavan*[3] In this case, the appellant, who contested elections from a parliamentary constituency, challenged the election of the respondent, who was the returned candidate from that constituency, by way of an election petition filed under section 81 read with sections 100, 101 and 123 of the Representation of the People Act, 1951(hereinafter simply, the *Act of 1951*). His ground of challenge was that the respondent had published false statements against him and thereby committed corrupt practice within the meaning of sub-section (4) of section 123 of the Act of 1951.This sub-section specifically provides that the publications 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 in relation to the personal character, conduct of any candidate, shall be deemed to be guilty of corrupt practice within the meaning of section 123 of the Act of 1951.[4] In order to substantiate the charge of his allegations, the election-petitioner brought on record certain undated newsletter, anonymous notice, hand bill, wall posters, allegedly all published and distributed by either the respondent himself or someone on his behalf.

The high court dismissed the election petition as it did not make out a 'complete cause of action' inasmuch as it neither contained averments regarding the knowledge of the respondent about the falsity of the statements in relation to each of the documented publications, and nor did the false statements related to the personal character or conduct of the candidate within the meaning of subsection (4) of section 123 of the Act of 1951.

In appeal before the Supreme Court, mainly the following four propositions derived from the relevant case law have come to be considered in order to decide whether the dismissal of the election petition lacking in proper verification could be avoided:

The first proposition related to whether the requirement of sworn affidavit by the petitioner in form 25, as stipulated under the proviso to section 83(1) of the Act of 1951, read with rule 94A of the Conduct of Election Rules, 1961, could be somewhat relaxed in favour of protecting "the purity and sobriety of elections" by bearing in mind the underlying objective of section 123(4) of the Act of 1951

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2 See also, Virendra Kumar, "Defect in verification of affidavit," in *ASIL*. Vol. XXXVII at 261-263 (2001); Virendra Kumar, "Non-compliance of rules requiring verification while filing disqualification petition: its consequences," in *ASIL*. Vol. XLVI at 338-345 (2010); Virendra Kumar, "Dismissal of election petition in limine," in *ASIL*. Vol. XXXV at 282-284 (1999).

3 AIR 2012 SC 2784, per Altamas Kabir, J. (for himself and J. Chalameswar, J.) Hereinafter simply cited as *P.A. Mohammad Riyas*.

4 See also, Virendra Kumar, "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," in *ASIL* 424-437 (2011).

which mandates that voters should not be misled at the time of casting of their votes by a vicious and defamatory campaign against the candidates.[5]

The second case-law-supported-proposition is that non-compliance of section 83(1) of the Act of 1951, which includes the requirement of verification under clause (c) of the said section, is a 'curable defect,' and, as such, an election petition could not be dismissed in *limine* if it lacked the requirement of verification.[6]

The third proposition is whether an affidavit filed under order VI, rule 15(4) read with Order XIX of the CPC could be considered a 'substantial compliance' with the requirement of form 25, as provided under rule 94A of the Conduct of Election Rules, 1961.[7] In other words, whether the requirement of filing a second separate affidavit in form 25 of the said rules would amount to filing two affidavits over the same self-same matter would render one of them otiose.[8]

The fourth 'well-settled' proposition is that material particulars, as opposed to material facts, need not be set out in the election petition and may be supplied at a later date.[9]

Each one of these propositions was counteracted by the counsel for the respondent, the returned candidate, by citing judicial decisions of the apex court in support of those propounding. For instance, if the election petition did not comply with section 81 of the Act of 1951, the high court was required to dismiss the same under section 86(1) of the said Act.[10] Similarly, non-compliance with the requirements of the proviso to section 83(1) of the Act of 1951 and form 25 appended to the rules, the election petition was liable to be dismissed at the threshold.[11] Likewise, omission to state a single material fact would lead to an incomplete cause of action and an election petition without material facts relating to a corrupt practice was not an election petition at all, and that such omission would amount to non-compliance of the mandate of section 83(1)(a) of the Act of 1951, which rendered

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5 *Id*. at 2785 (para 6).

6 See, *Muraka Radhey Shyam Ram Kumar* v. *Roop Singh Rathore*, AIR 1964 SC 1545; *F.A. Sapa* v. *Singora.*, AIR 1991 SC 1557; *Sardar Harcharan Singh Barar* v. *Sukh Darshan Singh,*AIR 2005 SC 22; *K.K. Ramachandran Master* v. *M.V. Sreyamakumar* (2010) 7 SCC 428: 2010 AIR SCW 4583. *Id*. at 1786 (para 8).

7 See, *V. Narayanaswamy* v. *C.P. Thirunavukkarasu*, AIR 2000 SC 694, cited by the appellant, *Id*. at 2787 (para 11).

8 See, *Prasanna Kumar* v. *G.M. Siddeshwar*, AIR 2010 Karnataka 113, cited by the appellant's council in support of this proposition. *Id*. at 2787 (para 9).

9 See *Ashwani Kumar Sharma* v. *Yaduvansh Singh* (1998) 1 SCC 416: AIR 1998 SC 337, cited in *P.A. Mohammad Riyas*, at 2787 (para 12).

10 See, *M. Kamalam* v. *Dr. V.A. Syed Mohammed*, [(1978) 2 SCC 659. Cited in by the respondent's counsel in P.A. *Mohammad Riyas*, at 2788 (para 14).

11 See, *R.P. Moidutty* v. *P.T. Kunju Mohammad* [(2000)1 SCC 481]: AIR 2000 SC 388. Cited in *P.A. Mohammad Riyas*, at 2788 (para 14). See also v. *Narayanaswamy* v. *C.P. Thirunavukkarasu*, [(2000) 2 SCC 294]: AIR 2000 SC 694 and *Ravinder Singh* v. *Janmeja Singh* [(2000) 8 SCC 191: AIR 2000 SC 3026. Cited in by the respondent's counsel in *P.A. Mohammad Riyas*, at 2788 (paras 14 and 15).

the election petition ineffective.[12] Moreover, it is also judicially settled principle that no corrupt practice could be made out in terms of section 123(4) of the Act of 1951 if the allegations did not relate to the personal character, conduct or candidature of the concerned candidate.[13]

The Supreme Court, however, for deciding the issues raised in appeal, instead of examining the plethora of case law cited by the parties before the court preferred to proceed on first principles by taking into account the legislative intent as reflected in the relevant statutory provision of the Act of 1951.[14] Accordingly, in the very first instance, the Supreme Court located the juxtaposition of the applicable section 83, which falls under chapter II of the Act of 1951 relating to the presentation of elections petitions to the high court.[15] Specifically dealing with 'contents of petitions', section 83 provides:

> (1) An election petition –
> (a) shall contain a concise statement of material facts on which the petitioner relies;
> (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practiceand 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 CPC (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.
> (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

On bare perusal of the provisions contained in sub-sections (1) and (2) along with three distinct clauses and the accompanying Proviso in sub-section (1) of the Act of 1951, the Supreme Court in the instant case has abstracted the following statutory requirements in the form of running narration:[16]

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12 See, *Hardwari Lal* v. *Kanwal Singh*, [(1972) 1 SCC 214]: AIR 1972 SC 515; *Azhar Hussain* v. *Rajiv Gandhi*, AIR 1986 1253, relying on *Samant N. Balkrishna and Anr.* v. *Goorge Fernandez* (1969) 3 SCC 238, AIR 1969 1201; *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi*, (1987) Supp SCC 93,AIR 1987 SC 1577 and *Anil Vasudev Salgaonkar* v. *Naresh Kushali Shigaonkar*, [(2009) 9 SCC 310]. Cited in by the respondent's counsel in *P.A. Mohammad Riyas*, at 2789 (para 17).

13 See *Dev Kanta Barooah* v. *Golak Chandra Baruah and Ors*. [(1970) 1 SCC 392]: AIR 1970 SC 1231, cited in by the respondent's counsel in *P.A. Mohammad Riyas*, at 2789 (para 18).

14 The Supreme Court for its own analysis has repeatedly observed that reference to the position reflected in case law cited copiously by counsels on both the sides "if required may be made at the later stage," *P.A. Mohammad Riyas*, at 2789 (paras 18 and 19). See also *Id*. at 2787(para 12), and 2788 (para 13) for similar import.

15 See *P.A. Mohammad Riyas*, at 2790 (para 23).

16 *Ibid.*

> As will be seen from the Section itself, the Election Petitioner is required to set forth full particulars of any corrupt practice that he alleges and the names of the parties involved therein and it further provides that the same is to be signed by the Petitioner and verified in the manner laid down in the Code of Civil Procedure for the verification of proceedings. What is important is the proviso which makes it clear that where the Election 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 and the schedule or annexure to the Petition shall also be signed by the Petitioner and verified in the same manner as the Petition. In other words, when the corrupt practices are alleged in an Election Petition, the source of such allegations has to be disclosed and the same has to be supported by an affidavit in support thereof.

Applying this abstracted legislative mandate to the facts of the present case, the apex court observes that "although allegations as to corrupt practices alleged to have been employed by the respondent had been mentioned in the body of the Petition, the Petition itself had not been verified in the manner specified in Order VI Rule 15 of the Code of Civil Procedure."[17]Accordingly, the court has held that "the publication of various statements [amounting to 'corrupt practice' as defined and understood under Section 124(4) of the Act of 1951] could not, therefore, have been taken into consideration by the high court while considering the Election Petition,"[18] and that "[i]n the absence of proper verification, it has to be accepted that the Election Petition was incomplete as it did not contain a complete cause of action."[19]

Having thus held on first principle, the Supreme Court has then considered the applicability of the judicially propounded proposition, namely that non-compliance with the requirement of verification under clause (c) of the section 83(1) of the Act of 1951 is a 'curable defect.' [20] In the opinion of the Supreme Court it does not apply to cases that are covered within the ambit of proviso appended thereto, which specifically stipulates that where corrupt practices are alleged, the election petition shall also be accompanied by an affidavit in the prescribed from.[21] This implies that the filing of the second affidavit in Form 25 in addition to the one under order VI rule 15(4) of CPC is a must.[22]

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17 *Id*. at 2790 (para 24).

18 *Ibid.*

19 *Ibid*.

20 See *supra* note 6, citing the decisions of the Supreme Court in *Muraka Radhey Shyam Ram Kumar,* subsequently followed in *F.A. Sapa.*; *Sardar Harcharan Singh Barar*; and *K.K. Ramachandran Master.*

21 *P.A. Mohammad Riyas*, at 2791 (para 8).

22 The Court categorically disapproved the contention advanced on behalf of the appellant that since the Election Petition was based entirely on allegations of corrupt practices, filing of two affidavits in respect of the same matter would render one of them redundant. See, *ibid.*

The Supreme Court has also specifically adverted to the decision in *F.A. Sapa case*, which was relied upon by the appellant's counsel for his plea on the principle of 'curable defect.'[23] As per court's reading, "it has been clearly indicated [in this case] that the Petition, which did not strictly comply with the requirements of section 86(1) of the 1951 Act, could not be said to be an Election Petition as contemplated in Section 81 and would attract dismissal under Section 86(1) of the 1951 Act."[24] Moreover, "the failure to comply with the proviso to Section 83(1) of the Act rendered the Election Petition ineffective," as was held by the Supreme Court in *Hardwari Lal* and other catena of cases.[25]

Thus, the Supreme Court has eventually dismissed the appeal by observing:[26]

(a) Since in the absence of proper verification as contemplated in Section 83, it cannot be said that the cause of action was complete.
(b) The consequence of Section 86 of the Act of 1951 come into play immediately in view of sub-section (1) which relates to trial of Election Petition and provides that the High Court shall dismiss the Election Petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act of 1951.
(c) Although, Section 83 has not been mentioned in sub-section (1) of Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the Election Petition remained incomplete.[27]
(d) The Petitioner had the opportunity of curing the defect, but it chose not to do so.

23 *P.A. Mohammad Riyas*, at 2786 (para 25).
24 *Ibid.*
25 See *supra* note 12.
26 *P.A. Mohammad Riyas*, at 2791 (para 26).
27 Similar argument was raised before the Supreme Court in *Ram Sukh* v. *Dinesh Aggarwal*, AIR 2010 SC 1227, D.K. Jain J (for himself and H.L. Dattu, J). On behalf of the election petitioner it was argued: since s.83 did not find a place in s. 86 of the Act of 1951, rejection of petition at the threshold would amount to reading into ss. (1) of s. 86 an additional ground. This argument was counteracted in the light of the reasoning propounded by the three-judge bench decision in *Hardwari Lal* v. *Kanwal Singh*, (1972) 1 SCC 214: AIR 1972 SC 215. The essence of that reasoning is that although s. 86, which confers power on the high court to dismiss the election petition which did not comply with the provisions of s. 81 or 82 or 117 of the RP Act, yet the provision of s. 83, which deals with the requirements of the contents of election petition, are linked with section 86 *via* s. 87 that obliges the high court to try election petition as nearly as may be in accordance with the procedure applicable under the CPC. Accordingly, a suit which does not furnish a cause of action can be dismissed at the threshold. See, Virendra Kumar's analysis of *Ram Sukh case* (*supra*) in *ASIL*, Vol. XLVI (2010) at 363.

III NOMINATION PAPERS WITHOUT AFFIDAVITS IN PRESCRIBED FORMAT: WHETHER THEIR ACCEPTANCE IS INVALID[28]

This issue constitutes the core question to be decided by the Supreme Court in *Shambhu Prasad Sharma* v. *Charandas Mahant*[29] On fact matrix of this case, the appellant petitioner in order to contest election from a Parliamentary constituency filed his nomination paper along with 17 other contestants who filed their respective nominations.[30] Election was held after the returning officer found all the nomination papers valid in spite of the objection raised by the appellant to the validity of the nominations of all other contestants.The respondent Charandas Mahant was declared duly elected with a margin of victory of about 20,000 votes between him and the next nearest rival candidate. The appellant- petitioner who polled only 23,136 votes filed election petition before the high court in which he sought declaration about his having been elected unopposed apart from a declaration to the effect that the nomination papers filed by the remaining 17 candidates had been improperly and illegally accepted by the returning officer.

The appellant-petitioner's allegation of illegal acceptance was that the nomination papers filed by the 17 other contestants were incomplete for want of a proper affidavit required to be filed in form 3 ka (iii) showing debts/dues of the government.This was obligatory in terms of the orders passed by the Supreme Court in the landmark judgment in *Union of India* v. *Association for Democratic Reforms*[31] and the instructions issued by the Election Commission requiring the candidates to file such affidavits along with their nomination papers. Absence of filing the affidavit in the requisite format "was reason enough for the rejection of the nomination papers filed by them and declaration of the appellant-petitioner as having been elected unopposed to the Lok Sabha from that constituency."[32]

The election petition was contested by the returned candidate by filing an application under order VII, rule 11 of the CPC read with section 86(1) of the Act of 1951.The singular contention of the respondent-applicant was that the election petition did not state material facts disclosing any cause of action nor even contained an averment to the existence of any un-discharged liability towards any financial institution or the government. The high court, thus, allowed the said application and dismissed the election petition by holding that "the petition did not indeed disclose any cause of action and was, therefore, not maintainable."[33] This decision of the high court is premised on the following:

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28 See also, Virendra Kumar, "Improper rejection of nomination paper," in, vol. XLV *ASIL* at 359-366 (2009).

29 AIR 2012 SC 2648, per T.S. Thakur J (for himself and Gyan Sudha Misrs J). Hereinafter, *Shambhu Prasad Sharma.*

30 Initially there were 22 candidates who filed their nomination papers from that constituency, but with the withdrawal of four of such candidates, only 17 were left in the field besides the appellant petitioner.

31 (2002) 5SCC 294: AIR 2002 SC 2112. Hereinafter simply, *Association for Democratic Reforms.*

32 See, *id*. at 2649 (para 3).

33 See, *id.* at 2649 (para 5).

(a) It relied on its recorded finding, namely that the appellant had not annexed affidavits filed by the other candidates to demonstrate how the same were not in the format prescribed for the purpose nor was it the case of the election petitioner that the respondents had any un-discharged liability towards any financial institution or the government for that matter.[34]
(b) The Returning Officer had in no uncertain terms recorded a finding that the requirement of filing an affidavit in support of nomination papers containing the requisite information in terms of order passed by the Supreme Court in *Association for Democratic Reforms* (supra) had been complied with in each case and that there was nothing irregular or deficient in the affidavits or nominations to call for their rejection.[35]

In appeal against the recorded finding and reasoning of the high court, the Supreme Court has located afresh "the ground" from the fact matrix of the appellant-petitioner on the basis of which he assailed the election.[36] On its appraisal of the averments made in different paragraphs of the election petition,[37] the apex court has found that "the appellant assailed the election on the ground that the affidavits filed by the contesting candidates [excepting that of the petitioner himself] were not in the prescribed format."[38]

By 'prescribed format', he meant the affidavit filed specifically in the format of form 3(K)(III) of the Conduct of Election Rules, 1961, showing debts/dues of the government.[39] In other words, the case pleaded by the appellant was not one of complete failure of the requirement of filing an affidavit but a case where "the affidavits were not in the required format."[40]

Absence of affidavits in that specified format, according to the appellant-petitioner, makes nomination papers of all the contestants "incomplete" within the meaning of sections 33-A and 33-B of the Act of 1951, and their acceptance being contrary to section 100(1)(d)(i) of the Act of 1951 is liable to declare the result of the election void insofar as it concerns the returned candidate.[41]

For examining the requirement whether it is imperative to file affidavits showing debts/dues of the government only in prescribed Form and not in any other format, the Supreme Court has explored the origin and development of this requirement. It

34 *Id*. at 2649-50 (para 5).
35 *Id*. at 2650 (para 5).
36 *Id.* at 2651 (para 8).
37 The Supreme Court has taken note particularly of para 5, 14A and 14C of the election petition.
38 See *supra* note 34.
39 *Ibid*, citing para 5 of the election petition.
40 *Id*. at 2652 (para 10).
41 *Id.* at 2651 (paras 8 and 9).

seemed to be necessary because in certain cases the observance of proper prescribed form is no less important than its 'substance' or 'core contents'.[42]

The Supreme Court has traced the genesis of the requirement of filing affidavit showing the election candidate's subsisting liability, particularly of any dues owed by him towards any public financial institutions or government, to the classical decision of the apex court in *Association for Democratic Reforms* (2002).[43] In this case, the three-judge bench of the Supreme Court[44] through the quirk of an argument raised the statutory status of the right to vote to the status of fundamental right.[45]This has been accomplished by treating this right as an integral part of the fundamental right to speech and expression under article 19(1) (a) of the Constitution. The right to vote inheres the right to know everything about the candidates that would enable him to make his right choice. One of the five counts that the three-judge bench considered necessary for the voters to know included the liabilities, if any, which a candidate owed to any public financial institution or government.[46]

However, the critical question before the Supreme Court was how to make this perspective functionally fructified?.For this purpose, the court fully explored the nature, power and the jurisdiction of the Election Commission to be exercised under article 324 of the Constitution and held that the ambit of this constitutional provision was wide enough to embrace all powers necessary for smooth conduct of elections and its processes at various stages including the introduction of mandatory revelation by the election candidates on five counts envisaged by the court and desiring them to implement under article 142 of the Constitution. This meant that the directives issued by the apex court under article 142, and their implementation by the Election Commission under article 324 would stay put till the legislature or the Parliament moved in to consider and enact the judicial directive through appropriate law.

As a sequel to the judicial initiative in *Association for Democratic Reforms* (2002), the Government promulgated the Representation of the People (Amendment)

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42 See, for instance, *supra* note 6: The third proposition is whether an affidavit filed under order VI, rule 15(4) read with order XIX of the CPC, 1908, could be considered a 'substantial compliance' with the requirement of form 25, as provided under rule 94A of the Conduct of Election Rules, 1961. In other words, whether the requirement of filing a second separate affidavit in form 25 of the said rules would amount to filing two affidavits over the same self-same matter would render one of them otiose.

43 *Shambhu Prasad Sharma***,** at 2650 (para 6)**.**

44 Per M.B. Shah, Bisheshwar Prasad Singh and H.K. Sema JJ.

45 For the full-length critique, see, Virendra Kumar, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies," Vol. 47(2) *JILI* 135-157 (2005).

46 The other four counts that an election candidate is obliged to reveal to his voters by filing affidavits include: (i) whether the candidate is convicted/acquitted/discharged of any criminal offence in the past – if any, whether he is punished with imprisonment or fine; (ii) prior to six months of filing of nomination, whether the candidate is accused in any pending case, or an offence punishable with imprisonment or two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, details thereof; (iii) the assests (immovable, movable, bank balance, *etc*.) of a candidate and of his/her spouse and that of dependants; and (iv) the educational qualification of the candidate.

Ordinance, 2002 on August 24, 2002. This was soon repealed and replaced by the Representation of the People (Amendment) Act, 2002, which came into force with retrospective effect.The legislative response is contained in section 33-A and section 33-B of the amended Act of 1951.

A bare comparison of the statutory provisions contained in sections 33-A and 33-B of the Act of 1951 with the directives of the Supreme Court in *Association for Democratic Reforms* (2002) instantly reveals that only some and not all of the aspects of the right to information raised by the court are incorporated by the legislature. The aspects relating to amassing of assets and incurring liabilities, for instance, are clearly excluded, for it is specifically stated in section 33-B that no candidate shall be liable to disclose or furnish any such information which is not required to be disclosed or furnished under the Act or the rules made thereunder despite the directions issued by the court on the contrary. This means that section 33-B of the Act of 1951 "purported to neutralise the effect of directions issued by this Court" in *Association for Democratic Reforms* (2002).[47]

This led to challenge the constitutional validity of the two added sections in *People's Union for Civil Liberties (PUCL)* v. *Union of India* [48] The three-judge bench of the Supreme Court while upholding the *vires* of section 33-A declared section 33-B to be constitutionally invalid being in violation of article 19(1)(a) of the Constitution.[49] Furthermore, the Supreme Court Bench in *People's Union for Civil Liberties (PUCL)* reiterated the directions given by it earlier in *Association for Democratic Reforms* (2002) and "directed the Election Commission to issue revised instructions keeping in view the observations made in the judgment delivered by this Court."[50] In particular, the Supreme Court also held that "the order issued by the Election Commission relating to the disclosure of assets and liabilities will continue to hold good and be operative although direction no. 4 (which relates to liabilities towards any public financial institutions or government) insofar as verification of assets and liabilities by means of a summary enquiry and rejection of nomination papers on the ground of furnishing wrong information or suppression of material information was concerned, the same shall not be enforced."[51]

What does this mean? The purport of this statement has been clearly brought out by the Supreme Court in *Shambhu Prasad Sharma* by observing:[52]

> The directions issued by this Court, and those issued by the Election Commission make the filing of an affidavit an essential part of the nomination papers, so that absence of an affidavit may itself render a nomination paper non est in the eye of law. But where an affidavit has been filed by the candidate and what is pointed out is only a defect in the

47 See, *Shambhu Prasad Sharma***,** at 2651 (para 7)**.**

48 AIR 2003 SC 2363, per M.B. Shah, P. Venkatarama Reddi and D.M. Dharmadhikari JJ. Hereinafter, *People's Union for Civil Liberties (PUCL)*.

49 See, *Shambhu Prasad Sharma*, at 2651 (para 7).

50 *Ibid.*

51 *Ibid*, citing para 123(9) of *People's Union for Civil Liberties (PUCL)*. Emphasis added.

52 *Id*. at 2652 (para 12). The emphasis is in the original.

> format of the affidavit or the like, the question of acceptance or rejection of the paper shall have to be viewed in the light of sub-section (4) to Section 36 of the Act, which reads:
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> '36(4): The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.'

Such a stance is further reinforced by the instructions issued to the Returning Officers that are contained in the hand book published by the Election Commission. To this effect, the Supreme Court has abstracted para 10.1 (vii), which *inter alia* provides: "You must reject a nomination paper, if ... the nomination paper is not substantially in the prescribed form ...."[53]

In the light of the above, the legal and constitutional proposition propounded by the Supreme Court in respect of filing affidavits in the format other than the prescribed one is:[54]

> From the above it is evident that the form of the nomination papers is not considered sacrosanct. What is to be seen is whether there is a substantial compliance of the requirement as to form. Every departure from the prescribed format cannot, therefore, be made a ground for rejection of the nomination papers.

Applying this proposition in the fact matrix of the case, the Supreme Court has clearly found that there is a 'substantial compliance' of the requirement of filing an affidavit in respect his liabilities, if any, towards any public financial institution or government: The returned candidate has filed an affidavit in which he had "clearly stated that no such dues were recoverable from the deponent."[55] "The departure from the format was not, in the circumstances, of a substantial character on which the nomination papers of the returned candidate could be lawfully rejected by the returning officer."[56]

Against the response of the respondent-returned-candidate, the appellant-petitioner's allegation that other candidates had also not submitted affidavits in proper format, rendering the acceptance of their nomination papers improper, the Supreme Court has held that such an allegation was not maintainable. This is so because the appellant himself "was required to not only allege material acts relevant to such improper acceptance, but further assert that the election of the returned candidate had been materially affected by such acceptance."[57] Moreover, mere improper acceptance, assuming that any such improper acceptance was supported by assertion of material facts by the appellant-petitioner, would not disclose a cause of action to call for trial of the election petition on merit unless the same is alleged

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53 See, *id*. at 2652 (para 13), citing the instructions to the effect, what can be said to be grounds for rejection of the nomination papers.

54 *Id.* at 2652 (para 14).

55 *Id*. at 2652 (para 15).

56 *Ibid*.

57 *Id*. at 2652-53 (para 16).

to have materially affected the result of the returned candidate.[58] This is how the appeal failed and thereby dismissed.[59]

IV CAUSE OF ACTION: WHEN IT IS SAID TO BE DISCLOSED IN AN ELECTION PETITION[60]

To establish disclosure or non-disclosure of a cause of action in an election petition is perhaps the most critical question. On the part of the returned candidate his endeavour is take the stance and prove that the election petition betrays no cause of action and, therefore, the same is not maintainable: it should be dismissed at the very threshold. The burden of the election petitioner on the other hand to persuade the court to see by adducing evidence that there exists a cause of action in his petition raising triable issues; and if he succeeds in establishing the same prima facie, he can hope to up-turn the election of the returned candidate and possibly be the direct beneficiary as well.

Although the answer to the question, namely, when can it be reasonably said that whether or not the election petition reveals a cause of action raising tiable issues, is a dicey one, nevertheless the Supreme Court has dealt with such a cryptic question in *Ponnala Lakshmaiah* v. *Kommuri Pratap Reddy*[61] and answered it with an admirable degree of certitude. The merit of this decision lies in its approach to the issue starting *ab initio* and subsuming the relevant judicial decisions of the apex court on this issue that had been hitherto delivered, say, during the past fifty years.

In this case, the Supreme Court for affirming, whether the election petitioner prima facie disclosed the 'cause of action' has initiated its analysis by stating that although the expression 'cause of action' has not been defined either in the CPC or elsewhere, nevertheless this is the expression which is "more easily understood than precisely defined."[62] For the functional understanding of the 'cause of action,' the Supreme Court has reviewed the varying nuances of its 'judicially settled' meaning, which may be abstracted as under:

(a) Broadly, the expression 'cause of action' is used in two senses: 'restricted and 'wider'. In the 'restricted' sense, 'cause of action' means "the circumstances forming the infraction of the right or the immediate occasion for the reaction."[63] In the 'wider' sense, it means "the necessary conditions

58 *Ibid*.

59 *Id.* at 2653 (para 17).

60 See also, Virendra Kumar, "An election petition lacking material facts as required to be stated in terms of Section 83(1): whether could be dismissed summarily without trial," in. Vol. XLVI *ASIL* at 358-363 (2010) and Virendra Kumar, "Material facts and particulars," in. Vol. XXXVI *ASIL* at 245-248 (2001).

61 AIR 2012 SC 2638, per T.S. Thakur J (for himself and Mrs. Gyan Sudha Misra J). Hereinafter simply *Ponnala Lakshmaiah.*

62 *Id.* at 2641 (para 3).

63 *Ibid*, citing *Om Prakash Srivastava* v. *Union of India,* (2006) 6 SCC 207: AIR 2007 SC (Supp) 1834.

for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself."[64]

(b) "Compendiously" the expression means "every fact [as distinguished from every piece of evidence], which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."[65]

(c) For deciphering the 'cause of action', the averments made in a plaint or an election petition should be "read as a whole" and not "in isolation"; "the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense."[66]

(d) Whether a plaint or an election petition, when read as a whole, does or does not disclose a 'cause of action' is essentially premised on the assumption that "the averments made in the plaint or the petition are factually correct" in their "entirety."[67]

(e) Non-compliance with the provisions of Sections 81, 82 and 117 entails dismissal of the election petition under Section 86 of the Act of 1951, and, therefore, in that eventuality seemingly it amounts to saying that election petition does not disclose any 'cause of action'.[68]

(f) Non-compliance with the provisions of Section 83 of the Act of 1951, on the other hand, though does not entail dismissal of the election petition under Section 86, yet it may lead to dismissal if the matter falls within the scope of Order VI, Rule 16 or Order VII, Rule 11 of CPC.[69] However, in this context it is worth noticing that defect in verification of the election petition or the affidavit accompanying the election petition has been held to be curable and, therefore, not fatal, implying thereby that the existence of such a defect, ipso facto, would not lead to infer and say that any 'cause of action' has not been disclosed.[70]

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64 *Ibid*.

65 *Ibid*.

66 *Id*. at 2641 (para 4), citing *Shri Udhava Singh* v. *Madhav Rao Scindia*, (1977) 1 SCC 511: AIR 1976 SC 744: "The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole." To the same effect, see also Id. at 2641-42 (para 5), citing Church of *North India* v. *Lavajibhai Ratanjibhai* (2005) 10 SCC 760: AIR 2005 SC 2544.

67 *Id*. at 2642 (para 6), citing *Liverpool & London S.P. and I. Asson Ltd.* v. *M.V. Sea Success I*, (2004) 9 SCC 512.

68 *Id*. at 2642 (para 7), citing *H.D. Revanna* v. *G. Puttasswamy*, (1999) 2 SCC 217: AIR 1999 SC 768.

69 *Ibid*.

70 *Ibid*. See also, *id*. at 2645 (para 16), citing the three-judge bench decision of the Supreme Court in *Sardar Harcharan Singh Brar*, infra. It clearly held that "an election petition is not liable to be dismissed in limine under Sction 86(1) of the Act for alleged non-compliance with the provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

(g) If allegations regarding a corrupt practice do not disclose "the constituent parts" of the corrupt practice alleged, that is its "material facts"(as distinguished from "particulars" that could be allowed to substantiate the 'material facts') of that corrupt practice, which cannot be amended after the period of limitation for filing an election petition is over, the same will not be allowed to be relied upon and proved.[71] The existence of such a material deficiency means to say that the election petition betrays no cause of action and, therefore, could be dismissed at the threshold on that count.[72] On the other hand, 'particulars' are not the primary or basic facts, but merely the "details in support of those facts meant to amplify, refine and embellish the material facts by giving distinct touch to the basic contours of a picture already drawn so as to make it more clear and informative," and, as such, their absence in the election petition should not prompt us to say that there is non-disclosure of the 'cause of action'.[73]

(h) The practice principle that corrupt practice has to be strictly proved does not mean that a pleading in an election petition must be strictly construed, and, accordingly the court is duty bound to enquire into allegations and should not be dissuaded by such defences as 'defective charge' in the election petition or that the brief of the petitioner was not prepared in an appropriate legal language.[74]

In the light of the judicially propounded principles during the course of interpreting and applying the relevant statutory provisions covering comparable fact situations,[75] the Supreme Court in instant case has not detected "any error in the order passed by the high court to dismiss the petition in *limine* on the ground that the same discloses no cause of action."[76] In the considered opinion of the court, the averments made in the election petition disclose a cause of action, and the high court did not commit any error much less an error resulting in miscarriage of justice, to warrant interference by the Supreme Court in exercise of its extraordinary powers under article 136 of the Constitution.[77]

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71 *Id.* at 2642-43 (para 9), citing *Raj Narain* v. *Indira Nehru Gandh*, (1972) 3 SCC 850: AIR 1972 SC 1302.

72 See, *ibid*.

73 *Id*. at 2643 (para 11), citing *Harkirat Singh* v. *Amrinder Singh,* (2005) 13 SCC 511: AIR 2006 SC 713; *Umesh Challiyil v. K.P. Rajendran*, (2008) 11 SCC 740: AIR 2008 SC 1677; *Virender Nath Gautam v. Satpal Singh*, (2007) 3 SCC 617: AIR 2007 SC 581.

74 *Id*. at 2643 (para 10), citing *H.D. Revanna* v. *G. Puttaswamy* , (1999) 2 SCC 217: AIR 1999 SC 768; *V.S. Achuthanandan v. P.J. Francis*, (1999) 3 SCC 737: AIR 1999 SC 2044; *Mahendra Pal* v. *Ram Dass Malanger*, (2000) 1 SCC 261: AIR 2000 SC 16; *Sardar Harcharan Singh Barar* v. *Sukh Darshan Singh and.*, (2004) 11 SCCC 196: AIR 2005 SC 22.

75 The cases cited on behalf of the appellant-returned candidate in support of his plea in para 13 have not been found to deal with "comparable situation" of the fact matrix of the case in hand, and, therefore, could not be relied upon, see, *id*. at 2647 (para 21).

76 *Id*. at 2642 (para 8).

77 *Ibid.*

In arriving at this conclusion, the Supreme Court was guided by the seminal statement that this court itself made earlier:[78]

> .... Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision, generally speaking, there lies a juristic principle. It is the duty of the court to ascertain that principle and implement it.

Concretion of this principle-statement is found at least in two respects. One in respect of two seemingly competing interests reflected in the statement: "while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process."[79] The court has reconciled the two by emphasizing that an election which is vitiated by reason of corrupt practices, illegalities and irregularities enumerated in Sections 100 and 123 of the Act of 1951 cannot obviously be recognized and respected as the decision of the majority of the electorate.[80] Accordingly, the courts are "*duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach and without being oblivious of the ground realities.*"[81] Basing upon its "experience", the court has stated unambiguously that electoral process is often vitiated by use of means, factors and considerations that are specifically forbidden by the statute, resulting into giving a distorted picture in which "the obvious may be completely different from the real."[82]In this predicament, therefore, the courts should abandon the "technical approach towards the resolution of electoral disputes," for that alone would help in retaining "the confidence of the people not only in the democratic process but in the efficacy of judicial determination of electoral disputes."[83]

The second count that has prompted the court to abandon the hyper-technical approach to law is to correct an "erroneous understanding of the law" settled by it, namely, that the successful candidates charged with commission of corrupt practices or other illegalities and irregularities that constitute grounds for setting aside their elections as if could seek dismissal of their petitions in *limine* even on grounds "that are more often than not specious."[84] Such a course is adopted by them with two-fold objective: first, to take "a chance" of getting the election petition dismissed at the threshold by pleading all sorts of technicalities that often emphasize from rather than substance in the name of regarding the election of the returned candidate as something sacrosanct; two, to delay the trial of the petition as much as possible.[85]

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78 *Id*. at 2643 (para 9), citing *Raj Narain*, *supra* note 71.
79 *Id.* at 2647 (para 22).
80 *Ibid*.
81 *Ibid.* Emphasis added.
82 *Id*. at 2647-48 (para 22).
83 *Ibid*, citing *T.A. Ahammed Kabeer* v. *A.A. Azeez*, (2003) 5 SCC 650: AIR 2003 SC 2271; and *P. Malaichami* v. *M. Andi Ambalam* (1973) 2 SCC 170: AIR 1973 SC 2077, expressing a similar sentiment.
84 *Id*. at 2644 (para 12).
85 *Ibid*.

The sagacious suggestion of the Supreme Court, therefore, is: "The Courts need to be cautious in dealing with requests for dismissal of the petitions at the threshold and exercise their powers of dismissal only in cases where even on a plain reading of the petition no cause of action is disclosed."[86]

Bearing this caution in mind, in the instant case the Supreme Court, while upholding the judgment of the high court, has held: "A petition that raises triable issues need not, therefore, be dismissed simply because the affidavit filed by the petitioner is not in a given format no matter the deficiency in the format has not caused any prejudice to the successful candidate and can be cured by the election petitioner by filing a proper affidavit."[87] Since the court has, seemingly, deciphered a tendency on the part of the appellant to have resort to frivolous litigation notwithstanding the clear findings of the high court, they dismissed the appeal with costs assessed at Rs. 25,000.[88]

V DENIAL OF COMMON SYMBOL TO A 'DE-RECOGNIZED' POLITICAL PARTY FOR ITS CANDIDATES: WHETHER VIOLATES CITIZENS' CONSTITUTIONAL FUNDAMENTAL RIGHTS[89]

The issue re-visited

Such an issue had arisen earlier before the Supreme Court. It was only relatively recently that two-Judge Bench of the Supreme Court in a special leave to appeal against the judgment of the High Court of Delhi in *Subramanian Swamy* v. *Election Commission of India*[90] dealt with this issue. In that case, the appellant-petitioner, Subramanian Swamy, was the President of the Janata Party, which came into existence in the year 1977. Once it remained a ruling national party in the Parliament and was also a recognized state party in number of States with a reserved symbol of chakra and haldar (a farmer carrying plough within a wheel). However, it lost its status as a national party because of its poor performance in general elections in 1996, and by an order dated 27.9.2000 of the Election Commission, it ceased to be a 'recognized' political party. As a result of de-recognition, it lost its right to have exclusive symbol on permanent basis. The issue, therefore, to be dealt with was whether the Election Commission could constitutionally deprive a 'de-recognized' political party of its symbol by passing the said order. The Supreme Court answered it in the affirmative, albeit in a limited way.[91]

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86 *Ibid*.

87 *Id*. at 2644 (para 23).

88 *Ibid*.

89 Virendra Kumar, "Recognized political party candidate," in Vol. XXXVI *ASIL* at 230-233 (2001) and Virendra Kumar, "Does Article 324(1) empower the Commission to issue the Election Symbols Order?" in. Vol. XXII *ASIL* at 508-510 (1986).

90 AIR 2009 SC 110, per V.S. Sirpurkar, J. (for himself and Ashok Bhan, J.).Hereinafter cited simply, *Subramanian Swamy*.

91 See Virendra Kumar, "Right of a political party: to retain permanently its allotted reserved symbol," in vol. XLV *ASIL* at 353-359 (2009).

The same issue thereafter has re-emerged in several other writ petitions under article 32 and special leave petitions under article 136 of the Constitution somewhat on a larger canvass. However, on account of the common issue involved all of them have been placed before the three judge bench of the Supreme Court and considered in *Desiya Murpokku Dravida Kazhagam (*DMDK) v. *Election Commission of India*.[92] In this representative case, the grievance of the writ petitioner before the court is that DMDK represents a political party, which was registered with the Election Commission in, January 2006 and contested 232 assembly constituencies out of 234 in the general elections to the Legislative Assembly of Tamil Nadu in the year 2006. It secured 8.33 % of the valid votes and returned one member to the legislative assembly. It had been refused recognition as a state party by the Election Commission of India (and therefore denied the use of its original symbol) on account of its failure to return at least 2 members to the legislative assembly of the state despite of its otherwise securing a larger percentage of votes than the required minimum of 6% under the amended clause 6 of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter simply, the *Election Symbols Order*).

The Supreme Court has delivered their decision, although with a divided court: Altamas Kabir and Surinder Singh Nijjar, JJ., constituting the majority on the one hand, and J. Chelameswar, J., representing the minority view, on the other. However, for appreciating the relative merits of the two opposite opinions, a perusal of their respective holdings would be in order.

Majority view

Altamas Kabir J (for himself and Surinder Singh Nijjar, J.), has upheld the order of the Election Commission on the premise of holding the constitutionality of the relevant provisions of the *Election Symbols Order.* Such a reasoning is reinforced on the ground that the *Election Symbols Order* along with subsequent amendments to it was itself promulgated by the Election Commission of India in exercise of wide powers conferred upon it under article 324 of the Constitution of India read with section 29A of the Representation of the People Act of 1951 (43 of 1951) and Rules 5 and 10 of the Conduct of Elections Rules, 1961 (hereinafter simply Rules). For in-depth analysis of the *Election Symbols Order* it would be helpful to bear in mind the following background.

The *Election Symbols Order* has classified for the first time since the year 1968[93] all 'political parties'[94] into two broad categories: 'recognized political parties'

92 AIR 2012 SC 2191, per Altamas Kabir, Surinder Singh Nijjar and J. Chelmeswar, JJ. (Hereinafter simply *AMDK case*).

93 Initially, elections were fought by the various political parties on the basis of symbols designed by them reflecting their own thrust of policies and programmes, irrespective of their performance at the elections. This continued until the year 1968, when a need was felt by the Election Commission to regulate the increasing number of political parties and their symbols both at the national and state levels.

94 Under cl. (h) of para 2 of the *Symbols Order*, a 'political party' means an association or body of individual citizens of India registered with the Commission as a political party under s.29A of the Representation of the People Act, 1951.

and 'unrecognized political parties.[95] Furthermore, a recognized political party may be either a national party or state party, depending upon the fulfilment of certain conditions in terms of securing a certain minimum percentage of total valid votes polled in some minimum number of states in addition to certain number of returned candidates from one state or more states.[96] Subject to the fulfilment of these two conditions, a recognized political party becomes instantly entitled to certain benefits, including particularly the allotment of reserved symbol,[97]that is, the symbol that is necessarily reserved for the exclusive allotment to the candidates of a recognized political party.[98]

In fact, the *Election Symbols Order* specifically deals with the issue of choice of symbols by candidates of National and State Parties and allotment thereof. It clearly stipulates that a candidate set up by a national party at any election in any constituency in India shall choose and shall be allotted the symbol reserved for that party and no other symbol.[99] Similarly, a candidate set up by a state party at an election in any constituency in a State in which such party is a State Party, shall choose, and shall be allotted the symbol reserved for that party in that State and no other symbol.[100]

The proximity of a reserved symbol to a recognized political party is realized by the *Election Symbols Order* to the extent that it expressly provides that a reserved symbol shall not be chosen by, or allotted to, any candidate in any constituency

95 See cl. 6 of The *Symbols Order*.

96 Para 6A of the *Symbols Order,* which lays down the conditions for recognition as a national party, provides that that a political party shall be treated as a recognized national party if , and only if, either (A)(i) the candidates set up by it, in any four or more states, at the last general election to the House of the People, or to the legislative assembly of the state concerned, have secured not less than six percent of the total valid votes polled in their respective states at the general election; and (ii) in addition, it has returned at least four members to the House of the People at the aforesaid last general election from any state or states; or (B)(i) the candidates have been election to the House of the People, at the last general election to that house, from at least two percent of the total number of parliamentary constituencies in India, any fraction exceeding one-half being counted as one; and (ii) the said candidates have been elected to that house from not less than three states. Likewise Para 6B, which down the conditions for recognition as a state party, provides that that a political party, other than a national party, shall be treated as a recognized state party in a state or states, if, and only if either (A)(i) the candidates set up by it, at the last general election to the House of the People, or to the legislative assembly of the state concerned, have secured not less than six percent of the total valid votes polled in that state; and (ii) in addition, it has returned at least two members to the legislative assembly of the state at the last general election to that assembly; or (B) it wins at least three percent of the total number of seats in the legislative assembly of the state, (any fraction exceeding one-half being counted as one), or at least three seats in the Assembly, whichever is more, at the aforesaid general election.

97 Para 5(1) of the *Symbols Order* recognizes two kinds of symbols which may either reserved or free.

98 *Symbols Order*, Para 5(2).

99 *Symbols Order,* Para 8(1).

100 *Symbols Order*, Para 8(2).

other than a candidate set up by a National Party for whom such symbol has been reserved or a candidate set up by a State Party for whom such symbol has been reserved in the State in which it is a State Party even if no candidate has been set up by such National or State Party.[101] Such proximity has been further recognized and strengthened under the *Election Symbols Order* in the following three distinct ways:

(i) By imposing restriction on the allotment of Symbols reserved for State Parties in States where such parties are not recognized.[102]
(ii) By granting concession to candidates set up by a State Party at elections in other States or Union Territories in which it is not a recognized State Party.[103]
(iii) By granting a concession to candidates set up by an unrecognized party which was earlier recognized as a National or State Party. This has been done by inserting a new paragraph 10A in the *Symbols Order*,[104] which provides:

If a political party, which is unrecognized at present but was a recognized National or State Party in any State or Union Territory not earlier than six years from the date of notification of the election, sets up a candidate at any election in a constituency in any State or Union Territory, whether such party was earlier recognized in that State or Union Territory or not, then such candidate may, to the exclusion of all other candidates in the constituency, be allotted the symbol reserved earlier for that party when it was a recognized National or State Party, notwithstanding that such symbol is not specified in the list of free symbols for such State or Union Territory, on the fulfilment of each of the following conditions, namely:

(a) That an application is made to the Commission by the said party for the exclusive allotment of that symbol to the candidate set up by it, not later than the third day after the publication in the Official Gazette of the notification calling the election;
(b) that the said candidate has made a declaration in his nomination paper that he has been set up by that party at the election and that the party as also fulfilled the requirements of clauses (b), (c), (d) and (e) of paragraph 13 read with paragraph 13A in respect of such candidate; and
(c) that in the opinion of the Commission there is no reasonable ground for refusing the application for such allotment;

provided that nothing contained in this paragraph shall apply to a candidate set up by the said party at an election in any constituency in a State or Union Territory where the same symbol is already reserved for some other National or State Party in that State or Union Territory.

Recognizing the value of a common symbol to a political party, perhaps the most critical question to be answered is, whether such a linkage between a political

101 *Symbols Order*, Para 8(3).
102 *Symbols Order*, Para 9 (Substituted by Notification No. 56/97/Judl-III, dated 15.12.1997).
103 *Symbols Order*, Para 10 (Substituted by Notification No. 56/97/Judl-III, dated 8.6.1999).
104 Vide Notification No. 56/2000/Judl-III, dated 1.12.2000.

party and its symbol could be made subject to the recognition granted by the Election Commission on the basis performance of that party at the elections. The majority court has answered this question in the affirmative. The rationale of the majority to reach such a decision may be abstracted as under:

(a) The Election Commission "in its wisdom" was free to take the "view that in order to be recognized as a political party, such party should have achieved a certain bench-mark in State politics."[105]

(b) Such a view has already been affirmed by the Supreme Court in a number of judicial decisions in which challenge to the vires of the *Election Symbol Order*, reflecting the power of the Election Commission in the matters of conducting election, including the power to allot symbols to candidates during election, was repelled, and that "[n]othing new has been brought out in the submissions made on behalf of the writ petitioners which could make us take a different view what has been decided earlier."[106]

(c) Subjecting the factum of 'recognition' by the Election Commission to the twin conditions cumulatively, as spelled out in *Election Symbol Order*, is justified, and, therefore, the plea raised on behalf of the petitioners that "political parties winning a larger number of seats while polling a lesser percentage of the votes, sounds attractive, but has to be discarded."[107]

(d) The "bench-mark" set down by the Election Commission for granting recognition to a political party, so that it becomes "entitled to all the benefits of recognition, including the allotment of a common symbol," "is not unreasonable," for "[i]n order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State."[108]

(e) The right to know the antecedents of the election candidates[109] is not at "variance" with "the amendments effected by the Election Commission to the Election Symbol Order, 1968, by its Notification dated 1st December, 2000," because such a right is required to be "balanced with the ground realities of conducting a State-wide poll."[110] "The Election Commission has kept the said balance in mind while setting the bench-mark to be

105 *AMDK*, at 2204 (para 33).

106 *Ibid*.

107 *Ibid*. The majority court supports its disapproval by stating that such a plea on behalf of the writ petitioners is in relation to the poll performance of the larger parties within a state where even a swing of 2 to 5 percent could cause a huge difference in the seats won by a political party. Such a phenomenon occurs especially when there is multi-cornered contest that could lead to splitting of the majority of the votes so that a candidate with a minority share of votes polled could emerge victorious. *Ibid.*

108 *Ibid.*

109 The view that a voter has the right to know the antecedents of the election candidates was propounded by the Supreme Court in *Union of India* v. *Association for Democratic Reforms* (AIR 2002 SC 2112), and later reiterated in *People's Union of Civil Liberties* (AIR 2003 SC 2363).

110 *DMDK* at 2204 (Para 34).

> achieved by a political party in order to be recognized as State Party and become eligible to be given a common election symbol."[111]

Minority view

J. Chelameswar J, on perusal of the majority opinion, regretted his "inability to agree with the same."[112] In order to approach the issue afresh, in the very first instance he has circumscribed the conflict problem to be addressed**:** it involves "substantial questions of law as to the interpretation of the Constitution,"[113] and on this count the "lis" [dispute] is "between the Election Commission of India, a creature of the Constitution under Article 324 on the one hand, and various bodies claiming to be political parties and some of their functionaries, on the other."[114] He has accordingly abstracted the core issue to be considered: "The essence of the dispute is whether a political party is entitled for the allotment of an election symbol on a permanent basis irrespective of its participation and performance judged by the vote share it commanded at any election."[115]

Unlike the majority opinion, the minority court holds that in the functioning of the system of constitutional democracy a political party is entitled to have a symbol on permanent basis, and that such an entitlement cannot be subjected to the outcome of its performance at an election. Since the majority opinion is in consonance with the view hitherto expressed by the Supreme Court in number of judicial decisions including the one its recent decision in *Subramanian Swamy*, Chelameswar, J. has raised "a preliminary issue", which is "required to be settled": "whether is it permissible for the petitioners to raise these various questions, which they are seeking to raise in this batch of petitions and right for this court to examine the same?"[116] Responding to this issue positively he cited the following statement from the classical decision of the Supreme Court in *Golak Nath* v. *State of Punjab*:[117]

> [T]here is 'nothing in the constitution that prevented the Supreme Court from departing from the previous decisions of its own if it was satisfied of its error and of its harmful effect on the general interest of the public'. If a principle laid down by this Court is demonstrably inconsistent with the scheme of the Constitution, it becomes the duty of this Court to correct the wrong principle laid down. It is also the duty of the Court itself as early as possible in the matters of the interpretation of the Constitution, 'as perpetuation of a mistake will be harmful to public interest'.[118]

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111 *Ibid.*

112 *Id*. at 2204 (para 37).

113 *Id*. at 2204 (para 38).

114 *Ibid.*

115 *Ibid*.

116 *Id*. at 2212 (para 64).

117 (1967) 2 SCR 762: AIR 1967 SC 1643, relying upon *Superintendent & Legal Remembrancer State of West Bengal* v. *Corporation of Calcutta* (1967) 2 SCR 170: AIR 1967 SC 997, and *Bengal Immunity Company Limited* v. *State of Bihar* (1955) SCR 603: AIR 1955 SC 661.

118 *DMDK* at 2212 (para 64).

Imbued by this guiding spirit, the minority court, making a drastic departure from the hitherto established view, shows that it is the inherent democratic right of every citizen to claim a common symbol for his political party, and denial of the same by the Election Commission is not constitutionally sanctioned. Such a view of Chelameswar, J. is premised on the following two sets of propositions:

First set – re nature of the right to elect and be elected

(a) The right of every citizen to elect and be elected to any one of the legislative bodies created by the Constitution emanates directly from the Constitution itself, which can be curtailed only by a law made by the appropriate legislation and that too on grounds specified under Article 326 only.[119]

(b) The right to elect members of the Lok Sabha or the Legislative Assemblies of the State is constitutionally guaranteed to every citizen of India who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.[120]

(c) The members of the House of the People are required to chosen 'by direct election'[121] and that duration of the House of the People shall be no longer than 5 years.[122]

(d) Such a reading of the Constitution is clearly and categorically is found to be reinforced by the earlier decision of the Supreme Court in *Mohinder Singh Gill and Anr. v. The Chief Election Commissioner*.[123]

(e) The contrary view of the Supreme Court in *N.P. Ponnuswamy v. Regturning Officer, Namakkal Constituency*[124] and *Jyothi Basu v. Debi* Gosal,[125] cited in favour of the Election Commission, had stated:[126]

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

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119 *Id*. at 2216-17 (para 72). For this proposition, see the cited series of constitutional provisions at 2212-2216 (paras 66-71).

120 See art. 326 of the Constitution.

121 See art. 81(1)(a) read with art. 83 of the Constitution.

122 See art.83(2) of the Constitution. The expiry of the period of 5 years reckoned from the date of the first meeting shall operate for dissolution of the House.

123 (1978) SCC 405: AIR 1978 SC 851, cited in *DMDK* at 2213-14 (paras 65, 67, 68) and 2217 (para 72): "the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise...."

124 1952 SCR 218: AIR 1952 SC 64.

125 (1982) 1 SCC 691: AIR 1982 SC 983.

126 See, *DMDK* at 2217 (para 73).

This view has been counteracted in three distinct ways. One, the question whether the right to vote or contest at any election to the Legislative Bodies created by the Constitution did not arise in the fact matrix of the two cases, and, therefore, there was no occasion to make the abstracted statement.[127] Two, such statements are "overbroad (overboard!) statements made without a complete analysis of the scheme of the Constitution regarding the process of election to the Legislative Bodies adopted in subsequent decisions as a compete movement of law," and, thus, makes a "classical example of the half truth of one generation becoming the whole truth of the next generation."[128] Three, the view of *N.P. Ponnuswamy* and *Jyothi Basu* was clearly disapproved by the Supreme Court in its later decision in *People's Union for Civil Liberties.* v. *Union of India* (2003):[129]

> "However, case after case starting from *Ponnuswamy* case characterized it as a statutory ..... With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the Statute, namely the R.P. Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple."

Second set – re political party and the legitimacy of its claim to a symbol on permanent basis in the electoral process of a representative democracy without subjecting it to its performance at any election;

(a) Considering a political party nothing but an association of individuals pursuing certain shared beliefs, its formation can be derived from article 19(1)(c) read with article 19(1)(a) of the Constitution. Article 19(1)(c) confers a fundamental right on all citizens to form association or associate with organizations of their choice, whereas article 19(1)(a) guarantees fundamental right to all citizens of the freedom of speech and expression, which, of course, takes within its sweep "the right to believe and propagate ideas whether they are cultural, political or personal."[130] "[W]ihtout free

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127 *Ibid*. The limited question before the Supreme Court in two cases revolved around the nature of the legal right to raise an election dispute and the forum before which such dispute could be raised. In *N.P. Ponnuswamy***,** the question was whether a challenge, under art. 226 of the Constitution, to the rejection of the nomination of N.P. Ponnuswamy at an election to the legislative assembly is permissible in view of the specific prohibition contained under art.329(b) of the Constitution. In *Jyothi Basu*, likewise, the question was, who were the persons who could be arrayed as parties to an election petition.

128 *Ibid.*

129 (2003) 4 SCC 399: AIR 2003 SC 2363 (paras 96, 100, and 101), P.V. Reddi, J., cited in *DMDK* at 2217-18 (para 73).

130 *DMDK* at 2217 (para 76).

political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible."[131]

(b) "Therefore, all the citizens have a fundamental right to associate for the advancement of political beliefs and opinions held by them and can either form or join a political party of their choice. Political parties are, no doubt, not citizens, but their members are generally citizens. Therefore, any restriction imposed on political parties would directly affect the fundamental rights of its members."[132]

(i) The restriction imposed by the Election Commission through its Symbols Order so far as it denies the reservation of a symbol for the exclusive allotment of the candidate set up by a political party with "insignificant poll performance" is not constitutionally justified because the Symbol Orders "certainly violates the prohibition contained in Article 14" of the Constitution.[133]

(ii) Prohibition contained in Article 14, for all functional purposes, means that "while Article 14 forbids class legislation, it does not forbid reasonable classification."[134]

(iii) To pass the test of reasonable or permissible classification two conditions must be fulfilled, namely, one, that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out the group; two, that the differentia must have a rational relation to the object sought to be achieved by the Statute in question.[135]

(iv) When this two-fold criterion is applied in the instant case, the intelligible classification between recognized and non-recognized political parties made by the Election Commission in its Symbol Orders fails to meet the second related condition inasmuch as it could not show how the stated objective sought to be achieved by the Election Commission, namely, "to avoid the confusion in the minds of the voters at the time of voting," had a bearing on the said classification for the purpose of allowing or not allowing

131 *Id*. at 2218 (para 76), citing *Romesh Thapper* v. *State of Madras*, AIR 1950 SC 124.

132 *Ibid*.

133 *Id*. at 2219 (para 79). There is yet another count on which the restriction imposed by the Symbol Orders needs examination: whether it the test of being a reasonable restriction designed to achieve any of the purposes specified under art.19(2) and art.19(4) of the Constitution. However, the minority court resisted such an examination, because, "in view of the settled principle of law that this court would not normally embark upon the examination of issues in the field of Constitutional Law unless it is absolutely necessary." *Ibid.*

134 The doctrine of 'reasonable classification' was authoritatively laid down by a Constitution Bench of 7 Judges of the Supreme Court in *Budhan Choudhry* v. *State of Bihar*, (1955) 1 SCR 1045: AIR 1955 SC 191, after analysis of 7 earlier judgments of the Supreme Court. Cited in *id*. at 2223 (para 92).

135 *Ibid.*

the use of symbols by the political parties on permanent basis in the light of their performance at the election.[136]

(v) Besides, there is nothing "either in the Constitution or in the R.P. Act, 1951 or any other law, which prohibits an unrecognized political party from setting up candidates at an election."[137]

(vi) On the contrary, despite the refusal of recognition by the Election Commission, unrecognized, derecognized political parties or independent candidates without any party support, including even the candidates set up by an unregistered political party[138] can contest the election, showing that "there is no rational nexus between the classification of recognized and un-recognized political parties and the professed purpose sought to be achieved by such classification."[139]

(vii) The clinching argument of the minority court in holding the Symbol Orders insofar as it denies the reservation of a symbol for the exclusive allotment of the candidates set up by a political party with insignificant poll performance is that "in a 'democratic set up', while the majorities rule, minorities are entitled to protection," else "the mandate of Article 14 would be meaningless."[140]

VI WITHDRAWAL OF ELECTION PETITION: WHO CAN SUBSTITUTE THE ORIGINAL PETITIONER[141]

Under the Representation of the People Act, 1951, there are provisions of Sections 109 and 110 that deal with the issue of withdrawal and the procedure for withdrawal and the consequent substitution in place of original election petitioner.[142] For the analysis of the issue of withdrawal and substitution, the provisions of these two sections of the Act of 1951 are abstracted as under:

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136 See, *id*. at 2223 (paras 92, 93). The Election Commission could not show how by simply denying the recognition to a political party with insignificant voter-support, "how the perceived voter confusion could be avoided," *id*. at 2224 (para 94).

137 *Ibid.*

138 A perusal of s. 29A of the Act of 1951, registration of political parities is not mandatory, except that registration begets certain advantages to the political party under the Act if it is registered.

139 *DMDK* at 2224 (para 94). Cf.

140 *Id*. at 2224 (paras 95 and 96). In the considered opinion of Chelameswar J (minority view), though the Supreme Court in *Subramanian Swamy* (supra) rightly took note of the fact that 'for good long 17 years there was no concept of recognized political party as till then there was no Symbol Orders', and yet came to the conclusion that 'concept of recognition is inextricably connected with the concept of symbol of that party." *Id.* at 2224 (para 95).

141 See also, Virendra Kumar, "Substitution of petitioner," in *ASIL*, XXXVI at 229-230 (2000).

142 There are also provisions of s. 116 of the Act of 1951 that deal with the issue of substitution, but that is only in case of death of the election petitioner. Accordingly, that would truly be the case of abatement; that is substitution on the death of the original election petitioner.

Section 109 – Withdrawal of election petitions:

(1) An election petition may be withdrawn only by leave of the High Court.
(2) Where an application for withdrawal is made under sub-section (1), notice thereof fixing a date for the hearing of the application shall be given to all the parties to the petition and shall be published in the Official Gazette.

Section 110 – Procedure for withdrawal of election petitions:

(1) If there are more petitioners than one, no application to withdraw an election petition shall be made except with the consent of all the petitioners.
(2) No application for withdrawal shall be granted if, in the opinion of the high court,such application has been induced by any bargain or consideration which ought not be to allowed.
(3) If the application is granted –
(a) the petitioner shall be ordered to pay the costs of the respondents theretofore incurred or such portion thereof as the High Court may think fit;
(b) the High Court shall direct that the notice of withdrawal shall be published in the Official Gazette and in such other manner ads it may specify and thereupon the notice shall be published accordingly;
(c) a person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions, if any, as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the high Court may deem fit.

The expression,"a person who might himself have been a petitioner" occurring in section 110(3)(c), has come up for consideration in *Chaugule* v. *Bhagwat*.[143] In this case, the election of the appellant, who was the returned candidate in the elections to the state legislative assembly from a constituency reserved for scheduled castes, was challenged by someone [one Mr. Yadavrao] who himself belonged to the scheduled caste. His grievance was that his nomination forms were rejected by the returning officer simply on the ground that the proposer's name was not included in the voters' list, and, therefore, he stood ineligible to contest the said election. Immediately he challenged the rejection order of the returning officer by filing a writ petition in the high court, resulting into quashing of the said order. The order of the high court, in turn, was challenged by the Election Commission before the Supreme Court, in which notice was issued and the impugned judgment of the high court was stayed. Consequently, in the subsequently held elections the name of challenger [Mr. Yadavrao] was not included in the ballot paper and, thus, he was unable to contest the elections. The present appellant, of course, was declared elected.

Mr. Yadavrao challenged the appellant's election by way of an election petition before the high court solely on the ground that his nomination papers were wrongly rejected by the returning officer. While the election petition was pending hearing,

143 AIR 2012 SC 1638, Altsmas Kabir, J. (for himself and Surinder Singh Nijjar J).

Mr. Yadavrao filed an application for withdrawal of the same. After hearing the petitioner in person, the high court recorded the fact that the election petitioner was no longer interested in pursuing the election petition and, therefore, wanted to withdraw the same. The high court allowed the application by particularly noting that "no corrupt practice had been alleged in the Election Petition."[144] The election petition was, therefore, disposed of "as withdrawn."[145]

However, within 14 days after the passing of the said disposing order, the present respondent Bhagwat filed a civil application for substituting his name in place of Mr. Yadavrao under section 110(3)(c) of the Act of 1951. Since the high court allowed the application for substitution, the appellant challenged such a substitution order before the Supreme Court. The singular question to be answered before the apex court in this case is, whether the respondent falls within the ambit of the expression used in section 110(3)(c) , namely, "a person who might himself have been a petitioner."

Applying the yardstick of section 81 of the Act of 1951, which lays down the grounds on which an election petition can be presented, the Supreme Court has held that the respondent is straight away disqualified from maintaining an election petition, "since he was not entitled to invoke any of the grounds set out in section 110(1) and 101 of the 1951 Act."[146] Besides, the respondent himself had neither filed any nomination papers, nor contested the election, nor even had alleged any corrupt practice against the appellant. Under the circumstances, the Supreme Court has held that "the Election Petition filed by Shri Yadavrao was an action in personam and, was, therefore, confined to his own situation."[147] "Had it been an action in rem," the apex court has added, "the High court may have been justified in substituting the Respondent in place of the original Election Petitioner."[148] In other words, the expression, "a person who might himself have been a petitioner" "cannot be held to apply across the board in all cases."[149] The respondent in the present case, who had been substituted in place of Shri Yadavrao, did not have the same interest as Yadavrao and, accordingly, the high court in the opinion of the Supreme Court had "misconstrued the provisions of Section 110(3)(c) of the 1951 Act in applying the conditions literally, without even satisfying itself that the order fits in the facts of the case."[150]

In the fact matrix of the case, thus, the Supreme Court has held that once the election petitioner decided not to pursue the matter, the election petition could not have been continued by a person as contemplated in section 110(1)(c) of the Act of 1951.[151] Hence, the appeal was allowed by setting aside the judgment of the high court.[152]

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144 *Id*. at 1639 (para 4).
145 *Ibid.*
146 *Id.* at 1641 (para 13).
147 *Id*. at 1642 (para 15).
148 *Ibid*.
149 *Ibid*.
150 *Ibid*.
151 *Id*. at 1642 (para 16).
152 *Id*. at 1642 (paras 17 and 18).

VII NON-COMPLIANCE WITH STATUTORY PROVISIONS: WHETHER ELECTION CAN BE DECLARED VOID WITHOUT PROVING THAT THE RESULT OF THAT ELECTION HAS BEEN MATERIALLY AFFECTED

The grounds for declaring an election to be void are specifically provided under section 100 of the Representation of the People Act, 1951.One of these grounds stipulated under section 100(1) (d)(iv) is:

> Subject to the provisions of sub-section (2), if the High Court is of the opinion that the result of the election, insofar as it concerns a returned candidate, has been materially affected by non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

A bare reading of this statutory provision raises a question whether for declaring an election of the returned candidate void it is enough for the election petitioner to prove that he (the returned candidate) did not comply with any of the provisions of the Constitution or of the Act of 1951 or of any rules or orders made under the said Act, and presuming that that violation itself is to be taken as materially affecting his election result. Or, in the alternative, the petitioner is also specifically required to establish that that non-compliance has resulted in materially affecting his election result.

Such an issue has come before the Supreme Court in an appeal against the judgment of the Patna High Court in *Mangani Lal Mandal* v. *Bishnu Deo Bahndari*,[153]

In this case, the respondent, Bishnu Deo Bahndari, a voter, challenged the election of the appellant, Mangani Lal Mandal, the returned candidate, by filing an election petition before the Patna High Court, alleging that the returned candidate had suppressed facts in the affidavit that he was required to file along with his nomination papers. Such fact included that he had two wives and dependent children by marriage with his first wife, and also the assets and liabilities of his first wife and the dependent children.[154]

The returned candidate traversed the averments made by the election petitioner and also raised various objections, to wit, that the election petition did not disclose any cause of action nor it contained the concise statement of material facts.[155]

The high court, on the basis of the pleadings of the parties and evidence adduced before it, held that "the returned candidate failed to furnish information about his first wife and the dependents in the affidavit filed along with his nomination papers," and that "the suppression of acts by the returned candidate with regard to the assets and liabilities of his first wife and the dependent children born out of that wedlock was breach of the Constitution, *viz,,* article 19(1)(a) and for such breach and non-

153 AIR 2012 SC 1094, per R.M. Lodha J (for himself and Sudhansu Jyoti Mukhopadhaya J).

154 See, *id*. at 1095 (para 3).

155 *Id*. at 1905 (para 4).

compliance, the candidate who has not complied with and breached the right to information of electors and has won the election has to suffer the consequence of such non-compliance and the breach."[156]

A conjoint reading of the provisions of section 100 (grounds for declaring an election void) with those of section 83 (contents of election petition) of the Act of 1951 has prompted the Supreme Court to hold with "no manner of doubt" that "the violation or breach or non-observation or non-compliance of the provisions of the Constitution or the 1951 Act or the rules or the orders made there under, by itself does not render the election of a returned candidate void under Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected."[157]

The Supreme Court in the instant case has not just set aside the impugned judgment, but seemingly expressed its 'anguish' and 'dismay' over the very approach the high court had adopted in dealing with the election petition. To wit:

(a) "Although the impugned judgment runs into 30 pages, but unfortunately it does not reflect any consideration on the most vital aspect as to whether the non-disclosure of the information concerning the appellant's first wife and the dependent children born out of that wedlock and their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate."[158]

(b) "As a matter of fact, in the entire election petition there is no pleading at all that suppression of the information by the returned candidate in the affidavit filed along with the nomination papers with regard to his first wife and dependent children from her and non-disclosure of their assets and liabilities has materially affected the result of the election."[159]

(c) "There is no issue framed in this regard nor there is any evidence let in by the election petitioner" and nor the High Court has "formed any opinion on this aspect."[160]

(d) "We are surprised that in the absence of any consideration on the above aspects, the High Court has declared the election of the returned candidate to the 15th Lok Sabha .... to be void."[161]

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156 *Id*. at 1095 (para 5), relying "heavily" on two decisions of the Supreme Court in *Union of India* v. *Association for Democratic Reforms*, (2002) 5 SCC 294: AIR 2002 SC 2112, and *People's Union for Civil Liberties* v. *Union of India* (2003) 4 SCC 399: AIR 2003 SC 2363.

157 *Id*. at 1095, 1096 (para 9), relying upon the three decisions of the Supreme Court in *Jabar Singh* v. *Genda Lal* (1964) 6 SCR 54: AIR 1964 SC 1200; *L.R. Shivaramagowda* v. *T.M. Chandrashekhar* (1999) 1 SCC 666: AIR 1999 SC 252; and *Uma Ballav Rath (Smt.)* v. *Maheshwar Mohanty (Smt.) and Others* (1999) 3 SCC 357: AIR 1999 SC 1322.

158 *Id*. at 1096 (para 10).

159 *Ibid*.

160 *Ibid*.

161 *Ibid*.

(e) "The impugned judgment of the High Court is gravely flawed and legally unsustainable," and as "a matter of law, the election petition filed by the election petitioner deserved dismissal at threshold [and] yet it went into the whole trial consuming Court's precious time and putting the returned candidate to unnecessary trouble and inconvenience."[162]

(f) Considering the election petition, it seems, 'frivolous' and 'vexatious', the Supreme Court has not only dismissed the election petition filed by the respondent, but "dismissed with costs" quantified at Rs. 1,00,000/- (Rupees one lakh).[163]

VIII ELECTION PAPERS INCLUDING THE RECORD OF REGISTER OF VOTERS' COUNTERFOILS (in FORM 17A): WHEN CAN AN ORDER FOR THEIR PRODUCTION AND INSPECTION BE MADE[164]

The specific provisions are contained in rule 93 of the Conduct of Elections Rules, 1961 (hereinafter simply the Rules of 1961) that provide for production and inspection of election papers. However, the list of election papers that cannot be opened or examined as a matter of course are specifically mentioned in clauses (a) to (e) of sub-rule (1) of rule 93 of the rules of 1961.These include the packets of unused ballot papers with counterfoils attached thereto; the packets of used ballot papers whether valid, tendered or rejected; the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152 of the Act of 1951; the packets containing registers of voters in Form 17A;[165] and the packets of the declarations by electors and the attestation of their signatures. All these papers while in the custody of the district officer or, as the case may be, the returning officer, "shall not be opened and their contents shall not be inspected by, or produced before, any person or authority *except under the order of a competent court*."[166]

All other papers relating to election shall be open to public inspection, and copies thereof shall on application be furnished, of course subject to such conditions and to the payment of such fee as the Election Commission may direct.[167]

The question is how and under what circumstances the court should order production and inspection of the election papers, particularly the register of voters

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162 *Ibid*.

163 *Id*. at 1096 (para 11).

164 See also, Virendra Kumar, "Secrecy of voting and purity of election," in, vol. XLV *ASIL* at 366-369 (2009); Virendra Kumar, "Election papers cannot be opened as a matter of course under rule 93(1)," in, vol. XLV *ASIL* at 369-372 (2009) and Virendra Kumar, "Recount of ballot papers," in Vol. XXXVII *ASIL* at 271-274 (2001).

165 The sub-rule of rule 93(1) of the rules of 1961, namely "the packets containing registers of voters in Form 17A," was added by notification dated 24.3.1992. Form 17A mentioned therein is related to rule 49(L) which is concerning the procedure about the voting by voting machines. Sub-rule (a)(a) of rule 49(L) requires the polling officer to record the electoral roll number of the elector as entered in the marked copy of the electoral roll in a register of voters which is maintained in form 17A.

166 Emphasis added.

167 See, sub-rule (2) of rule 93 of the Conduct of Elections Rules of 1961.

in form 17A? The Supreme Court has reviewed this question in *Markio Tado* v. *Takam Sorang* [168]

In this case, the appellant, Markio Tado, and the respondent no. 1, Takam Sorang, contested the election to the Arunchal Pradesh Legislative Assembly, wherein the appellant was declared elected, defeating his nearest rival respondent no. 1 by a margin of 2713 votes. The respondent No. 1 filed an election petition challenging the election of the appellant on the ground of corrupt practice of booth capturing. The appellant contested this petition by filing a written statement, denying the allegations of booth capturing and criminal intimidation at all.

The high court thereupon framed the necessary issues including whether Electronic voting Machines System (EVMS) were illegally removed, whether any election offence of booth capturing and criminal intimidation were committed, whether the election was liable to be declared void under Section 100 of the Act of 1951, and whether the respondent No. 1 was entitled to be declared duly elected.[169]

However, before the evidence could start, the respondent no. 1 filed interlocutory application, submitting that thousands of voters from the enumerated polling stations have "double entry" in different polling stations, and that according to his "knowledge" about 80% of the voters had cast their votes at polling stations in one particular constituency and not another. But in view of the counter submissions made by the appellant, the said application was rejected by the election judge.Thereafter, in the resumed proceedings, the evidence of the first respondent was recorded and he was cross-examined bringing out the various facets of evidence on record. While the process was still on, the first respondent moved another interlocutory application, which was allowed by the high court, directing the district returning officer to produce the record of register of voters' counterfoils in from 17A of 38 polling stations falling under a certain constituency of the state assembly. In its passing order, the high court, keeping in mind the two decisions of the apex court,[170] observed:[171]

> "This allegation [about impersonation] sounds to be new one, but when it is closely examined, it also comes under the purview of booth capturing because votes by impersonation is one of the modus operandi adopted towards accomplishment of securing votes by use of illegal method or illegal resource."

It is this order, which has become the subject of appeal before the Supreme Court.The Supreme Court has allowed the appeal and reversed the decision of the high court. The reversal-reasons of the apex court may be abstracted on the following

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168 AIR 2012 SC 993, per H.L. Gokhale, J. (for himself and Deepak Verma J)

169 *Id.* at 995 (para 5).

170 *Hari Ram* v. *Hira Singh*, AIR 1984 SC 396, laying down that electoral rolls and counterfoils should be called sparingly and only when sufficient material is placed before the Court; and *Fulena Singh* v. *Vijoy Kr. Sinha*, 2009 (5) SCC 290: AIR 2009 SC 2247, wherein it was held that inspection of register of voters in form 17A would be permissible where a clear case is made out. Cited in, id. at 997 (para 11).

171 *Id*. at 996-997 (para 10).

counts:

(a) The two grounds of 'booth capturing' and 'impersonation or double voting' "deal with two different aspects of corrupt practices."[172] Booth capturing is a corrupt practice covered under Section 123(8) and a ground to declare an election void under Section 100(1)(d). It is also made an offence under Section 135-A. The element of booth capturing involves "use of force or intimidation,"[173] whereas impersonation or double voting involves "cheating or deception,"[174] which amounts to 'improper reception of votes and which is a separate ground for declaring an election to be void under Section 100(1)(d)(iii) of the Act of 1951.

(b) In the election petition, since the grievance is only about booth capturing and not impersonation or double voting, the petitioner, therefore, cannot be allowed to lead any evidence on a plea not raised in the pleadings, and that no amount of evidence can cure the defect in the pleadings.[175]

(c) The statement of the first respondent that the appellant had appointed fake polling agents for him (the first respondent) "was a clear after thought." If it were so, the said respondent would have pleaded the same in the election petition itself.[176]

(d) Even with respect of impersonation, the only instance pointed out was that of one Markio Tama, but in this case also it was not stated in the petition or in evidence as to who voted in his place.[177]

(e) Besides, the ground of impersonation falling in the category of 'improper reception of votes', the election petitioner under Section 100(1)(d) is also required to show as to how the election insofar as it concerns the returned candidate was materially affected. Since the first respondent failed to show how the result of the appellant was affected, the second application could not have been entertained.[178]

(f) The High Court for its order had referred to two judgments of the Supreme Court – *Hari Ram* (supra) and *Fulena Singh* (supra), which hold that only "in rare case an order of production of such record concerning voters'

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172 *Id*. at 999 (para 18).

173 See Explanation to s. 135-A (which deals with the offence of booth capturing).

174 *Ibid.*

175 *Id.* at 998, 999 (paras 16, 17, and 18), citing *Hari Shanker Jain* v. *Sonia Gandhi*, 2001 (8) SCC 233: AIR 2001 SC 3689 (three-judge bench decision), and *Ravinder Singh* v. *Janmeja Singh*, 2000 (8) SCC 191: AIR 2000 SC 3026.

176 *Id*. at 999 (para 19). Even the evidence that has come on record showed that the fake polling agent plea was false because the first respondent received overwhelming votes in some polling stations, whereas the appellant received similarly overwhelming votes in other polling stations. *Ibid.*

177 *Ibid*.

178 *Id*. at 1000 (para 20). The first respondent's allegation was that there were some 1304 double entries of voters in two named polling stations. The votes received by the appellant in both these polling stations put together came to 1873, whereas the appellant won with a margin of 2713 votes. Thus, the first respondent could not make out a prima facie case to show that the result of the appellant was materially affected.

registers could be passed."[179] However, the High Court "made no attempt to apply the principles laid down in those cases to the facts of the present [case]."[180]

(g) The High Court did not bear in mind the following two conditions which are required to be fulfilled before an order would be justified in granting for inspection under Rule 93 of the Election Rules of 1961:[181] one, that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and two, the Tribunal is prima facie satisfied that in order to decided the dispute and to do complete justice between parties inspection of the ballot papers is necessary.

(h) Through a catena of judicial decisions, it is also very well established that "discretion conferred on the Court [under Rue 93 of the Election Rules, 1961] should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void."[182]

(i) The reliance by the High Court in the instant case on *Fulena Singh* (supra) was also "wholly erroneous", inasmuch as the Supreme Court has clearly held in that case that "inspection of election papers mentioned in detail in the entire Rule 93(1) is not a matter of course unless a clear case is made out."[183]

Keeping in view the propositions as abstracted above, the Supreme Court has clearly found that the order passed by the high court is "illegal and unsustainable," and therefore "required to be set aside."[184] Accordingly, by allowing the appeal, the judgment and order of the high court has been 'quashed and set aside' by the Supreme Court.[185]

IX DEATH OF INDEPENDENT CANDIDATE AFTER THE DATE OF WITHDRAWAL OF NOMINATION: WHETHER DISPLAY OF THE NAME OF DECEASED CANDATE AMOUNTS TO MATERIALLY AFFECTING THE RESULT OF RETURNED CANDIDATE[186]

The law providing for the consequence of the death of a candidate duly nominated after the scrutiny of nomination form has gone through at least two significant changes since its inception. Initially section 52 of the Act, in its original

179 *Id*. at 1000 (para 21).

180 *Ibid*.

181 *Id*. at 1001 (para 23), citing the decision of the Constitution Bench in *Ram Sewak* v. *H.K. Kidwai*, AIR 1964 SC 1249.

182 *Ibid*., citing *Bhabhi* v. *Sheo Govind*, AIR 1975 SC 2117.

183 *Id.* at 1001 (para 24).

184 *Id*. at 1001 (para 25).

185 *Id*. at 1001-1002 (para 26).

186 Virendra Kumar, "Withdrawn candidate committing corrupt practice" in. Vol. XXXVI *ASIL* at 240-242 (2001).

form provided that in case a candidate who had been nominated under the said Act died after the date fixed for the scrutiny of nominations and a report of his death was received by the returning officer before the commencement of the poll, he shall "countermand the poll" and "all proceedings with reference to the election shall be commenced a new in all respects as if for a new election."[187]

However, a significant departure was made from this original stance by the Amending Act 2 of 1992 which substituted new section 52 in place of the old one. The amendment was in two respects: one, the consequence of countermand of the poll was confined only to the case of death of a candidate "set up by recognized political party;"[188] two, the countermand of the poll was provided in three situations set out in three clauses of substituted section 52 of the Act of 1951, namely, where (a) a candidate dies at any time after 11 a.m. on the last date of making nominations and his nomination is found valid on scrutiny under section 36; (b) a candidate whose nomination has been found valid on scrutiny under section 36 and who has not withdrawn his candidature under section 37, and dies; and (c) a candidate dies as contesting candidate before the commencement of the poll.[189]

The substituted section 52 which was brought in the Act of 1951 by the Amending Act 2 of 1992 was further substituted by the Amending Act 21 of 1996, which, indeed, represents the existing law. The crucial change brought in by the 1996 amendment is that the death of a candidate of a recognized political party before the poll in three situations set out in clauses (a), (b) and (c) of sub-section (1) results in adjournment of the poll to a date to be notified later and not countermand the poll as was envisaged earlier prior to 1996.[190] Proviso that follows sub-section (1) of Section 52 provides that no order for adjourning poll shall be made in a case if a candidate set up by a recognized political dies after 11.00 a.m. on the last date for making nomination and his nomination is found valid on scrutiny under section

187 S. 52 of the Act of 1951 (in its original form). However, to this provision were appended two provisos: "Provided that no further nomination shall be necessary in case of a candidate whose nomination was valid at the time of the countermanding of the poll; Provided further that no person who has under sub-section (1) of Section 37 given a notice of withdrawal of his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding."

188 The explanation appended to substituted s. 52 of the Act of 1951 stipulates that for the purpose of this section, 'recognized political party' means a political party recognized by the Election Commission under the Election Symbols (Reservation and Allotment) Order. 1968.

189 The three clauses appended to the substituted s.52 of the Act of 1951 are accompanied by three provisos: one, "Provided that no order for countermanding a poll should be made in a case referred to in clause (a) except after the scrutiny of all the nominations including the nomination of the deceased candidate;" two, "Provided further that no further nomination shall be necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll;" three, "Provided also that no person who has given a notice of withdrawal of his candidature under sub-section (1) of Section 37 before the countermanding of the poll shall be ineligible as a candidate for the election after such countermanding."

190 S. 52 of the Act of 1951 after the amendment of 1996 carries three ss.: ss. (1) and ss. (2) are followed by one proviso, whereas ss. (3) is followed by an explanation.

36 except after the scrutiny of all the nominations including the nomination of the deceased candidate. Sub-section (2) of section 52 provides that the Election Commission shall on receipt of the report of the returning officer call upon the recognized political party to nominate another candidate in place of the deceased candidate for the said poll within seven days of issue of such notice.[191] According to sub-section (3), in a situation where list of contesting candidates had been published under section 38 before the adjournment of the poll under sub-section (1), the returning officer shall again prepare and publish afresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under sub-section (2). Thus, section 52 of the Act of 1951, as it stands now, takes care of the situation in case of death of a candidate of recognized political party before poll.

In view of this scenario, a question has arisen before the Supreme Court in *Jitu Patnaik* v. *Sanatan Mohakud*[192] whether non-cognizance of the death of an independent candidate after publication of the list of contesting candidates under section 38 by the returning officer amounts to furnishing a cause of action for declaring the election of the returned candidate to be void under section 100(1) (iv) of the Act of 1951.

In *Jitu Patnaik*, in a multi-corner contest to a state legislative assembly elections, it so happened that one of the independent candidates died after the date of withdraw but before the date of polling. The returning officer was duly informed about his death, but nevertheless his name continued to appear in the list of contesting candidates and was included in Electronic Voting Machine (EVM). The appellant, Jitu Patnaik, who contested as an independent candidate, was declared elected having secured 27700 votes, 145 votes more than the first respondent, Sanatan Mohakud, a candidate of Indian National Congress, who secured 27555 votes. The deceased independent candidate got 550 votes.

The first respondent challenged the election of the appellant by filing an election petition before the high court setting out the case in several paragraphs for declaring the election of the returned candidate to be void and declare the election petitioner duly elected. His singular contention was that had the name of the deceased candidate not appeared in EVM, all the 550 votes would have been polled in his favour.[193] The appellant filed his written statement/reply traversing the pleadings set out in the election petition and also made an application by invoking several provisions of law[194] with a prayer to strike out/reject the pleadings made in several paragraphs. The high court after considering the application made by the returned candidate, struck out several paragraphs excepting two by invoking its jurisdiction under order

191 S. 30 to 37 of the Act of 1951 shall apply in relation to such nomination as far as applicable.

192 AIR 2012 SC 913, per R.M. Lodha J. (for himself and H.L. Gokhale, J.). Hereinafter simply, *Jitu Patnaik.*

193 The deceased candidate was, like the appellant, a member of the Indian National Congress, who stood for election as an independent candidate because he was denied to be the official candidate of the party.

194 The application was made under order VI, rule 16 of the CPC read with s. 86(1) of the Act of 1951.

VI, rule 16(c) of CPC and ordered that the election petition shall proceed in respect of the pleadings named in two paragraphs. Aggrieved by the said order of the high court, the appellant has come to the Supreme Court by contending that the said two paragraphs "do not set out the material facts to constitute cause of action under Section 100(1)(d)(iii) and/or (iv) of the 1951 Act."[195]

The Supreme Court allowed the appeal by reversing the decision of the high court. The reasons for reversal may be abstracted as follows:

(a) The Act of 1951 is "complete and self-contained code within which the rights claimed in relation to an election or election dispute must be found."[196]
(b) Section 52, after it substitution by Act 21 of 1996, deals with the situation of a death of candidate of a recognized political party before poll, and not with the any other category of candidates including the independent ones.[197]
(c) Accordingly, the returning officer was obliged to take note of the death of a candidate only of a recognized political party before the poll, and not that of death of an independent candidate once the nomination had been filed by him and on scrutiny his candidature was found proper and before the expiry of the period of withdrawal, he had not withdrawn his candidature and his name was included in the list of validly nominated candidates prepared under Section 38 of the Act of 1951.
(d) Even the instructions in the Handbook, including the one that requires the returning officer that on ballot unit only those contesting candidates' buttons should be visible which are to be used by the voters and remaining buttons should be masked [Paragraph 8.1 of the instructions in the *Handbook*][198] do not apply at least for two reasons: one, the expression, 'contesting candidates' in the said paragraph has to be given the same meaning as it is defined under Section 38 of the Act of 1951, implying thereby "the number of candidates' buttons which should be visible on EVM should be equal to the number of candidates as published in the list of validly nominated candidates who have not withdrawn the candidature within the period prescribed and whose nominations are included in the list published under Section 38;"[199] two, the instructions in the guidelines have "no statutory force."[200]

195 See, *Jitu Patnaik* at 916 (para 9).

196 *Id*. at 919 (para 19), citing N.*P. Ponnuswami* v. *The Returning Officer, Namakkal Constituency, Salem Dist.*, AIR 1952 SC 64; *Jagan Nath* v. *Jaswant Singh*, AIR 1954 SC 210; *Jyoti Basu* v. *Debi Ghosal*, (1982) 1 SCC 691: AIR 1982 SC 983; *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi*, 1987 (Supp) SCC 93: AIR 1987 SC 1577; and *Chandra Kishore Jha* v. *Mahavir Prasad*, (1999) 8 SCC 266: AIR 1999 SC 3558.

197 S. 38 of the Act of 1951 classifies all the candidates into three broad categories: candidates of the recognized political parties, candidates of registered political parties other than the candidates of recognized political parties, and other candidates, which include independent candidates.

198 Cited in *Jitu Patnaik* at 922 (para 25).

199 *Ibid*.

200 *Ibid.*, citing *Ramesh Rout* v. *Rabindra Nath Rout*, 2012 (1) SCC 762: AIR 2012 SC 329: ".... The Handbook does not have statutory character and is in the nature of guidance to the Returning Officer."

(e) Since there is no rule of universal application which can applied in finding out whether the averments in the election petition constitute material facts or not,[201] it is necessary to consider the burden of the following undernoted central pleading in the instant case with regard to the suppression of 319 votes."[202] In the considered view of the apex court, the analysis of the undernoted pleadings reveals that the petitioner has failed to establish 'material facts' about the 'deliberate suppression of 319 votes' for the following reasons:

(i) There is no averments that the election petitioner or any of his polling agents had perused the register of voters maintained in Form 17-A.[203]

(ii) In fact, the basis of the knowledge that the register of voters maintained in Form 17-A records that 1091 voters came to vote is not disclosed at all.[204]

(iii) Moreover, there is no pleading that 1091 voters who came to vote at Booth No. 179 in fact voted.[205]

(iv) Nor there is averment that in Form 17-C, certified copy, it has been deliberately shown as 772 making a deliberate suppression of 319 votes.[206]

(v) Besides, the plea of suppression is also incomplete as it does not disclose who suppressed 319 votes; who was the counting agent present on behalf of the election petitioner at the time of counting; how 319 votes were suppressed and why recounting was not demanded.[207]

(v) On the top of it, there is no express pleading as to how the result of the election has been materially affected by less counting of 319 votes.[208]

Since the omission of even a single material fact leads to an incomplete cause of action,[209] the Supreme Court has no difficulty in holding in the averments made in instant case "do not set out all the material facts and do not afford an adequate

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201 *Id.* at 924 (para 34), citing *Virender Nath Gautam* v. *Satpal Singh and others*, 2007 (3) SCC 617: AIR 2007 SC 581, relying on the leading case of *Philipps* v. *Philipps* , (1878) 4 QBS 127.

202 The pleadings set out in para7(D) of the election petition, inter alia, show the following facts to be taken as 'material facts': "On the date of polling, on a plain perusal of register of voters maintained in Form 17-A, it will be abundantly clear that the total number of voters came to vote and signed 17-A register is 1091; whereas in From 17-C, it has been deliberately shown as 772 making a deliberate suppression of 319 votes." *Id*. at 924 (para 35).

203 *Id*. at 924 (para 37).

204 *Ibid*. Under cl. (dd) of rule 93(1) of the rules of 1961 it is specifically provided that the packets containing register of voters in form 17-A, while in the custody of the district election officer or the returning officer, as the case may be, shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court.

205 *Ibid.*

206 *Id.* at 924 (para 38).

207 *Id. a*t 925 (para 39).

208 *Ibid.*

209 See, *id.* at 925 (para 40), citing *Samant N. Balkrishna* v. *George Fernandez*, 1969 (3) SCC 238: AIR 1969 SC 1201.

basis for the allegations made therein."[210] Accordingly, the court has found that nothing remains in the election petition for trial, obliging it to allow the appeal by reversing the decision of the high court.[211]

X PLEA OF NON-FILING OF DULY SIGNED FORMS IN ORIGINAL SEEKING NOMINATION OF RECOGNIZED POLITICAL PARTY: WHETHER ITS REJECTION BY RETURNING OFFICER WITHOUT GIVING OPPORTUNITY TO REBUT IS ILLEGAL[212]

Election Symbols (Reservation and Allotment) Order, 1968 (as amended)[213] passed by the Election Commission of India in exercise of the powers conferred on it by article 324 of the Constitution read with 29A of the Act of 1951 and rules 5 and 10 of the Conduct of Election Rules, 1961, inter alia, provides for when a candidate shall be deemed to be set up by a political party. *Vide* para 13, it stipulates:[214]

For the purpose of an election from any Parliamentary or assembly constituency to which this order applies, a candidate shall be deemed to be set up by a political party in such Parliamentary or assembly constituency, if, and only if –

(a) The candidate has made the prescribed declaration to this effect in his nomination paper;
(aa) the candidate is a member of that political party and his name is borne on the rolls of members of the party;
(b) a notice by the political party in writing in Form B, to that effect has, not later than 3 p.m. on the last date for making nomination, been delivered to the Returning Officer of the constituency;
(c) the notice in Form B is signed by the President, the Secretary or any other office-bearer of the party, and the President, Secretary or such other office-bearer sending the notice has been authorised by the party to send such notice;
(d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the constituency and to the Chief Election Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and
(e) Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party:

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210 *Id*. at 925 (para 42).
211 *Id*. at 925 (paras 43 and 44).
212 See also, Virendra Kumar, "Exercise of discretion under s. 36(5) of the Act of 1951," in Vol. XXXV *ASIL* at 264-266 (1999), and Virendra Kumar, "Role of returning officer," in, Vol. XXIV *ASIL* at 262-266 (1988).
213 See Notification No. 56/2000/Judl. III, dated 1st Dec.2000. Hereinafter simply cited as, Symbols Order of 1968.
214 Emphasis supplied.

> Provided that no facsimile signature or signature by means of rubber stamp, etc. or any such office-bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted.

In pursuance of this order, a question has come before the Supreme Court in *Ramesh Rout* v. *Rabindra Nath Rout*,[215] whether non-filing of original forms A and B duly signed in ink by an authorised person of the concerned political party along with the first set of nomination paper without giving him the opportunity of rebut the same constitutes a defect of 'substantial character', resulting into its instant rejection by the returning officer at the time of scrutiny of the nomination papers.

In *Ramesh Rout*, the appellant is the returned candidate in the state legislative assembly elections. His election was challenged by the respondent on the ground that at the time of scrutiny of nomination papers, the returning officer had rejected his nomination papers because he had held that the respondent did not file in original along with his first set of nomination paper forms A and B, duly signed in ink by the authorized officer of his political party. The respondent's contention was that he did file in original the requisite forms duly signed and, therefore, the rejection was improper and that ipso facto resulted into declaring election of the appellant null and void. The appellant naturally resisted the election petition by filing his written statement. On the respective pleadings of the parties, examining all the original documents pertaining to the scrutiny of nomination papers called at the time of hearing the parties, the high court set aside the election of the appellant, inasmuch as in its view the respondent's nomination paper was improperly rejected by the returning officer. In appeal, the Supreme Court upheld the judgment of the high court and thereby dismissed the appeal.

On fact matrix, the decision on the election petition essentially revolved around the finding whether or not the respondent did file the requisite Forms duly filled in at the appropriate time, nevertheless, while upholding the finding of the high court the apex court has clarified/amplified certain issues/areas that are germane to the proper conduct of elections. In this respect, we may abstract the following:

(a) Role of the Returning Officer

i. The Returning Officer plays a critical role in "election management"[216] and for this he is required to comprehend fully the guidelines laid down for him by the Election Commission of India in the *Handbook for Returning Officers*.[217] It instantly equips him "with up-to-date rules and procedures prescribed for the conduct of elections and to ensure that there is no scope for complaint of partiality on the part of any official involved in the election management.[218] For instance,

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215 AIR 2012 SC 329, per R.M. Lodha, J. (for himself and Jagdish Singh Khehar J). Hereinafter simply *Ramesh Rout*.

216 *Id*. at 332 (para 15).

217 Hereinafter simply, the *Handbook.*

218 *Ibid*.

ii. The Returning Officer must learn to appreciate the value of the 'check list' of documents issued to every candidate filing nomination papers.[219] It serves a dual purpose of acknowledging the receipt of the documents submitted as well as of notices as directed in the Handbook.[220] If any of the documents has not been filed, the returning officer is required to clearly state at the bottom of the checklist, indicating the time limit by which such document(s) can be submitted. The Returning Officer is obliged to maintain in duplicate the checklist of the documents/requirements filed by the candidates. The checklist (marked original) is handed over to the candidate who files nomination paper, while checklist (marked copy) is retained by the Returning Officer.

iii. Para 2 of Chapter VI of the *Handbook,* dealing with the scrutiny of nominations by the Returning Officer, emphasises that scrutiny of nomination papers is an important "quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards."[221]

iv. Para 7 provides for presumption of validity of every nomination paper unless the contrary is *prima facie* obvious or has been made out.[222] In case of a reasonable doubt, as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to valid.[223]

v. Para 7 also seeks to remind the Returning Officer that whenever a candidate's nomination paper is improperly rejected and thereby he is prevented from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper rejection and the election is liable to be set aside.[224]

(b) Whether it is mandatory for a candidate set up by a recognized political party to file original ink signed Forms A and B appended to Para 13 of Symbols Order of 1968.[225]

This question emanates from the stipulations made in para 13 of the Symbols Order of 1968 that tells us when a candidate is considered to have been set up by a political party.[226] The Supreme Court has answered this question in the affirmative through their purposive interpretation of that Para, which simply reinforced the view taken earlier by the apex court in *Krishna Mohini (Ms.)* v. *Mohinder Nath*

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219 The provision of 'check list' has been introduced for the first time by the Election Commission through its notification, dated February 10, 2009, for streamlining the process of submission of all the requisite documents.

220 See *Ramesh Rout* at 332 (para 16).

221 *Id.* at 334-35 (para 24)

222 *Id.* at 335 (para 24).

223 *Ibid.*

224 *Ibid*.

225 *Id.* at 336 (para 28).

226 See *supra* note 214 and the accompanying text.

Sofat.[227] For purposive interpretation, the Supreme Court has directed their attention on clause (e) of para 13: "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the part."A bare perusal of this clause shows that though the Parliament has not used the expression that Forms A and B 'shall be signed,' but the use of the word "only" is of "significance," which "cannot be ignored."[228] On this count, the Supreme Court has held:[229]

> In ascertaining the meaning of the word 'only', its placement is material and so also the context in which the word has been used. The use of the word 'only' in clause (e), Para 13, 1968 Order, emphasises that Forms A and B are to be signed in ink by the recognized party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognized political party. In our view, therefore, the word 'only' used in clause (e) of Para 13 is indicative of the mandatory character of that provision."

(c) Whether the high court erred in framing the critical issue at the time of decision of the election petitions, namely, whether the election petitioner filed the original forms A and B, duly signed in ink by the authorised person with the first set of his nomination and whether the finding recorded by the high court on that issue suffers from any illegality.[230]

Initially, on the pleadings of the parties the high court framed four plus one issues for consideration.[231] Somehow or the other, the critical question necessary for its decision emerged later when the election petitioner vehemently asserted that he had filed original Forms A and B, duly signed in ink before the Returning Officer at the time of presentation of nomination papers and check list was issued acknowledging receipt of those forms, and the returned candidate disputed that assertion.[232] Moreover, the evidence of the Returning Officer, who was examined as court witness No. 1, and his cross-examination on behalf of the election-petitioner as well as the returned candidate also indicated that the factual controversy in the election petition centered around on the filing of the original Forms A and B duly signed in ink by the authorised person of the political party with the first set of his

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227 (2000) 1 SCC 145: AIR 2000 SC 317. In this case the Supreme Court has held that in order to be a candidate set up by a registered and recognized political party so as to take advantage of being proposed by a single elector, all the four requirements set out in clauses (a), (b), (c) and (d) of para 13 of 1968 Order must be satisfied. That is, if any one or more of the requirements are not satisfied, the benefit of nomination being proposed by a single elector is not available to him. Cited in *Ramesh Rout* at 338 (para 32).

228 *Ramesh Rout* at 338 (para 33)

229 *Id*. at 338-39 (para 36).

230 *Id.* at 339 (para 39).

231 See, *id.* at 331 (para 9).

232 *Id*. at 339 (para 40).

nomination.[233] It is this scenario that prompted the high court to frame the said issue at the time of final decision. The Supreme Court has set at rest the concern of the appellant on this count by observing:[234]

> ... It follows that by framing issue No. 6 at the time of final decision of the election petitions, no prejudice has been caused to the returned candidate. As a matter of fact, n ground of prejudice has been raised in the appeals nor such arguments was advanced before us by ... the returned candidate.We, accordingly, hold that the High Court did not commit any error in framing issue No. 6 which was quite vital and material for decision in the election petitions. We further hold that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions.

In upholding the judgment of the high court whereby the election of the returned candidate was declared null and void on ground of improper rejection of the nomination of the respondent in the instant case the basic flaw that emerges relates to the deficient role played by the Returning Officer. The objection of non-filing of original Forms A and B signed in ink by the authorised officer of the concerned political party was raised not by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny; it was raised by the Returning Officer himself. He clinched the issue in hot haste by rejecting the nomination paper even by refusing minimum opportunity to the election petitioner to rebut the same, which, indeed, was his statutory right in terms of proviso to Section 36(5) of the Act of 1951.[235] It is true that the use of the expression, "not later than the next day but one following the date fixed for scrutiny," in the proviso to Section 36(5) of the Act of 1951 "unmistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper," but "such a discretion has to be fairly and judicially exercised".[236]

Thus, in the facts and circumstances of the present case, the Supreme Court has held that "the Returning Officer erred in acting in hot haste in rejecting the nomination paper of the proposed candidate (the respondent) and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate".[237] The election petitioner, accordingly,

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233 *Ibid*. The returning officer in his deposition has not specifically denied that form a and form B in original duly signed in ink by the authorised officer of the recognized political party were not filed by the election petitioner. See, *id.* at 340 (para 43).

234 *Ibid.*

235 *Id*. at 347 (para 63). The proviso that follows ss. (5) of s. 36 of the Act of 1951 provides that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

236 *Id*. at 347-48 (para 65), citing *Rakesh Kummar* v. *Sunil Kumar* (1999) 2 SCC 489: AIR 1999 SC 935.

237 *Id*. at 348 (para 66).

has succeeded in proving the improper rejection of his nomination paper, and, thereby, establishing the ground for setting aside the appellant's election to the state legislative assembly under section 100(1)(c) of the Act of 1951.[238] This has led the Supreme Court to dismiss the appeal because they see "no ground to interfere with the impugned judgment" of the Orissa High Court.[239]

XI ELECTED DIRECTOR OF STATE CORPORATION: WHETHER HOLDING AN OFFICE OF PROFIT WITHIN THE AMBIT OF SECTION 10 OF THE ACT OF 1951 READ WITH ARTICLE 102(1) (a) OF THE CONSTITUTION[240]

Disqualifications for membership of either house of Parliament have been provided under article 102 of the Constitution. One of such disqualifications under sub-clause (a) of clause (1) of article 102 specifically provides: "A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he hold any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder."[241] In consonance with this constitutional perspective, section 10 of the Act, 1951 lays down that a person "shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share."

In view of this constitutional and statutory framework of disqualification, an issue has come before the Supreme Court in *Gajanan Samadhan Lande* v. *Sanjay Shyamrao Dhotre*,[242] whether an elected director of a state corporation is holding an office of profit under the state government and thereby disqualified to be a member of the Parliament. In this case, the respondent contested the 15th Lok Sabha elections from a parliamentary constituency in the State of Maharashtra, and was declared elected. The appellant, a voter, challenged the election of the respondent through an election petition before the high court alleging that the returned candidate was disqualified to contest the said election as he was holding an office of profit under the Government being a Director of the Maharashtra Seeds Corporation.

238 *Ibid.*

239 *Id*. at 348 (pars 67-68)

240 See also, Virendra Kumar, "Village Lambardar: whether he holds an 'office of profit'," in XLVII *ASIL* 411-417 (2011); Virendra Kumar, "Holding an office of profit under the government," in XXXIII *ASIL* at 303-308 (1997-98); Virendra Kumar, "Contract for sale of liquor with State Government – whether disqualification," in, XXXV *ASIL* at 266-268 (1999); Virendra Kumar, "Holding an office of profit under the government," in, XXXVII *ASIL* at 253-258 (2001); Virendra Kumar, "Contract for execution of works between returned candidate and Government," in, Vol. XXXVIII *ASIL* 271 (2002).

241 For similar disqualification for being a member of the State Legislative Assembly, see art. 191 of the Constitution.

242 AIR 2012 SC 486, R.M. Lodha, J. (for himself and H.L. Gokhale, J.). Hereinfter simply, *Gajanan.*

The high court on consideration of the evidence on record and on hearing the counsel for the parties, held that the returned candidate was not disqualified to be a member of Parliament either under article 102(1)(a) of the Constitution or under Section 10 of the Act of 1951.[243]

On appeal, the Supreme Court has upheld the judgment of the high court and dismissed the appeal. However, from a very brief judgment of the Supreme Court, the following principal reasons may be culled:

(a)The Maharashtra Seeds Corporation is indeed a 'Government company' within the ambit of Section 10 of the Act of 1951, because the Government of Maharashtra "admittedly has more than 25 per cent share in the Corporation."[244]

(b)However, the returned candidate is not the holder of any office of profit either under the Government of India, or the Government of Maharashtra, because–

(i) He (the returned candidate) was holding "an elected office and not an office by appointment."[245]

(ii) "The Government had nothing to do in the election of Director from the Growers constituency."[246]

(iii) Directorship of the Corporation, "being an elected office, the Government has no power to remove the returned candidate from that office," showing clearly "that the returned candidate does not hold an office much less an 'office of profit' under the Government."[247]

(iv) "As an elected Director, the amount paid to the returned candidate by way of allowances, by no stretch of imagination, can be said to be 'remuneration' in the form of pay or commission."[248] "It is only a sort of reimbursement of the expenses incurred by the returned candidate."[249]

Bearing in mind "the peculiar features of an elected office of Director in the Corporation," which "do not bring such office within the meaning of 'office of profit'," the Supreme Court has dismissed the appeal by affirming the judgment of the Bombay High Court, Nagpur Branch, Nagpur.[250]

XII CONCLUSION

In the light of the foregoing analysis, we are prompted to project the following conclusion-statements that might enable us to strengthen the practice-procedure and the underlying principles of electoral system.

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243 *Id.* at 488 (para 6).

244 *Id.* at 489 (para 10).

245 *Id*. at 489 (para 13).

246 *Ibid.*

247 *Ibid*. See also, *Pradyut Bordoloi* v. *Swapan Roy*, AIR 2001 SC 296, in which the Supreme Court has laid down that in order to bring a person within the ambit of s. 10 of the Act of 1951, the first and foremost thing that the election petitioner is required to show is whether the government has appointed the returned candidate and has power to remove him from the office and if the election petitioner has not been able to show that, nothing further is required to be seen. See, *id*. at 488 (para 8).

248 *Id.* at 489 (para 14).

249 *Ibid*.

250 *Id*. at 489 (paras 15, 16 and 17).

A. Challenging election of the returned candidate in the high court through an election petition is indeed a statutory right, and so is the statutory right to first appeal in the Supreme Court against the judgment of the high court. Nevertheless, much of the precious time of the courts of record is often consumed in dealing with either 'frivolous litigation' directed to delay the eventual outcome of judicial determination, or quagmire of case law of high precedent value cited copiously by the opposing counsels. In this predicament, to preserve courts' time for further development of election law, we may follow at least a three-fold strategy: one, by discouraging frivolous litigation through the imposition of heavy costs or otherwise;[251] two, by resolution of conflict problems on the basis of first principles in the first instance and invoking the authority of precedents only when it is warranted by the so-called legislative lacunae;[252] and three, by assisting the courts through publication of review articles critically examining the ambit of such judicial decisions as lay down propositions of wide import, providing coverage of certain crucial grey areas, under the aegis of premier research institutes like the Indian Law Institute or the Law Commission of India.[253]

B. The connotation of the expression whether or not a 'defect' in the filing of nomination paper if of 'a substantial character,' in the construction of the provision contained Section 36(4) of the Act of 1951,[254] is to be gathered

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251 In *Ponnala Lakshmaiah*, the returned candidate insisted upon resisting the election petition against himself solely on the plea that the affidavit filed by the petitioner is not in a given format. The Supreme Court disallowed such a plea by observing: "A petition that raises triable issues need not, therefore, be dismissed simply because the affidavit filed by the petitioner is not in a given format no matter the deficiency in the format has not caused any prejudice to the successful candidate and can be cured by the election petitioner by filing a proper affidavit." Since the Court, seemingly, deciphered a tendency on the part of the appellant to have resort to frivolous litigation notwithstanding the clear findings of the high court, they dismissed the appeal with costs assessed at Rs. 25,000. For analysis, see part IV, supra. See also part V, supra, in which the Supreme Court in *Mangani Lal Mandal*, seemingly considering the election petition filed by the respondent as 'frivolous' and 'vexatious' not only dismissed it, but "dismissed with costs" quantified at Rs. 1,00,000/- (Rupees one lakh). See also, Virendra Kumar, "Frivolous election petitions: A matter of judicial concern," in, XXXIX *ASIL* at 288-290 (2003).

252 See the approach of the Supreme Court in *P.A. Mohammad Riyas, supra* note 14 and the accompanying text, *supra* part I.

253 For instance, the principle of 'curable defect' adverted in the series of such judicial decisions of the apex court as *Muraka Radhey Shyam Ram Kumar* v. *Roop Singh Rathore,* AIR 1964 SC 1545; *F.A. Sapa* v. *Singora,* AIR 1991 SC 1557; *Sardar Harcharan Singh Barar* v. *Sukh Darshan Singh*, AIR 2005 SC 22; *K.K. Ramachandran Master* v. *M.V. Sreyamakumar*, [(2010) 7 SCC 428: 2010 AIR SCW 4583. *Id*. at 1786 (para 8), which is relied upon for drawing two opposite conclusions, needs re-statement for bringing certainty. For analysis how this issue has arisen in *P.A. Mohammad Riyas, see* part I, *supra*

254 S. 36(4) of the Act of 1961 provides: "The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character."

not from 'the form of the nomination papers', but from the fact whether or not there is 'a substantial compliance of the requirement as to form.'[255] Every departure from the prescribed format for nomination cannot, therefore, be made a ground for rejection of the nomination papers.[256]

C. The analysis of the sharply divided opinion of the Three-Judge Bench decision of the Supreme Court in *Desiya Murpokku Dravida Kazhagam (*DMDK) amply shows that denial of common symbol to a 'de-recognized' political party for its candidates, impinging upon citizens' constitutional fundamental rights, warrants the attention of the Law Commission of India to take up the issue as a part of electoral reforms on priority basis.[257]

D. The prescription of the Supreme Court in *Chaugule,* reversing the decision of the high court regarding the issue, who can substitute the original petitioner on withdrawal of election petition, is rightly based upon the jurisprudential distinction between action in *personam* and action *in rem*.[258]Under the provision of Section 110(3)(c) , which stipulates that "a person" "who might himself have been a petitioner," is entitled to be substituted, means that he is required to show that his case falls within the ambit of action *in personam*.[259]

E. An election of the returned candidate cannot be declared void solely on grounds of non-compliance with statutory provisions without proving that the result of that election has been materially affected. According to the Supreme Court in *Mangani Lal Mandal,* this is the principle that emerges from the conjoint reading of the provisions of Section 100 (grounds for declaring an election void) with those of Section 83 (contents of election petition) of the Act of 1951, and this is the principle which was ignored by the high court in its decision-making.[260]

F. An order for production and inspection of election papers including the record of register of voters' counterfoils (in form 17-A) under Rule 93 of the Election Rules, 1961 should not be made "as a matter of course" "so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void."[261] Stated positively, such

255 See analysis of *Shambhu Prasad Sharma* in part II, *supra.*

256 *Ibid.*

257 See part IV, *supra.*

258 See part V, *supra.*

259 In the opinion of the Supreme Court the high court had "misconstrued the provisions of s. 110(3) (c) of the 1951 Act in applying the conditions literally, without even satisfying itself that the order fits in the facts of the case." See, *ibid.*

260 See *supra* note part VI,. The Supreme Court, deprecating the tendency of the high court to read the provision disjointedly, *inter alia*, observed: "The impugned judgment of the High Court is gravely flawed and legally unsustainable," and as "a matter of law, the election petition filed by the election petitioner deserved dismissal at threshold [and] yet it went into the whole trial consuming Court's precious time and putting the returned candidate to unnecessary trouble and inconvenience," *ibid*.

261 See *supra* note part VII.

an order should be made "only where a clear case is made out.[262]

G. The display of the name of independent candidate who died after the date of withdrawal of nomination, *ipso facto*, does not amount to materially affecting the result of returned candidate; the latter fact is required to the expressly pleaded and proved by the election petitioner showing how the result of the election has been materially affected by the alleged lapse on the part of the returning officer.[263]

H. In our electoral system, the returning officer in the matter of scrutiny of nominations for determining their validity has been vested with vast discretion, but "such discretion has to be fairly and judicially exercised."[264] Accordingly, rejection of nomination paper of an election candidate by the returning officer simply on the plea of non-filing of duly signed forms in original, seeking nomination of recognized political party, without giving him the opportunity to rebut is totally unwarranted and, therefore, illegal.[265]

I. The office held by an elected director of a state corporation does not amount to 'holding an office of profit' within the ambit of section 10 of the act of 1951 read with article 102(1) (a) of the constitution in such a corporation, and, therefore, he is not debarred to be a member of parliament or the state legislative assembly.[266] This is so, because in the case of directorship of the corporation in question, "being an elected office, the Government has no power to remove the returned candidate from that office;" nor the allowances paid to him by any stretch of imagination, can be said to be 'remuneration' in the form of pay or commission; it is only a sort of reimbursement of the expenses incurred by him.[267]

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262 *Ibid.* Bearing this principle in mind, the Supreme Court in *Markio Tado* held that the order passed by the high court, allowing inspection of election papers, is "illegal and unsustainable," and therefore "required to be set aside."

263 See *supra* note part VII. In *Jitu Patnaik,* since the High Court in its decision-making failed to notice that the omission of even a single material fact leads to an incomplete cause of action, the Supreme Court allowed the appeal by reversing its decision.

264 See *supra* note part IX.

265 *Ibid.* In *Ramesh Rout*, the Supreme Court, by upholding the judgment of the Orissa High Court, held that "the Returning Officer erred in acting in hot haste in rejecting the nomination paper of the proposed candidate (the respondent) and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate." *Ibid.*

266 See part X.

267 *Ibid*. Bearing these indices in mind, the Supreme Court in *Gajanan Samadhan Lande* clearly and categorically held that the elected office of Director in the Corporation, does not bring the returned candidate within the meaning of 'office of profit'," and, thus, dismissed the appeal by affirming the judgment of the Bombay High Court, Nagpur Branch, Nagpur.