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ELECTION LAW

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I INTRODUCTION

IN THE PRESENT survey the singular focus of our critical analysis is chiefly on four issues impinging upon the electoral law that have come up for consideration before the Supreme Court in cases reported in the All India Reporter (AIR) during the year 2017. The first issue that we have taken up relates to whether invocation of religion by the election candidate is per se prohibitive under the Representation of the People Act, 1951.[1] This is perhaps one of the most critical issues that has emerged before the 7-Judge Constitution Bench of the Supreme Court in *Abhiram Singh case* (2017) on the interpretation of section 123(3) of the Representation of Act of 1951, which, inter alia, prohibits an election candidate to appeal to the voter on ground of "his religion".[2] The short question to be decided was, whether the pronoun "his" refers to the 'religion' of the election candidate or does it include the religion of the voter as well.[3] Three Justices took the restricted view on the basis of literal interpretation and past precedents; whereas the other four Justices preferred the broader view on the basis of purposive interpretation. In our analysis of the deeply divided opinions of the Supreme Court we have attempted to explore whether it is possible to make the two divergent views converge.[4]

The second issue for our critical review relates to the lingering problem, whether encroachment upon public property by a family member of the original encroacher can be disqualified under the Panchayat election law, which, *inter alia*, stipulates that no person shall be a member of a Panchayat, or continue as such, who has encroached

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1 See, Part II, *infra*.

2 *Ibid*.

3 *Ibid*.

4 *Ibid*.

upon the Government land or public property.[5] On this count before the Supreme Court in *Sagar Pandurang Dhundare* case (2017) there were two diagonally opposite views: one, that the prohibition to be a member of a Panchayat comes into vogue only if encroachment upon the Government land or public property is directly by the person who is or a prospective member of a Panchayat and not by any third party; the other opposite view is that the disqualification on grounds encroachment includes encroachment, not only directly by the person who is or aspiring to be a member of the elected body but also, by the legal heirs of such person, who has encroached and continues to occupy the government land.[6] We have explored how the Supreme Court has resolved this conflict of opinion keeping in view the basic requisites of election law and how far the court can stretch its interpretative process in their decision-making.[7]

What should be the ambit of enquiry by the designated Election Court for determining whether or not the election petition discloses any 'cause of action' is the third issue that has emerged for our analysis as a sequel to the Supreme Court decision in *Kuldeep Singh Pathania* (2017).[8] For determining the 'cause of action', which needs to be answered at the very threshold of enquiry, it has been critically examined whether it is legitimate for the election court to go beyond the pleadings of the plaintiff and look into the correctness of allegations made therein by entering into the merits of the case; that is, by considering evidence adduced by the opposite party.[9]

The fourth and the final issue that has been taken up for our analysis in the present survey is, whether illegal acceptance of 'withdrawal of candidature' by the returning officer, *per se*, materially affects the result of the election and thereby merits annulling the election of the returned candidate – an issue that has been squarely dealt by the Supreme Court in *Kameng Dolo*.[10] In order to resolve this issue the analysis revolves around whether illegal acceptance of 'withdrawal of candidature' effectively partakes the character of improper rejection of nomination paper.[11]

II INVOCATION OF RELIGION BY THE ELECTION CANDIDATE: WHETHER IT IS *PER SE* PROHIBITIVE UNDER THE REPRESENTATION OF THE PEOPLE ACT, 1951

For establishing the inclusive democratic social order, the electoral law is sought to be premised on the values of secularism that prohibits us to create institutions of governance on the basis of religion, race, caste, etc. Accordingly, in the very enactment of the law regulating elections to the legislative bodies, namely, Representation of the People Act, 1951, appeal on grounds of religion, race, caste, etc., came to be treated

5 See, Part III, *infra.*
6 *Ibid*.
7 *Ibid*.
8 See, Part IV, *infra*.
9 *Ibid*.
10 See, Part V, *infra*.
11 *Ibid*.

as 'corrupt practice', voiding the election of the candidate who violated these prohibitions. Sub-section (3) of section 123 of the said Act, prior to the amendment of 1961 read as follows:[12]

> The *systematic* appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting on the grounds of caste, race, community or religion or the use of, or appeal to, religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of that candidate's election. [Emphasis added]

With a view to curb communal and separatist tendencies in the country by widening the scope of the corrupt practice, Sub-section (3) of section 123 of the Act of 1951 was further amended by the amending Act of 1961(40 of 1961). The amended section 123(3) reads as follows:

> (3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of *his* religion, race, caste, community or language or the use of, or appeal to, religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. [Emphasis added].
>
> (3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of that candidate or for prejudicially affecting the election of any candidate.

A bare comparative perusal of the pre and post 1961 amendment provisions of section 123(3) of the Act of 1951 betrays at least two highlighted changes: the deletion

12 Prior to the amendment of 1961, the provisions relating to s. 123(3) of the Representation of the People Act, 1951, were amended at least twice. In 1956, the Act of 1951 was amended by Act No. 27 for removing the distinction between major and minor corrupt practices. Again, before 1956, a 'systematic appeal' to an elector by anybody 'to vote or refrain from voting' on certain specified grounds 'for the furtherance of the prospects of a candidate's election', was deemed minor corrupt practice. In 1958, clarifying clause was inserted by adding the words, "with the consent of a candidate or his election agent," after the words "any other person" occurring in s. 123(3) of the Act.

of the word "systematic" on the one hand, and the addition of the pronoun "his" on the other, in addition to the cognate provisions of sub-section (3A). It is about the purport of the deletion and addition of the two words respectively that has caused the problem of interpretation. Most seemingly, the dropping of the word "systematic" widens the ambit of 'corrupt practice' under section 100[13] read with section 123(3) of the Act, inasmuch as even a stray or single appeal on ground of religious affiliation would amount to 'corrupt practice'. On the other hand, the scope of 'corrupt practice' is considerably diluted if the appeal is made by the election candidate in the name of religion other than "his" own religion. There had been an acute conflict of judicial opinion about the resultant effect of deletion and addition, which was needed to be resolved. It is this conflict of opinion that has resulted in making a reference to the Seven-Judge Bench of the Supreme Court in the case of *Abhiram Singh* v. *C.D. Commachen (Dead) By Lrs.*[14]

Reference to be responded in *Abhiram Singh (2017)* relating to the interpretation of section 123(3) of the Representation of the People Act, 1951 has its origins at least in three decisions of the Supreme Court: *Abhiram Singh* v. *C.D. Commachen*[15] (3-Judge Bench); *Narayan Singh* v. *Sunderlal Patwa*[16] (5-Judge Bench); and *Kultar Singh* v. *Mukhtiar Singh*[17] (5-Judge Bench). The issue specifically to be responded is,whether the pronoun "his" occurring in the sub-section (3) of section 123 of the Act of 1951, as amended by the Act of 1961, refers only to the candidate's own religion, or whether

13 S. 100 of the Representation of the People Act, 1951, which deals with the Grounds for declaring election to be void, inter alia, provides: Subject to the provisions of sub-section (2) if the High Court is of opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; the High Court shall declare the election of the returned candidate to be void.

14 Civil Appeal No. 37 of 1992, with *Narayan Singh* v. *Sunderlal Patwa,* Civil Appeal No. 8339 of 1995, per T.S. Thakur, C.J.I., Madan B. Lokur, L. Nageswara Rao, S.A. Bobde, A.K. Goel, U.U. Lalit and Dr. D.Y. Chandrachud, JJ., ILR 2017 (1) Kerala 89: 2017 (1) SCALE 1: AIR 2017 SC 401. Hereinafter, simply *Abhiram Singh.* The analysis of *Abhiram Singh* presented in this survey has been substantially abstracted from the author's article, "Varying Approaches to Religion under the Electoral Law [A functional comparative perspective of the deeply divided opinion of the 7-Judge Constitution Bench of the Supreme Court in *Abhiram Singh* case (2017)]," which is being published by the National Law University Delhi in their *Yearbook 2018.* Since this article was done earlier than the assignment of the present Annual Survey, when the reported version of this case in AIR was not available, the reference to footnotes has been made only in terms of paragraphs, without reference to the page numbers in AIR,as is the pattern in the rest of the survey.

15 (1996) 3 SCC 665: In *Abhiram Singh,* a 3-Judge Bench of the Supreme Court, while hearing appeal against the judgment of the Bombay High Court in which the election of the appellant Abhiram Singh was successfully challenged by respondent Commachen. Since the content, scope and what constitutes a corrupt practice under sub-sections (3) or (3A) of s. 123 of the Representation of the People Act, 1951 needed to be clearly and authoritatively, the three-Judge bench opined that the appeal be heard by a larger Bench of five Judges.

16 (2003) 9 SCC 300.

17 AIR 1965 SC 141: (1964) 7 SCR 790.

it is also intended to include the religion of the voter. The implication of this amendment is: it appeared that a corrupt practice for the purposes of the Act prior to the amendment could cease to be a corrupt practice after the amendment of 1961.[18] Prima facie, it looked quite strange that when the avowed object of the said amendment by the deletion of the word "systematic" was clearly for curbing the communal and separatist tendency in the country by widening the scope of corrupt practice mentioned in sub-section (3) of section 123 of the Act, how come the addition of a word "his" by the same amendment could be construed to have the opposite effect.[19] This reference has now been answered by the 7-Judge Bench on January 2, 2017, albeit with a deeply divided court.[20]

Majority opinion - Location of the conflict:With a view to locate "the apparent cause of conflict,"[21] which needed to be resolved by the 7-Judge Bench, they made an excursion into various decisions hitherto rendered by the Supreme Court in the matter of interpretation of section 123(3) of the Act of 1951 as amended by the Act of 1961.[22] In their perusal, they have deciphered two lines of interpretation of section 123(3) of the said Act. On the one hand the 'narrow' view taken in *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta*,[23] *Kanti Prasad Jayshanker Yagnik* v. *Purshottamdas Ranchhoddas Patel*,[24] and *Ramesh Yeshwant Prabhoo (Dr.)* v. *Prabhakar Kashinath Kunte*[25] was that section 123(3) barred an appeal by a candidate or his agent or any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion i.e., the religion of the candidate. On the other hand the 'broad' view taken in *Kultar Singh* v. *Mukhtiar Singh*,[26] and *S.R. Bommai* v. *Union of India*[27] was that in enacting section 123(3) of the Act the Parliament intended to provide a check on the 'undesirable development' of appeals to religion, race, caste, community or language of *any person,* including that of the candidate, as that would vitiate the secular atmosphere of democratic life.

18 This anomaly was noticed by the Constitution Bench in *Narayan Singh, supra* note 6.

19 *Ibid*.

20 Per Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.), S. A. Bobde, J. and T.S. Thakur, CJI., delivering separate opinions but concurring with Lokur, J.; and Dr D. Y. Chandrachud, J. (for himself and Adarsh Kumar Goel and Uday Umesh Lalit, JJ.) dissenting.

21 See, *Abhiram Singh, per* Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.), para 5.

22 See, *id*. at paras 6-12.

23 (1964) 6 SCR 750 (CB): **"**it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed," cited in *Abhiram Singh*, para 6.

24 (1969) 1 SCC 455.

25 (1996) 1 SCC 130.

26 AIR 1965 SC 141: (1964) 7 SCR 790: "appeals to religion, race, caste, community, or language made in furtherance of the candidature of any candidate would constitute a corrupt practice and would render the election of the said candidate void," cited in *Abhiram Singh*, para 7.

27 (1994) 3 SCC 1 [9-Judge Bench].

However, persistence duality of interpretation of section 123(3) has been explained through comparative analysis of judicial decisions on the following counts:

(a) Non-consideration of the narrow view propounded in *Jagdev Singh Sidhanti* (1964) while expounding the broad view in the later decision of the Constitution Bench in *Kultar Singh* (1965),[28] giving currency to two different interpretations of section 123(3).
(b) While giving a narrow and restricted interpretation to section 123(3) of the Act in *Kanti Prasad JayshankerYagnik (1969)*, no reference was made either to *Jagdev Singh Sidhanti* (1964) or *Kultar Singh(1965),*[29] giving impetus to persistent duality.
(c) *Ramesh Yeshwant Prabhoo* (1996), while giving "a narrow and restricted meaning to the provision by an apparent misreading of section 123(3) of the Act,"[30] inasmuch as the Constitution Bench wrongly disregarded the broad view taken in *Kultar Singh (1965)* by observing that the same was decided on the basis of the text of sub-section (3) of section 123 of the Act as it existed prior to its amendment in 1961, and not on the basis of the text after its amendment in 1961.[31]
(d) The issue of the interpretation of section 123(3) of the Act came up for consideration in *S.R. Bommai* (1994), and it preferred its 'broad' interpretation seemingly on the ground that our electoral law is premised on 'secularism' mentioned in the Preamble to our Constitution, which is undeniably "a part of the basic structure of our Constitution".[32] However, since the issue of interpretation came up only indirectly, the observations made therein are of little assistance for construing the meaning and scope of sub-sections (3) and (3-A) of section 123 of the Representation of the People Act.[33]

This brief comparative analysis of the judicial decisions amply shows that owing to lack of coordinated judicial consideration or otherwise, the duality of interpretation

28 *Abhiram Singh, per* Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.), para 7: "However, it must be noted that *Kultar Singh* made no reference to the decision in *Jagdev Singh Sidhanti*". See also, *Id*. at para 13.

29 See, *Id*. at paras 9 and 13.

30 *Id*. at para 13.

31 *Id*. at para 12: "It is not all clear how this conclusion was arrived at since the paraphrasing of the language of the provision in *Kultar Singh* suggests that the text under consideration was post-1961." This inference was reinforced by observing: "Further, a search in the archives of this Court reveals that the election petition out of the which the decision arose was the General Election of 1962 in which Kultar Singh had contested the elections for the Punjab Legislative Assembly from Dharamkot constituency No. 85. Quite clearly, the law applicable was s. 123(3) of the Act after the amendment of the Act in 1961".

32 See, *Id.* at para 10.

33 See, *Mohd. Aslam* v. *Union of India*, (1996) 2 SCC 749, cited in *Abhiram Singh*, para 10.

of sub-section (3) of section 123 of the Act of 1951, as amended by the Act of 1961, continued to persist. It is this duality that needs to be removed by the 7-Judge Bench by clearly and authoritatively laying down the correct interpretation in order "to avoid a miscarriage of justice in interpreting 'corrupt practice'".[34]

Mode of resolving the conflict: The 'narrow' and the 'broad' approaches to interpretation of sub-section (3) of section 123 of the Act of 1951, as amended, have been construed to correspond to the two distinct modes of interpretation, 'literal' and 'purposive' respectively. Both these modes have been taken as adversary to each other by stating "Literal v. Purposive Interpretation," and that such adversarial conflict between the two is "perennial".[35]

At first blush, it seems to imply that as if the court is eventually required to choose or adopt either of these two modes. However, with a little reflection, the court seems to suggest that the preference for the 'literal' approach is likely to succeed only "if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible".[36] Accordingly, the preferred approach of the court in their interpretation should be "to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted".[37] This is termed as the 'purposive' approach.

The preferential approach to 'purposive' instead of 'literal' interpretation is reinforced in the light of the following abstracted propositions:

- 'Literal' interpretation encourages not only "immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise," but "may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute".[38]
- The controversial provisions "should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment".[39]

34 See the initial reference made by the 3-Judge Bench to 5-Judge Bench in *Abhiram Singh* v. *C.D. Commachen*, (1996) 3 SCC 665, cited in *Abhiram Singh*, para 2.

35 See, *Abhiram Singh*, para 36: "The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial".

36 *Ibid*.

37 *Ibid*.

38 Lord Bingham of Cornhill in *R.* v. *Secretary of State for Health ex parte Quintavalle,* [2003] UKHL 13 (para 8), cited in *Abhiram Singh*, para 36.

39 *Ibid*.

- 'Purposive' interpretation is not necessarily an anti-thesis of 'literal' interpretation, inasmuch as there is "no inconsistency between the Rule that statutory language retains the meaning it had when Parliament used it and the Rule that a statute is always speaking".[40]
- The adoption of a purposive approach to construction of statutes "is one of the surest indexes of a mature developed jurisprudence," which does not "make a fortress out of the dictionary;" but reminds "that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning".[41] In this respect, the Court has gone to the extent of emphasizing the sway of purposive interpretation by quoting Lord Millett: "We are all purposive constructionists now".[42]
- Invariably, difficulties over statutory interpretation belong to the language,[43] and not the purpose of the statute, which is till about remedying what is thought to be a defect in the law.[44] If so, it is emphatically stated: "Even the most 'progressive' legislator, concerned to implement some wholly normal concept of social justice, would be constrained to admit that if the existing law accommodated the notion there would be no need to change it".[45] All this seems to imply that literal interpretation must yield to purposive interpretation.
- In a welfare State like ours, since "what is intended for the benefit of the people is not fully reflected in the text of a statute," the interpreter is required to take "a pragmatic view" and the law is "interpreted purposefully and realistically so that the benefit reaches the masses".[46]
- In view of "the clear expression of opinion that the purpose of the amendment [with the deletion of the word 'systematic' from the ambit of

40 *Id*. Lord Bingham of Cornhill in *R.* v. *Secretary of State for Health ex parte Quintavalle,* [2003] UKHL 13 (para 9), cited in *Abhiram Singh*, para 36. This has been illustrated by Lord Bingham of Cornhill by extracting an example from *Grant* v. *Southwestern and County Properties Ltd.,* [1975] Ch 185, where Walton, J. had to decide whether a tape recording fell within the expression "document" in the Rules of the Supreme Court. Pointing out (page 190) that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that the tape recording was a document". *Ibid*.

41 Per Lord Steyn in *Grant* v. *Southwestern and County Properties Ltd.,* [1975] Ch 185, *Ibid*.

42 "*Construing Statutes*," (1999) 2 *Statute Law Review* 107, at 108 quoted in Justice G.P. Singh's *Principles of Statutory Interpretation* (14th Edition, revised by Justice A.K. Patnaik) at 34, cited in *Abhiram Singh*, para 37.

43 *Bennion on Statutory Interpretation,* [6th ed. (Indian Reprint)] at 847, citing *Heydon's Case* (1584) 3 Co. Rep 7a cited in *Abhiram Singh*, para 37.

44 *Ibid.*

45 *Ibid*.

46 *Abhiram Singh*, para 38. However, an exception is made to the purposive interpretation: "Of course, in statutes that have a penal consequence and affect the liberty of an individual or a statute that could impose a financial burden on a person, the Rule of literal interpretation would still hold good". *Ibid*.

section 123(3) of the Act of 1951] was to widen the scope of corrupt practices to curb communal, fissiparous and separatist tendencies and that was also 'the sense of the House',"[47] read with the contemporaneous amendment of section 153A of the Indian Penal Code,[48] and the accentuated possibility of fanning separatist tendencies through the usage/abusage of modern technology,[49] it is imperative to go in for purposive interpretation.

- The practice principle of 'Purposive interpretation' of a statute is prompted by the ever changing social context, giving rise to the concept of, what is termed as, 'social context adjudication'.[50] This is the concept which has been developed by such eminent judges and jurists as Justice Holmes, Julius Stone and Dean Roscoe Pound to the effect that law must not remain static but move ahead with the spirit of times keeping in mind the social context. This concept is now well-received and has been duly recognized by our Supreme Court in their decision-making.[51] "Like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a changing society, a readjustment of legal norms demanded by a changed social context," said the Supreme Court in *Raghubir Singh*.[52] Likewise, the Supreme Court stated in *Maganlal Chhaganlal (P.) Ltd.: "*Law, if it has to satisfy human needs and to meet the problems of life, must adapt itself to cope with new situations".[53] In *Badshah* v. *Urmila Badshah Godse* the Supreme Court yet again reaffirmed the need to shape law as per the changing needs of the times and circumstances by observing, "Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law".[54]

47 *Abhiram Singh*, para 41.

48 *Id*. at para 42. See also, *Supra* note 46 and the accompanying text.

49 See, *Id*. at para 43: In view of the "tremendous reach" available to the candidates through internet and social media, none of which were seriously contemplated till about fifteen years ago, it has become imperative to ensure that "the provisions of sub-section (3) of s. 123 of the Act are not exploited by a candidate or anyone on his or her behalf by making an appeal on the ground of religion with a possibility of disturbing the even tempo of life".

50 *Abhiram Singh*, para 44: "Another facet of purposive interpretation of a statute is that of social context adjudication".

51 *Union of India* v. *Raghubir Singh (Dead) by L.Rs.,* (1989) 2 SCC 754, cited in *Abhiram Singh*, para 44; *Maganlal Chhaganlal (P.) Ltd.* v. *Municipal Corporation of Greater Bombay,* (1974) 2 SCC 402, *Id*. at para 44; *Badshah* v. *Urmila Badshah Godse,* (2014) 1 SCC 188, *Id*. at para 45.

52 *Union of India* v. *Raghubir Singh (Dead) by L.Rs.,* (1989) 2 SCC 754, cited in *Abhiram Singh*, para 43.

53 *Maganlal Chhaganlal (P.) Ltd.* v. *Municipal Corporation of Greater Bombay,* (1974) 2 SCC 402, in *Abhiram Singh*, para 45.

54 *Badshah* v. *Urmila Badshah Godse,* (2014) 1 SCC 188, cited in *Abhiram Singh*, para 46.

Bearing in mind the broad purpose of enacting and amending sub-section (3) of section 123 of the Act of 1951, "it is absolutely necessary to give a purposive interpretation to the provision rather than a literal or strict interpretation".[55] This interpretation has prompted the court to take into account "the context of simultaneous and contemporaneous amendments inserting sub-section (3A) in section 123 of the Act and inserting section 153A in the Indian Penal Code".[56] "So read together, and for maintaining the purity of the electoral process and not vitiating it," sub-section (3) of section 123 of the Representation of the People Act, 1951 must bring "within the sweep of a corrupt practice any appeal made to an elector by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate on the ground of the religion, race, caste, community or language of (i) any candidate or (ii) his agent or (iii) any other person making the appeal with the consent of the candidate or (iv) the elector".[57]

To this extent, the earlier decisions of the Supreme Court limiting the scope of section 123(3) of the Act in *Jagdev Singh Sidhanti*, *Kanti Prasad Jayshanker Yagnik* and *Ramesh Yeshwant Prabhoo* to an appeal based on the religion of the candidate or the rival candidate(s), have been accordingly overruled by observing: "we are not in agreement with the view expressed in these decisions".[58] This interpretation in no way conflicts with any of the fundamental rights inasmuch as the various provisions of the electoral law, including those of section 123(3) of the Act of 1951 (as amended), merely prescribe conditions which must be observed if anybody wants to enter the Parliament, and that outside these provisions there is no prohibition to exercise those rights.[59] Nor does it "unsettle the long-standing interpretation given to section 123(3) of the Act," because the very reason of making a reference before the 7-Judge Bench was that "there was some uncertainty about the correct interpretation of sub-section (3) of section 123 of the Act,"[60] and the same was required to be settled.

55 *Abhiram Singh*, per Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.), para 47.

56 *Id*. at para 50(1).

57 *Id*. at para 50(2).

58 *Ibid*. *Jagdev Singh Sidhanti* has been overruled only in respect of 'religion', without saying anything with regard to an appeal concerning the conservation of language, since that issue has not arisen for consideration before the 7-Judge Bench.

59 *Abhiram Singh*, *per* Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.), para 47, citing *Jamuna Prasad Mukhariya* v. *Lachhi Ram,* (1955) 1 SCR 608, in which, while considering the constitutional validity of s. 123(5) of the Act, the Constitution Bench held: "The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. The Appellants have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are intra vires".

60 *Id*. at para 49.

This is how the reference has been answered by Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.) on the limited issue of the meaning of sub-section (3) of section 123 of the Act of 1951, as amended by the Act of 1961.[61]

S.A. Bobde, J., has concurred with Lokur, J. in respect of his eventual conclusion that the bar under the amended section 123(3) of the Act, 1951 "to making an appeal on the ground of religion must not be confined to the religion of the candidate because of the word 'his' in that provision".[62] He has also agreed "that the purposive interpretation in the social context adjudication as a facet of purposive interpretation warrants a broad interpretation of that section",[63] inasmuch as it enables us "to maintain the sanctity of the democratic process and to avoid the vitiating of secular atmosphere of democratic life" by "checking appeals to religion, race, caste, community or language by any candidate".[64]

Having thus concurred, Bobde, J. adds that the same conclusion is warranted solely on literal or textual interpretation of the same section 123(3) of the said Act by realizing that the purposive interpretation does not exclude the literal interpretation.[65] Acting on this premise, he holds: "I am of the view that the language that is used in section 123(3) of the Act intends to include the voter and the pronoun 'his' refers to the voter in addition to the candidate, his election agent etc".[66] This construction is reinforced by stressing that it is in conformity with the intendment and the purpose of the statute, which is to prevent an appeal to voters on the ground of religion:[67]

> I consider it an unreasonable shrinkage to hold that only an appeal referring to the religion of the candidate who made the appeal is prohibited and not an appeal which refers to religion of the voter. It is quite conceivable that a candidate makes an appeal on the ground of religion but leaves out any reference to his religion and only refers to religion of the voter. For example, where a candidate or his election agent, appeals to a voter highlighting that the opposing candidate does not belong to a particular religion, or caste or does not speak a language, thus emphasizing the distinction between the audience's (intended voters) religion, caste or language, without referring to the candidate

61 In the light of this meaning, in specific cases brought before the court, it would indeed be a matter of evidence for determining whether an appeal has at all been made to an elector and whether the appeal if made is in violation of the provisions of sub-section (3) of s. 123 of the Representation of the People Act, 1951. *Id*. at paras 50(3) and 51.

62 *Id*. at para 81.

63 *Ibid*.

64 *Ibid*.

65 *Id*. at para 82, citing *IRC* v. *Trustees of Sir John Aird's Settlement,* (1983) 3 All ER 481 (CA), which, inter alia, held that there seemed no valid reason while construing a statute (be it a taxing or penal statute) why both Rules of interpretation literal and purposive cannot be applied.

66 *Id*. at para 84.

67 *Ibid*. (Emphasis added)

> on whose behalf the appeal is made, and who may conform to the audience's religion, caste or speak their language, the provision is attracted. The interpretation that I suggest therefore, is wholesome and leaves no scope for any sectarian caste or language based appeal and is best suited to bring out the intendment of the provision. There is no doubt that the section on textual and contextual interpretation proscribes a reference to either.[68]

The approach to textual interpretation in an expansive manner is further supported by a string of precedents providing for emerging practice principles:

(a) The '*mens or sententialegis,'* that is the intent, of the Parliament is of crucial concern in the interpretation of the statute.[69] In the instant case, the intent of the Parliament in using the pronoun "his" was to prohibit an appeal made on the ground of the voter's religion, and that such a construction is clearly within and not outside the mischief of the provision.[70]

(b) In the matter of construction of a modern statute, the issue is neither of strict or of liberal construction, and that all statutes, whether penal or not, are now construed by substantially by the same rules: "All modern Acts are framed with regard to equitable as well as legal principles" [*Edwards* v. *Edwards*: (1876) 2 Ch. D. 291, 297, Mellish L.J., quoted with approval by Lord Cozens-Hardy M.R. in *Re. Monolithic Building Co. Ltd*., (1915) 1 Ch. 643, 665].[71] Accordingly, amended section 123(3) of the Act of 1951 must be construed now with reference to the true meaning and real intention of the legislature.[72]

(c) "It is an overriding duty of the Court while interpreting the provision of a statute that the intention of the legislature is not frustrated and any doubt or ambiguity must be resolved by recourse to the Rules of purposive construction".[73] This is what has been laid down by the Supreme Court in *Balram Kumawat* v. *Union of India*,[74] by clearly observing that the courts will "reject that construction which will defeat the plain intention of the

68 The intent of the Parliament in using the pronoun "his" was to prohibit an appeal made on the ground of the voter's religion, and that such a construction is clearly within and not outside the mischief of the provision. Citing *Grasim Industries* v. *Collector of Customs, Bombay,* 2002(4) SCC 297 (para 10). See, *Id*. at para 85.

69 *Grasim Industries* v. *Collector of Customs, Bombay,* 2002 (4) SCC 297 (para 10). See, *Id.* at para 85.

70 *Ibid*.

71 *Id*. at para 56, citing *Craies on Statute Law*, 7th Edn. at Page No. 531.

72 *Ibid*.

73 *Id*. at para 88.

74 2003 (7) SCC 628 (para 26), cited in *Abhiram Singh*, para 88.

> legislature even though there may be some inexactitude in the language used".[75] Moreover, it is further emphasized that "reducing the legislation futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result," and that the courts, "when Rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve".[76] In the light of such decisions, the Supreme Court in *Balram Kumawat* conclusively states that these decisions "are authorities for the proposition that the Rule of strict construction of a regulatory/penal statute may not be adhered to, if thereby the plain intention of Parliament to combat crimes of special nature would be defeated".[77]

Applying the above principles, Bobde J. concludes that "there is no doubt that Parliament intended an appeal for votes on the ground of religion is not permissible whether the appeal is made on the ground of the religion of the candidate etc., or of the voter".[78] Accordingly, "the words 'his religion' must be construed as referring to all the categories of persons preceding these words".[79]

T.S. Thakur, CJI, has also concurred with the conclusions drawn by Lokur, J., and supported the same by highlighting a couple of interpretative dimensions. He vehemently disputes the argument that if the purpose of 1961 amendment of section 123(3) was to widen the scope of corrupt practice by deleting the word 'systematic' from its provision, the question of restricting the same at the same time by the addition of the word 'his' did not arise.[80] On this count there is nothing to suggest "either in the statement of objects and reasons or contemporaneous record of proceedings including notes accompanying the bill".[81] "Any such interpretation will artificially restrict the scope of corrupt practice for it will make permissible what was clearly impermissible under the un-amended provision".[82] "Seen both textually and contextually the argument that the term 'his religion' appearing in the amended provision must be interpreted so as to confine the same to appeals in the name of 'religion of the candidate' concerned alone does not stand closer scrutiny and must be rejected".[83]

75 *Ibid*, *Salmon* v. *Duncombe,* AC at page 634.

76 *Ibid*, *BBC Enterprises* v. *Hi-Tech Xtravision Ltd*., All ER at pp. 122-23.

77 2003 (7) SCC 628 (para 36), cited in *Abhiram Singh*, para 88.

78 *Abhiram Singh*, para 89.

79 *Ibid*.

80 *Id*. at para 67.

81 *Ibid*.

82 *Ibid*.

83 *Ibid*.

The second interpretative dimension relates to resolving the duality of interpretation. "Assuming that section 123(3), as it appears, in the Statute Book is capable of two possible interpretations, one suggesting that a corrupt practice will be committed only if the appeal is in the name of the candidate's religion, race, community or language and the other suggesting that regardless of whose religion, race, community or language is invoked an appeal in the name of anyone of those would vitiate the election".[84] The question is which one of these two interpretations ought to be preferred by the Court?[85]

Through his elaborate analysis Thakur, CJI has shown that our constitutional polity is essentially premised on the bedrock of 'secularism', which has been declared by the Supreme Court to be one of the basic features of our Constitution.[86] Accordingly, that interpretation of amended section 123(2) of the Act of 1951 should be adopted which is in consonance with secular character of our polity. "This necessarily implies that religion will not play any role in the governance of the country".[87] An interpretation which has the effect of eroding or diluting the constitutional objective of keeping the State and its activities free from religious considerations, therefore, must be avoided.[88] Indeed, the Court should always remain cognizant of the Constitutional goals and interpret the provisions of an enactment which would make them consistent with the Constitution.[89] In other words, if two constructions of a statute were possible, one that promotes the constitutional objective ought to be preferred over the other that does not do so.[90] In this respect, Thakur, CJI, goes even one step further when it is invoked, recalled and restated that in the background of the constitutional mandate, "the question is not what the statute does say but what the statute must say," and that "if the Act or the Rules or the bye-laws do not say what they should say in terms of the Constitution, it is the duty of the court to read the constitutional spirit and concept into the Acts".[91]

84 *Id.* at para 61.

85 *Ibid*.

86 See, *Id*. at para 62: "That India is a secular state is no longer *res integra*". See also, the exposition made by the Supreme Court in cases cited in *Id.* at paras 71-80.

87 *Id*. at para 74.

88 *Ibid*.

89 *Id*. at para 75, citing *Kedar Nath* v. *State of Bihar*, AIR 1962 SC 955, in which a Constitution bench of the Supreme Court declared that while interpreting an enactment, the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to address.

90 *Id*. at para 76. See also, *State of Karnataka* v. *Appa Balu Ingale*, [1995] Supp. 4 SCC 469, wherein the Supreme Court has held that Judge's should be cognizant of the constitutional goals and remind themselves of the purpose of the Act while interpreting any legislation, *Id*. at para 77.

91 *Id*. at para 78, citing *Vipulbhai M. Chaudhary* v. *Gujarat Cooperative Milk Marketing Federation Ltd.*, (2015) 8 SCC 1 (para 26).

Foregoing analysis reveals the following propositions for eventual decision making:[92]

A. An interpretation that will have the effect of removing the religion or religious considerations from the secular character of the State or state activity ought to be preferred over an interpretation which may allow such considerations to enter, effect or influence such activities.
B. Electoral processes are doubtless secular activities of the State, and that religion can have no place in such activities, for religion is a matter personal to the individual with which neither the State nor any other individual has anything to do.
C. The relationship between man and God and the means which humans adopt to connect with the almighty are matters of individual preferences and choices, and the State is under an obligation to allow complete freedom for practicing, professing and propagating religious faith to which a citizen belongs in terms of article 25 of the Constitution of India, but the freedom so guaranteed has nothing to do with secular activities which the State undertakes.
D. The State can and indeed has in terms of section 123(3) forbidden interference of religions and religious beliefs with secular activity of elections to legislative bodies.

Thus, "an appeal in the name of religion, race, caste, community or language is impermissible under the Representation of the People Act, 1951 and would constitute a corrupt practice sufficient to annul the election in which such an appeal was made regardless whether the appeal was in the name of the candidate's religion or the religion of the election agent or that of the opponent or that of the voter's".[93] "The sum total of section 123(3) even after amendment is that an appeal in the name of religion, race, caste, community or language is forbidden even when the appeal may not be in the name of the religion, race, caste, community or language of the candidate for whom it has been made".[94] "So interpreted religion, race, caste, community or language would not be allowed to play any role in the electoral process and should an appeal be made on any of those considerations, the same would constitute a corrupt practice".[95]

Minority opinion: The view expressed by three Judges [Dr. D.Y. Chandrachud, J. (for himself, A.K. Goel, and U.U. Lalit, JJ.)] in comparison to four Judges [Madan B. Lokur, J. (for himself and L. Nageswara Rao, J.), S. A. Bobde, J. and T.S. Thakur, CJI. delivering separate but concurring with the judgment of Lokur, J.] is taken as minority opinion in *Abhiram Singh* (2017). According to minority, the expression

92 *Id.* at para 79.
93 *Id*. at para 80.
94 *Ibid*.
95 *Ibid*.

'his' is used in the context of an appeal to vote for a candidate on the ground of the religion, race, caste, community or language of the candidate.[96] Similarly, in the context of an appeal to refrain from voting on the ground of the religion, race, caste, community or language of a rival candidate, the expression 'his' refers to the rival candidate.[97] This is how the expression "his" in the amended section 123(3) of the Act of 1951 needs to be construed. In their view, "it is impossible to construe sub-section (3) as referring to the religion, race, caste, community or language of the voter".[98]

For the adoption of this view, the following rationale are being adduced:

(a) The restricted construction of section 123(3) is "consistent with the plain and natural meaning of the statutory provision".[99]
(b) A strict construction of the provision of section 123(3), being "quasi-criminal" in nature, is "mandated".[100]
(c) The restricted view of section 123(3) is supported by "the legislative history".[101]
(d) The ambit of section 123(3) is distinctly different from that of section 123(3A) that does not use the word "his" and, therefore, "section 123(3A) cannot be telescoped into section 123(3)" in supersession of its "plain and natural construction".[102]
(e) A change in legal position, which has held the field "through judicial precedent over a length of time, can be considered only in exceptional and compelling circumstances".[103] And in the instant case, "no case has been made out to take a view at variance with the settled legal position",[104] and that there is "merit in ensuring a continuity of judicial precedent".[105]

96 *Id*. at para 151.

97 *Ibid*.

98 *Id*. at para 107.

99 *Id*. at para 151. See also, *Id*. at para 103, citing In *Bipinchandra Parshottamdas Patel (Vakil)* v. *State of Gujarat,* (2003) 4 SCC 642 (para 31), wherein a Bench of three Judges referred to Read Dickerson's *The Interpretation and Application of Statutes* to the effect that the court "will not extend the law beyond its meaning to take care of a broader legislative purpose," and thereby "using the statute as a basis for judicial law-making by analogy with it".

100 *Ibid*. See also, *Id*. at para 152: "The provisions of an election statute involving a statutory provision of a criminal or quasi criminal nature must be construed strictly".

101 *Ibid*.

102 *Id*. at para 152. The legislature has used the expression "his" in s. 123(3) "with a purpose" and "there is no reason or justification to depart from a plain and natural construction in aid of a purposive construction". *Ibid*.

103 *Id*. at para 153, citing Constitution Bench decision of the Supreme Court in *Keshav Mills Co. Ltd.* v. *Commissioner of Income Tax, Bombay North, Ahmedabad,* (1965) 2 SCR 908. See also, *Id*. at para 154 read with paras 155 and 156, citing *Supreme Court Advocates on Record Association* v. *Union of India,* (2016) 5 SCC 1.

104 *Id*. at para 157.

105 *Id.* at para 158.

In view of the above, the minority opinion holds that the "interpretation which has earlier been placed on section 123(3) is correct and certainly does not suffer from manifest error," and nor that interpretation has been "productive of [any] public mischief".[106] In their considered opinion, the pronoun 'his' in section 123(3) "does not refer to the religion, race, caste, community or language of the voter".[107] According to them, it is to be read as "referring to the religion, race, caste, community or language of the candidate in whose favor a vote is sought or that of another candidate against whom there is an appeal to refrain from voting".[108]

Relative evaluation of majority and minority opinions: Why is the cleavage of opinion between the majority court and the minority court? Where does lie the point of deviation in the construction of pronoun 'his' used in sub-section (3) of section 123 of Act of 1951? The opinion of T.S. Thakur, CJI concurring with the opinion of Lokur, J. (who wrote the judgment for himself and L. Nageswara Rao, J.), gives us some clue, when it is candidly stated by him in his opening paragraph:[109]

> I have had the advantage of carefully reading the separate but conflicting opinions expressed by my esteemed brothers Madan B. Lokur and Dr. D.Y. Chandrachud, JJ. While both the views reflect in an abundant measure, the deep understanding and scholarship of my noble brothers, each treading a path that is well traversed and sanctified by judicial pronouncements, the view taken by Lokur, J. appears to me to be more in tune with the purpose and intention behind the enactment of section 123(3) of the Representation of Peoples Act, 1951. I would, therefore, concur with the conclusions drawn by Lokur, J. and the order proposed by His Lordship with a few lines of my own in support of the same. [Emphasis added]

The italicized statement brings out the point of cleavage or deviation: the majority opinion has preferred the purposive expansive interpretation of section 123(3) of the Act of 1951, whereas the minority opinion has chosen to restrict itself to its 'plain and natural' interpretation. Although the opinion of the majority court constitutes 'the law' declared by the Supreme Court for all intents and purposes under article 141 of the Constitution, nevertheless in our relative evaluation of the two opinions, we need to address ourselves at least on two major counts. This is required for deciding the crucial issue, whether it is at all possible to make the two opinions reconciled, convergent or complementary to each other.

The two counts are: one, whether there is any need to go in for purposive interpretation by making a departure from the literal construction of section 123(3); two, if the departure is desiderated, whether it should be carried out through judicial construction or legislative exercise.

106 *Ibid*.
107 *Ibid*.
108 *Ibid*.
109 *Id*. at para 51.

The singular reason opting for purposive interpretation is that confining the appeal to voters on religious grounds only to the religion of the candidate or his rival candidate and not extending to that of the voters militates against the principle of 'secularism', which is an inviolable feature of the constitution under the basic structure doctrine.[110] To this extent, appeal on ground of religion requires to be prohibited. This, indeed, is the underlying purpose of enacting section 123(3) read with the simultaneous enactment of section 123(3A) of the Act of 1951, which prohibits the promotion of or attempts to promote feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language. This simultaneous addition augments the purport of section 123(3) rather than diluting it.

If we are inclined to realize this underlying meaning of section 123(3), the next question that comes to the fore is: how to fructify this objective? Minority opinion reveals that such a drastic departure should be accomplished only through legislation proper:[111]

> A change in the law would have to be brought about by a parliamentary amendment stating in clear terms that 'his' religion would also include the religion of a voter. In the absence of such an amendment, the expression 'his' in section 123(3) cannot refer to the religion, race, caste, community or language of the voter.

Majority opinion, on the other hand, veers round the view that if the existing provisions are amenable to such an interpretation as would serve the underlying purpose, the same should be achieved by the Court through purposive interpretation by overriding the literal construction on the contrary. While doing so, the Court should not be deterred by the precedents, even if those are binding in character. Constitution Bench of the Supreme Courthas succinctly stated that "the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a changing society, a readjustment of legal norms demanded by a changed social context".[112]

Moreover, the avowed objective of constituting the Constitution Benches of five or more Judges of the Supreme Court is essentially not to decide a *lis* (a controversy or dispute) between two particular parties to litigation. In the constitutional scheme of things, its singular purpose, as provided under article 145(3) of the Constitution, is

110 *Id*. at 62 per T.S. Thakur, CJI: "Secularism has been declared by this Court to be one of the basic features of the Constitution." See also, *Supra* note 76 and the accompanying text.

111 *Id*. at para 152. In the opinion of minority, if the narrow interpretation of "his", which in their view is "the settled legal position", is considered as one of the "imperfections", such "imperfections cannot be attended to by an exercise of judicial redrafting of a legislative provision".

112 Constitution Bench of the Supreme Court in *Raghubir Singh (supra), cited in Abhiram Singh*, para 44.

to resolve the 'substantial question of law as to the interpretation of constitution' so that the basic law of the nation becomes clearer, more certain and transparent. That alone would strengthen the rule of law with futuristic import.

The fact matrix in the instant case before the 7-Judge Bench involved the appellant *Abhiram Singh*, whose election in the year 1990 to the Maharashtra State Assembly was successfully challenged by the respondent Commachen in the Bombay high court. On appeal before the Supreme Court, the decision of the Bench after more than a quarter of century is not going affect either of the parties to litigation – the respondent-opponent is dead and the term of the appellant was over long ago. What is survived before the 7-Judge Bench is the fact-matrix of that case, presenting an opportunity to evolve the law for generations to come. The approach of the larger Constitution Bench, therefore, perforce has to be constitution-centric, resolving relatedness of the religion to the electoral law on the larger canvas of foundational value of democratic secularism, which is unarguably, as eloquently noticed by the majority court, an inviolable basic feature of our Constitution.[113]

This wider constitutionally-purposive-modern-approach indubitably would override the narrow confines of such peripheral practice-principles as that of rule of strict or literal construction, uncritical adherence to past precedents by ignoring even the contemporaneous developments (as indicated by the introduction of sub-section (3A) in section 123 of the Act and section 153A of the IPC that make a person criminally liable if he made an appeal on the ground of religion fanning communal, fissiparous and separatist tendencies), etc. Following the precept of Justice Oliver Wendell Holmes that "the law is forever adopting new principles from life at one end", and "sloughing off" old ones at the other,[114] Justice Lokur has commended that 'for maintaining the purity of the electoral process and not vitiating it', the word "his" in sub-section (3) of section 123 of the Representation of the People Act, 1951 must be given a broad and purposive interpretation.[115] Such an interpretation would bring within the sweep of a corrupt practice any appeal made to an elector solely on the ground of religion irrespective of the fact whether it is the religion of the candidate or of the voter.

The minority court has resorted to the principle of strict construction or to that of binding precedents in construing the literal meaning of section 123(3) of the Act of 1951 with some "rationale and logic underlying the provision".[116] That rationale for the restricted interpretation of section 123(3) is that the State, by not adverting 'to the religion, caste, community or language of the voter as a corrupt practice', is enabled to provide some space for recognizing "the position of religion, caste, language and gender in the social life of the nation".[117] Pursuing this line of logic, Chandrachud, J., *inter alia*, observes:[118]

113 See, *Supra* notes 76 and 100, and the accompanying text.

114 Oliver Wendell Holmes, *Common Carriers and the Common Law* (1943) 9 *Curr LT* 387, 388.

115 *Abhiram Singh*, para 50(2)3.

116 *Abhiram Singh*, para 104.

117 *Id*. at para 105.

118 *Ibid*.

> The Indian state has no religion nor does the Constitution recognize any religion as a religion of the state. India is not a theocratic state but a secular nation in which there is a respect for and acceptance of the equality between religions. Yet, the Constitution does not display an indifference to issues of religion, caste or language. On the contrary, they are crucial to maintaining a stable balance in the governance of the nation. [Emphasis added]

This rationale is reinforced by citing a string of constitutional provisions,[119] which, on the one hand, prohibit the State to discriminate "against any citizen only on grounds of religion, race, caste, sex, place of birth or any of them,"[120] and yet, on the other hand, encourage it to make "special provisions for the advancement of socially or educationally backward classes of the citizens or for the scheduled castes and scheduled tribes".[121] In view of this purport of the constitutional provisions, it is assertively stated by the minority court that "there is no wall of separation between the state on the one hand and religion, caste, language, race or community on the other".[122] Premised on this proposition, it is further observed as a corollary that if the State is obligated to undo the injustices caused merely on ground of religion, race, caste, etc., the electoral politics, which is mode and medium of social mobilization, could not debar the election candidates of achieving the same objective by discussing those very issues of religion, race, caste, etc. for mobilizing the masses. It is on this count, minority court concludes:[123]

> Electoral politics in a democratic polity is about mobilisation. Social mobilisation is an integral element of the search for authority and legitimacy. Hence, it would be far-fetched to assume that in legislating to adopt section 123(3), Parliament intended to obliterate or outlaw references to religion, caste, race, community or language in the hurly burly of the great festival of democracy.

Again:

> Access to governance is a means of addressing social disparities. Social mobilization is a powerful instrument of bringing marginalized groups into the mainstream. To hold that a person who seeks to contest an election is prohibited from speaking of the legitimate concerns of citizens that the injustices faced by them on the basis of traits having

119 See, *Id.* at para 112, citing a string of art. 15, 16, 25, 29, 30, 41, etc. of the Constitution.

120 Art. 15(1) of the Constitution.

121 Art. 15(4) of the Constitution.

122 *Abhiram Singh*, para 118.

123 *Ibid*.

> an origin in religion, race, caste, community or language would be remedied is to reduce democracy to an abstraction. Section 123(3) was not meant to and does not refer to the religion (or race, community, language or caste) of the voter. [Emphasis added]

This stand of the minority court seemingly represents the deviant view, which comes to the fore when it is contrasted in the light of some of the statements reflected in the opinion of the majority court. To wit, the following statements may be abstracted from the majority opinion:

(a) "When the State allows citizens to practise and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. *The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life*".[124]
(b) "One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, *religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited"*.[125]
(c) The Constitution does not recognize or permit mixing religion and State power and that the two must be kept apart.[126]

It is this seemingly *absolute* separation of religion from secular activities of the State is dissented by the minority court. T.S. Thakur, CJI, in his judgment concurring with Lokur, J., is conscious of the two principal constitutional values; namely, secular functions of the State on the one hand, and citizen's fundamental freedom to profess, practice and propagate one's own religion on the other. However, in their *inter se* relationship and seeking correlation between them, CJI Thakur seems to accord primacy to State's secular activities over citizen's fundamental freedom. To wit:[127]

> The upshot of the above discussion clearly is that under the constitutional scheme mixing religion with State power is not permissible while freedom to practice profess and propagate religion of one's choice is guaranteed. The State being secular in character will

124 *Id*. at para 67, per T.S. Thakur, CJI, citing Sawant J. speaking for himself and Kuldeep Singh J. in *S.R. Bommai* v. *Union of India,* 1994(3) SCC 1 (para 148) in the light of several provisions of the Constitution including art. 25, 26, 29, 30, 44 and 51A in para 148. [Emphasis added]

125 *Id*. at para 67. [Emphasis added]

126 *Id*. at para 70, per T.S. Thakur, CJI, citing Jeevan Reddy J. for himself and Agarwal J. in *S.R. Bommai* v. *Union of India,* 1994 (3) SCC 1 (para 310).

127 *Id*. at para 74.

> not identify itself with anyone of the religions or religious denominations. This necessarily implies that religion will not play any role in the governance of the country which must at all times be secular in nature. The elections to the State legislature or to the Parliament or for that matter or any other body in the State is a secular exercise just as the functions of the elected representatives must be secular in both outlook and practice. Suffice it to say that the Constitutional ethos forbids mixing of religions or religious considerations with the secular functions of the State. This necessarily implies that interpretation of any statute must not offend the fundamental mandate under the Constitution. An interpretation which has the effect of eroding or diluting the constitutional objective of keeping the State and its activities free from religious considerations, therefore, must be avoided. This Court has in several pronouncements ruled that while interpreting an enactment, the Courts should remain cognizant of the Constitutional goals and the purpose of the Act and interpret the provisions accordingly.

In our respectful submission, it is this uncritical absolute acceptance of the primacy of the principle of secularism without seeking any accommodation or its correlation with citizen's fundamental freedom to religion that makes the majority opinion somewhat suspect. It is this factor that seems to have prompted the minority opinion to invoke the statement made by then Law Minister in the Lok Sabha while introducing the Bill that sought to add the word "his" in section 123(3) of the Act of 1951.[128] Chandrachud, J., speaking for the minority court, brings out clearly two nuances showing in respect of secular activity of the State what is prohibited and what is permitted in the name of religion. Seeking vote and support in the election campaign by making appeal merely on the ground of religion is prohibited;[129] whereas, in the same campaigning if the election candidate urges the electorate to protect and promote your fundamental rights, the same should not be construed as violation of the principle of secularism. Such an accommodation of the fundamental right to religion within the ambit of election law, which indeed is the secular activity, is shown by Chandrachud, J. by abstracting the singular statement made by the Law Minister in respect of conservation of language, which is co-terminus with 'religion' in the expression "religion, race, caste, community or language" used in section 123(3) of the Act of 1951:[130]

128 See, *Id*. at para 90, per Chandrachud, J.

129 This is evident from the Law Minister's very poser: "...But the problem is, are we going to allow a man to go to the electorate and ask for votes because he happens to speak a particular language or ask the electorate to refrain from voting for a particular person merely on the ground of his speaking a particular language or following a particular religion and so on? If not, we have to support this," cited in *Abhiram Singh*, para 130 per Chandrachud, J.

130 *Ibid*. Emphasis by Chandrachud, J.

> But if you say that Bengali language in this area is being suppressed or the schools are being closed, because they bore a particular name, then, you are speaking not only to fight in an election but you are also really seeking to protect your fundamental rights, to preserve your own language and culture. That is a different matter.
>
> But, if you say, 'I am a Bengali, you are all Bengalis, vote for me', or 'I am an Assamese and so vote for me because you are Assamese-speaking men', I think, the entire House will deplore that a hopeless form of election propaganda. And, no progressive party will run an election on that line. Similarly, on the ground of religion.

The Constitution Bench of the Supreme Court in *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta*[131] had adverted to this correlation as early as 1964 by holding that the provisions of section 123(3) must be read in the light of the fundamental right guaranteed by article 29(1) of the Constitution, which protects the right of any section of the citizens with a distinct language, script or culture of its own to conserve the same. In that case, it was alleged by the election Petitioner that the returned candidate had exhorted the electorate to vote for the Haryana Lok Samiti if it wished to protect its own language. The issue to be responded was whether such exhortations to the electorate fell within the corrupt practice of appealing for votes on the ground of the language of the candidate or to refrain from voting on the ground of the language of the contesting candidate. The Court concluded by observing, *inter alia*:[132]

> Therefore, it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice.

Jagdev Singh Sidhanti has been overruled by the majority court in *Abhiram Singh*, but only in respect of 'religion' without saying anything with regard to an appeal concerning the conservation of language, because that issue has not arisen for consideration before the 7-Judge Bench.[133] Since the issue of 'religion' is conterminous with 'language' in the expression "religion, race, caste, community or language" used in section 123(3), whatever is held about 'language' should be equally applicable to

131 (1964) 6 SCR 750, cited in *Abhiram Singh*, para 139, per Chandrachud, J.

132 *Ibid.*

133 Per Lokur, J. in *Abhiram Singh*, para 50(2). See also, *Supra* note 48 and the accompanying text.

'religion' along with other attributes of 'caste' and 'community'. Be that as it may, an opportunity of considering the critical relationship between the fundamental rights and the electoral law, especially more when this issue is brought to the fore in precipitant form by the minority court on the touchstone of 'mobilization of masses' for fulfilling the constitutional goals, is lost.

Finally, on comparative functional evaluation of the majority and minority opinions of the 7-Judge Bench of the Supreme Court, we may agitate and ask two critical questions. One, whether the strict interpretation of section 123(3) of the Representation of the People Act of 1951 by the minority court precludes the possibility of any abuse religion of the electorates by the election candidate in the electoral secular matters, notwithstanding the fact that he is merely espousing the collective cause of the targeted community. Two, whether the liberal interpretation of the same section 123(3) by the majority court excludes the possibility of accommodating the play of fundamental right to religion in the electoral secular matters notwithstanding such categorical statement as "the encroachment of religion into secular activities is strictly prohibited". Our own response in both the cases is in the negative.

We may expound our response to the first critical question first. In our view, the restricted interpretation of section 123(3) of the Act of 1951 by the minority court does not necessarily preclude the possibility of abuse of religion if the prohibition is confined to the religion of the candidate who made the appeal and not to the religion of the voter. In this respect, we may do no better than to quote the instance envisaged by Bobde, J., in the exposition of the construction of section 123(3):[134]

> It is quite conceivable that a candidate makes an appeal on the ground of religion but leaves out any reference to his religion and only refers to religion of the voter. For example, where a candidate or his election agent, appeals to a voter highlighting that the opposing candidate does not belong to a particular religion, or caste or does not speak a language, thus emphasizing the distinction between the audience's (intended voters) religion, caste or language, without referring to the candidate on whose behalf the appeal is made, and who may conform to the audience's religion, caste or speak their language, the provision is attracted.

In our second submission we intend to propose that the liberal or purposive interpretation of the same section 123(3) by the majority court does not necessarily exclude the possibility of accommodating the play of fundamental right to religion in the electoral secular matters. On this count we may abstract the fact matrix from a case decided by the Constitution Bench of the Supreme Court, namely, *Kultar Singh* v. *Mukhtiar Singh*.[135] In this case, the appellant, admittedly a Sikh by religion and also

134 *Id*. at para 84. See also, *supra* note 57.

135 AIR 1965 SC 141, cited in *Abhiram Singh*, para 141, per Chandrachud, J.

a member of the Akali Dal Party, who had made speeches and circulated posters calling upon voters to vote for him as a representative of the Sikh Panth, was elected to the Punjab Legislative Assembly. His election was challenged by the respondent. The singular issue to be determined was whether the speeches and the posters made by him amounted to an appeal to the voters to vote for the appellant on the ground of "his religion" within the ambit of section 123(3). Realizing the context in which appeal was made, the Constitution Bench conclusively held: "we are satisfied that the word 'Panth' in this poster does not mean Sikh religion, and so, it would not be possible to accept the view that by distributing this poster, the Appellant appealed to his voters to vote for him because of his religion".[136]

Thus, essentially in all situations, "It is a matter of evidence for determining whether an appeal has at all been made to an elector and whether the appeal if made is in violation of the provisions of sub-section (3) of section 123 of the Representation of the People Act, 1951". This, indeed, precisely is the eventual conclusion of Lokur, J.,[137] whose opinion is central to the opinion of the majority court. This implies, invocation of 'religion' in the matters of election *per se* is not prohibitive. In all cases, "whether an appeal has at all been made to an elector" on ground of "religion" that vitiates the secular environ of election "is a matter of evidence". If so, then, where is the cleavage between the majority and minority opinions? The true test in both the cases is: whether the appeal made by the election candidate on ground of religion is destructive of the 'secular' character of our democratic social order, irrespective of the fact whether it is the religion of the contesting candidate or that of the electorate. Viewed from this perspective, both the majority and the minority opinions tend to converge rather than deviating.[138] It is both possible and desirable so to do constitutionally. As an axiomatic principle on this count, we venture to state somewhat jurisprudentially: 'the more you move unto the Constitution Benches of greater strength, the more you enter the rarefied realm of foundational values by liberating yourself from the traditional inertia'.

III ENCROACHMENT UPON PUBLIC PROPERTY: WHETHER A FAMILY MEMBER OF THE ORIGINAL ENCROACHER CAN BE DISQUALIFIED UNDER THE PANCHAYAT ELECTION LAW

This question has been specifically dealt with by the Supreme Court in *Sagar Pandurang Dhundare* v. *Keshav Aaba Patil*,[139] under the provisions of Maharashtra

136 AIR 1965 SC 141 (para 14), cited in *Abhiram Singh*, para 1415, per Chandrachud, J.

137 *Abhiram Singh*, para 50(3), per Lokur, J.

138 Cf. See, Amit Bindal, "Religion, Governance and Corruption: An Analysis of the Judicial Reasoning in the Election Judgment," 59 *JILI* (2017) 57-77 – a critical case comment on *Abhiram Singh* (2017) done by the promising young scholar with a different perspective.

139 AIR 2017 SC 5420, per Kurian Joseph (for himself and R. Banumathi, J.). Hereinafter, cited as *Sagar Pandurang Dhundare*.

Village Panchayats Act, 1958.[140] Section 14 of this Act, dealing with disqualifications of election candidates, *inter alia*, lays down in clause (j-3) of sub-section (1) that "No person shall be a member of a Panchayat, or continue as such, who has encroached upon the Government land or public property".[141]

On "undisputed" fact-matrix, the allegation against the appellants was that though they were not the first direct encroachers upon public property, nevertheless their father/grandfather were encroachers and they were the beneficiaries of the encroachment.[142]According to the State and the contesting Respondent, "the beneficiary of an encroachment was also an encroacher".[143]

In the light of this statutory stipulation, the crucial question to be decided is whether a family member of the original encroacher can be disqualified, under section 14(1)(j-3) of the Act, 1958. On this count there are several decisions of the Bombay high court taking the two opposite, contradictory views. One view is that the said statutory provision, on plain reading, reveals that the prohibition to be a member of a Panchayat comes into vogue only if encroachment upon the Government land or public property is directly by the person who is or a prospective member of a Panchayat and not by any third party.[144]

The opposite view is that the disqualification envisaged by section 3(1)(j-3) of the Act of 1958 on grounds encroachment includes encroachment, not only directly by the person who is or aspiring to be a member of the elected body but also, by the legal heirs of such person, who has encroached and continues to occupy the government land.[145]

140 Hereinafter simply, the Act of 1958.

141 This clause was inserted into the Act of 1958 by the Amending Act of 1966.

142 *Sagar Pandurang Dhundare* at 5420 (para 2).

143 *Ibid*.

144 See, *Ganesh Arun Chavan* v. *State of Maharashtra,* 2013 (2) Mh. L.J. 955, decided on 24.09.2012, in which the incumbent was sought to be disqualified on the ground of encroachment, but the court repelled the contention by holding that the encroachment was not by him, but by his father and that the house, wherein he was residing, was constructed with the income of his father, cited at 5420-21 (para 3). See also, *Yallubai Kamble* v. *State of Maharashtra*, (Writ Petition No. 8497 of 2012) decided on 05-10-2012, relying upon the decision in *Ganesh Arun Chavan (supra),* in which the Petitioner was elected as the Sarpanch of the Gram Panchayat, and the allegation was that her husband and brother-in-law made an encroachment on gairan land and constructed a house thereon; the allegation was counteracted by holding that that the encroachment was by her husband and not by her, cited in *Sagar Pandurang Dhundare* at, at 5421-22 (para 4); *Kanchan Shivaji Atigre* v. *Mahadev Baban Ranjagane*, 2013(1) Mh. L.J. 455, decided on 12.10.2012, holding that the wording of the provision makes it clear that it is the act of the person contesting the poll as a candidate or the act of elected member himself or herself as the case may be, that alone would disqualify him or her; It cannot be that somebody else commits an act of encroachment even if he is a Member of the same family but the consequences are visited on an elected representative or a person desiring to contest the election to Gram Panchayat, *id*., at 5422 (para 5).

145 See, *Devidas s/o Matiramji Surwade* v. *Additional Commissioner Amravati*, 2017(1) Mh. L.J. 102 decided on 31.07.2012, a division bench of the High Court of Bombay emphasizing that if such a liberal interpretation is not made in the said provision, "the result would be absurd in the sense that the Government land would continue to remain encroached and the

However, later an attempt was made by the High Court in a case[146] to reconcile the two opposite views by observing that there is no conflict between the two, because in either case the "emphasis is really on the continued encroachment and not so much on the original act of encroachment".[147] "Encroachment, after all, is not a one-time act", said the Court, but "a continuous act," and that "if someone's encroachment is continued by another, that other is equally an encroacher, as much as the original encroacher".[148]

After taking due note of the various decisions of the Bombay high court, the Supreme Court in the instant case has approached the issue of construction of section 14(1)(j-3) of the Act of 1958 strictly from the perspective of electoral law. This is necessitated by the fact matrix of the instant case, where, in the post-election scenario, the Collector has taken steps to disqualify an elected member on the petition filed by certain individuals much after the election, chiefly on the plea that the appellant's father/grandfather were encroachers and he was the beneficiary of the encroachment, and that such person's participation as an interested member in the Panchayat would be detrimental to the object of the statute and it would be against the larger public interest.[149]

The Supreme Court has considered the issue of appellant's removal in the light of the statutory scheme, which requires the reading of section 14(1)(j-3) in conjunction

legal heirs or the assignees or the transferees remaining on such encroached Government land shall claim the right to get elected as a member of democratically elected body"; and "the very object of the Bombay Village Panchayats (Amendment) Act, 2006" would be defeated. Cited cited in *Sagar Pandurang Dhundare* at, at 5422-23 (para 6). See also, *Parvatabai @ Shobha d/o Kisan Kande* v. *Additional Commissioner Nagpur*, 2015 (5) Mh. L.J. 238, in which the High Court faithfully followed the view taken in *Devidas s/o Matiramji Surwade* (supra) by observing: "The decision in Devidas Surwade (supra) being that of the Division Bench and the expression "person" having been duly considered, it is not permissible for this Court to go into the question as to whether the ratio of judgments of learned Single Judge [in *Arun Chavan (supra),* for instance] should be followed instead of the view taken by the Division Bench. The ratio of the judgment of the Division Bench will have to be respectfully followed." Cited in *Sagar Pandurang Dhundare*, at 5423-24 (para 7). It is significant to note that the Special Leave Petition in this case was dismissed by the Supreme Court at the threshold, *ibid.* See also, *Sandip Ganpatrao Bhadade* v. *Additional Commissioner Amravati*, 2017(1) Mh. L.J. 79, cited, *Id.*, at 5424 (para 8).

146 *Anita Laxman Junghare* v. *Additional Commissioner Amravati Divisio*n, (Writ Petition No. 1660 of 2017), cited in *Sagar Pandurang Dhundare* at, at 5425 (para 9).

147 *Ibid*.

148 *Ibid*. The High Court in *Anita Laxman Junghare* distinguished the two opposite views. In the case of *Devidas Surwade* (supra), representing the liberal construction of s. 14(1)(j-3) of the Act of 1958, the original encroachment may have been by the Petitioner's father, but after the death of his father, he continued to occupy the property and thereby attracted the disqualification of s. 14(1)(j-3). On the other hand, in the case of *Kanchan* (supra), representing the narrow construction of the same provision, it was the Petitioner's father-in-law, who was the encroacher; and that she had nothing to do with it. Besides, it was not the case of the State that she continued to occupy the property either as a legal heir of her father-in-law or as a member of her husband's family. See, *ibid.*

149 *Sagar Pandurang Dhundare*, at 5425 (para 10) read with para 2 at 5420.

with section 53 of the Act of 1958. Dealing specifically with "Obstructions and encroachments upon public streets and open sites," section 53, *inter alia*, provides under sub-section (1) that whoever, within the limits of the village, "builds or sets up any wall, or any fence, rail, post, stall, verandah, platform, plinth, step or structure or thing or any other encroachment or obstruction", "shall, on conviction, be punished with fine, which may extend to fifty rupees, and with further fine which may extend to five rupees for every day on which such obstruction deposit, projection, cultivation or unauthorized use continues after the date of first conviction for such offence".[150] Sub-section (2) of section 53 empowers the Panchayat to remove any such unauthorized obstruction or encroachment that soon after it comes to its notice or brought to its notice, and the expense of such removal "shall be paid by the person who has caused the said obstruction or encroachment".[151]

If any Panchayat fails to take action under sub-section (2), the Collector *suomotu* or on an application made in this behalf, may take action as provided in that sub-section, and submit the report thereof to the Commissioner.[152] The expense of such removal shall be recovered by him in the same manner as it is provided in the case of the Panchayat; that is, as "an arrear of land revenue".[153]

On conjoined consideration of the provisions of section 14(1)(j-3) and section 53 (1), (2) and (2A) of the Act of 1958 (as amended), in the opinion of the Supreme Court the person to be disqualified under section 14(1)(j-3) from becoming member of the Panchayat or to continue as such is the person "who has actually, for the first time, made the encroachment".[154] This is so because, it is this person to be disqualified who is "punished for encroachment" under section 53(1) or "against whom there is a final order of eviction under section 53(2) or (2A)" of the Act of 1958 either on behalf of the Panchayat or the Collector, as the case may be.[155]

The decision that follows in the light of the abstracted principle on the fact matrix in the instant case is: "In case, the Appellants suffer from any of the three situations indicated above, they shall be unseated".[156] This implies that the narrow interpretation of section 14(1)(j-3) of the Act of 1958, confining its ambit of disqualification to the person who has *actually* encroached upon the public property, is the desiderated course.

150 Clause (a) of sub-section (1) of section 53 of the Act of 1958.

151 The expenses incurred in the removal of unauthorized encroachment shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter IX of the Act of 1958.

152 Clause (2A) of section 53(1) of the Act of 1958 inserted by the Amending Act of 2006.

153 *Ibid*.

154 *Sagar Pandurang Dhundare*, at 5427 (para 15).

155 *Ibid*.

156 *Id*. at 5427 (para 16).

For obviating the conflict of decisions, the Supreme Court has adequately addressed to the concern, why they are not willing to go in for desirability of wider interpretation of section 14(1)(j-3). On this count, the stated concern of the Supreme Court is:[157]

> … Encroachment is certainly to be condemned, the encroacher evicted and punished. *Desirably,* there should not be a member in the Panchayat with conflicting interest.…. [Emphasis added]

The principles, showing how, in which manner, and to what extent, the courts should venture to undertake wider view of a statutory provision(s), especially in the arena of election law, may be expounded as follows:

(a) Once a person is elected by the people, he can be unseated only in the manner provided under law,[158] because invariably the statute governing elections is a self-contained code.

(b) The intention of the legislature, whether the statutory provision is to be construed liberally, is to be gathered from the statute itself. "If there is no statutory expression of the intention, the court cannot supply words for the sake of achieving the alleged intention of the law maker," for it is "entirely within the realm of the law maker to express clearly what they intend".[159]

(c) Moving beyond the clear statutory expression is "permissible" in a situation "when it is absolutely necessary, and where the intention is clear but the words used are either inadequate or ambiguous".[160] Beyond this, the Court,

157 *Id.* at 5426 (para 11). It is this element of 'desirability' that prompted the Division Bench of the Bombay high court in *Devidas* (supra) to adopt the liberal construction of s. 14(1)(j-3): "….The term person in the said amended provision has to be interpreted to mean the legal heirs of such person, who has encroached and continues to occupy the Government land or the Government property, his agent, assignee or transferee or as the case may be. If such an interpretation is not made in the said provision, the result would be absurd in the sense that the Government land would continue to remain encroached and the legal heirs or the assignees or the transferees remaining on such encroached Government land shall claim the right to get elected as a member of democratically elected body. In no case our conscious permits such type of interpretation to defeat the very object of the Bombay Village Panchayats (Amendment) Act, 2006". Cited in *Sagar Pandurang Dhundare*, at 5423 (para 6).

158 *Sagar Pandurang Dhundare*, at 5426 (para 11).

159 *Ibid*.

160 *Ibid*. This is not the situation in the instant case. In the Act of 1958, wherever the law-makers wanted to widen the scope of disqualification by involving the encroachment by any member of the family of the concerned person, they have done so specifically. For instance, in Explanation 2 for s. 14(1)(h), the failure to pay any tax or fee due to the Panchayat or Zila Parishad by a member of a Hindu Undivided Family (HUF) or by a person belonging to a group has been expressly mentioned as a disqualification on others in the family or group. On the contrary, lest a person is said to be disqualified for having any interest either by himself

> "in the process of interpretation, cannot lay down what is desirable in its own opinion, if from the words used, the legislative intention is otherwise discernible".[161]
>
> (d) The emerging principle-statement is: "What is desirable is the jurisdiction of the law-maker and only what is discernible is that of the court".[162]

For achieving the "laudable object" of section 14(1)(j-3), namely disqualifying not only the person who has directly encroached upon public property to represent the community, but also the legal heirs of such person, who has encroached and continues to occupy the Government land or the Government property, whether the Court would be justified to invoke the principle of 'purposive interpretation' as recently enunciated by the 7-Judge bench in *Abhiram Singh* v. *C.D. Commachen (D) by L.Rs.*[163] in the instant case.

On critical examination of this plea, the Supreme Court has found that in *Abhiram Singh case* on the basis of liberal construction ('purposive interpretation') of the relevant provisions of the Representation of the People Act, 1951, appeal on the grounds of religion, race, caste, community, language, etc. of the candidates and the electorate, and canvassing votes accordingly, has been held to be a corrupt practice.[164] The rationale for purposive interpretation is that it is essentially "electorate centric rather than candidate centric".[165] Perceived in this manner, 'purposive interpretation' is simply inapplicable in the instant case for the following reasons:[166]

> One, the Appellants were elected by the people to the Panchayat. Two, there is no case that they are original encroachers on the public property. Three, most importantly, this is not the case where the alleged act of encroachment has influenced the will of the people in which case, going

directly or indirectly through or his partner, any share or interest in any work done by order of the panchayat or in any contract with by or on behalf of or employment with or under the panchayat in case of Clause 14(1)(g), the Legislature has clearly clarified by adding Explanation IA to the effect that a person shall not be disqualified under Clause (g) by reason of only such person having a share or interest in any newspaper in which any advertisement relating to the affairs of the panchayat, or having a share or interest in the occasional sale to the panchayat of any article in which he regularly trades and having an occasional share or interest in the letting out or on hire to the panchayat of any article and equally having any share, interest in any lease for a period not exceeding ten years of any immovable property. Both the positive and negative modes of legislative intention clearly and specifically show when the intent of the legislature was to disqualify a member for the act of his family, and when not.

161 *Id*. at 5426-27 (para 11).

162 *Id.* at 5427 (para 14).

163 (2017) 2 SCC 629. For detailed analysis, see Part II, *Supra.*

164 See, *Sagar Pandurang Dhundare*, at 5427 (para 12).

165 *Ibid.*

166 *Ibid.*

> by the propounding in *Abhiram Singh* case, the court would have been justified in attempting a purposive interpretation to achieve a laudable object.

Indiscriminate reliance on judicial precedent emanating from the apex court decision in *Hari Ram* v. *Jyoti Prasad*[167] is discounted inasmuch as it is not at all relevant to decide the issue in hand.[168] Neither it relates to interpretation of a statute dealing with election to a public office or disqualification on the ground of encroachment; nor it deals with the question of whether a legal heir can be considered an encroacher.[169] Reliance on such a precedent in the instant case is "misplaced".[170]

This is how in the light of the analysis as abstracted above, the Supreme Court set aside the impugned judgment of the Bombay high court[171] and thereby settled the issue of, how far the court can stretch the interpretative process in their decision-making.

I. WHETHER ELECTION PETITION DISCLOSES ANY 'CAUSE OF ACTION': AMBIT OF COURT'S ENQUIRY[172]

This issue has emerged for consideration of the Supreme Court in *Kuldeep Singh Pathania* v. *Bikram Singh Jaryal*.[173] The fact matrix giving rise to this specific issue is as follows:[174]

The Appellant lost election in an Assembly Constituency by a narrow margin of 111 votes. He filed an election petition mainly on the grounds under section

167 (2011) 2 SCC 682, cited in *Sagar Pandurang Dhundare*, at 5427 (para 13).

168 It is a case where there was an allegation of encroachment upon a substantial part of a street by the Appellant which was causing inconvenience to the users of the street.

169 *Ibid*.

170 *Ibid*.

171 *Id.* at 5428 (para 17).

172 See also, Virendra Kumar, "corrupt practices under the representation of the people act, 1951: when does an election petition is held to disclose triable issues?" *ASIL* Vol. LII at 482-488 (2016); Virendra Kumar, "Election Petition: When could it be said to disclose 'no cause of action'" *ASIL* Vol. LI at524-530 (2015); Virendra Kumar, "Nomination paper: when does it amount to its proper or improper rejection by the returning officer?" *ASIL*. Vol. L at 545-550 (2014); Virendra Kumar, "Cause of action: when it is said to be disclosed in an election petition," *ASIL*. Vol. XLVIII at 414-418 (2012); Virendra Kumar, "An election petition lacking material facts as required to be stated in terms of s. 83(1): whether could be dismissed summarily without trial," *ASIL*. Vol. XLVI at 358-363 (2010); Virendra Kumar, "Material facts and particulars,"*ASIL*. Vol. XXXVI at 245-248 (2001); Virendra Kumar, "Dismissal of election petition *in limine*,"*ASIL*. Vol. XXXV at 282-284 (1999); Virendra Kumar, "Modus operandi for determining cause of action," *ASIL* Vol. XXIII (1987) at 412-415; and Virendra Kumar, "Rejection of nomination paper," *ASIL* Vol. XXI (1985) at 409-418.

173 AIR 2017 SC 593, per Kurian Joseph, J. (for himself and A.M. Khanwilkar, J.) Hereinafter, simply *Kuldeep Singh Pathania.*

174 See, *Id.* at 594 (para 2).

100(1)(d)(iii) of the Representation of the People Act, 1951.[175] While trying the election petition, out of the six issues settled by the High Court, issues 2 to 5 were treated as preliminary issues, of which, issues 2 and 3 related to cause of action:[176]

2) Whether the election petition is liable to be dismissed *in limine* for lack of material facts and particulars, as alleged?

3) Whether the election petition is not maintainable for want of any cause of action, as alleged?

Based on the findings on the preliminary issues, the election court held that the election petition lacked in material facts as required under section 83(1)(a) of the 1951 Act and as such, did not disclose any cause of action.[177] Consequently, the election petition was dismissed *in limine*. The appellant-petitioner, aggrieved by the decision of the election court, has come to the Supreme Court in appeal.

For deciding whether the issue whether a cause of action is made out or not, the Supreme Court has taken note of the averments made in the election petition (as summarized by the election court itself in paragraph 27 of the impugned judgment), which read as follows:[178]

The "violations" alleged by the Petitioner during poling and counting of votes can be grouped in the following three categories, which shall be dealt with one by one:

I. Exercise of dual right of franchise by a voter and discrepancy between the EVM record and the record maintained in Form 17-A at polling station No. 92-Kamla;
II. Improper reception of 30 postal ballot papers; and
III. Discrepancy regarding 100 postal ballot papers-whether 597 or 697?

The High Court dealt with the various violations referred to in the petitioner's averments as abstracted above with reference to the replies furnished by the Respondents and then came to the conclusion that the petition did not disclose any cause of action since it lacked material facts. This was done by the High Court, in view of the Supreme Court, "apparently or rather mistakenly, under Order XIV Rule 2 [of CPC]".[179] This is where, according to the apex court, the High Court "committed a grave error".[180]

175 S. 100 of the Act provides for grounds for declaring election to be void. S. 100(1)(d)(iii) of the Act provides that an election of a returned candidate can be declared to be void if the High Court is of the opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void.

176 *Kuldeep Singh Pathania*, at 594 (para 2).

177 See, *Id*. at 594 (para 3).

178 See, *Id.* at 594-95 (para 4), reproducing para 27 of the High Court judgment.

179 *Id.* at 595 (para 5).

180 *Ibid*.

For the elucidation the "grave error", the Supreme Court has explored and analyzed the ambit of Order XIV of the Code of Civil Procedure, 1909, which deals with 'settlement of issues and determination of suit on issues of law or on issues agreed upon'. Its analysis, especially with reference to Order XIV Rule 2 and Rule 2(2)[181] is as under:[182]

(a) Rule 2 provides for disposal of a suit on a preliminary issue.
(b) Sub-rule (2) of Rule 2 provides that if the court is of opinion that a case or part thereof can be disposed of on an issue of law only, it may try that issue first, if it relates to (i) the jurisdiction of the court, or (ii) a bar to the suit created by any law for the time being in force.
(c) The whole purpose of trial on preliminary issue is to save time and money.
(d) Though it is not a mini trial, the court can and has to look into the entire pleadings and the materials available on record, to the extent not in dispute.

Having thus expounded, the Supreme Court has then instantly explored the ambit Order VII Rule 11 in relation to the ambit of Order XIV Rule (2) and Rule 2(2) with the following features:[183]

(i) The enquiry of the election court under Order VII Rule 11 is strictly limited to deciphering "institutional defects", which need to be attended right at the institution stage.
(ii) At the institution stage, the court can only see whether the plaint, or rather the pleadings of the Plaintiff, constitute a cause of action.
(iii) Pleadings in the sense where, even after the stage of written statement, if there is a replication filed, in a given situation the same also can be looked into to see whether there is any admission on the part of the Plaintiff.
(iv) In other words, under Order VII Rule 11, the court has to take a decision looking at the pleadings of the Plaintiff only and not on the rebuttal made by the Defendant or any other materials produced by the Defendant.

Relative evaluation of the respective ambits of the two Orders as abstracted above yield the following practice-principles:

A. The trial on preliminary issues is held at the stage of Order XIV, whereas the trial on issues pertaining to the rejection at the institution stage for lack of material facts and for not disclosing a cause of action is undertaken at the stage of Order VII Rule 11 of CPC.[184]

181 Substituted by the Act 104 of 1976, s. 64, with effect from1-2-1977.
182 *Kuldeep Singh Pathania*, at 595 (para 6).
183 *Ibid*.
184 *Id.* at 595 (Para 7).

B. A trial on preliminary issues at the stage of Order XIV, does not exclude or preclude an enquiry under Order VII Rule 11(a) of the Code; that is, in case of latter enquiry can be taken up "at any stage".[185]
C. In an enquiry under Order VII Rule 11 (a), only the pleadings of the Plaintiff-Petitioner can be looked into even if it is at the stage of trial of preliminary issues under Order XIV Rule 2(2).[186]
D. "Considering correctness of allegations and evidence in support of averments by entering into the merits of the case which would be permissible only at the stage of trial of the election petition and not at the stage of consideration whether the election petition was maintainable and dismissed the petition".[187]
E. While settling preliminary issues, the entire pleadings on both sides can be looked into under Order XIV Rule 2(2) to see whether the court has jurisdiction and whether there is a bar for entertaining the suit.[188]

Bearing this practice-principles in mind that differentiate the functional difference between the nature and scope of two enquiries, one relating to the preliminary issues and the other relating to determination of the 'cause of action', it shows that the High Court in the instant case had "committed a mistake".[189] It unwittingly treated two issues[190] as preliminary,[191] which "actually are relatable only to Order VII Rule 11 of the Code, in the sense those issues pertained to the rejection at the institution stage for lack of material facts and for not disclosing a cause of action".[192]

Besides, in the present case, there is no preliminary issue relating to the jurisdiction of the court warranting trial under Order XIV Rule 2(2) of CPC, inasmuch as the court "exercised its jurisdiction only under section 83(1) (a) of the Act read with Order VII Rule 11(a) of the Code".[193] In view of this settled position, the Supreme Court has stated unequivocally: "Since the scope of the enquiry at that stage has to be limited only to the pleadings of the Plaintiff, neither the written statement nor the averments, if any, filed by the opposite party for rejection under Order VII Rule 11(a) of the Code or any other pleadings of the Respondents can be considered for that purpose."[194]

185 *Ibid*.

186 *Id.* at 595 (para 8).

187 *Id.* at 596 (para 11), citing *Virender Nath Gautam* v. *Satpal Singh*, (2007) 3 SCC 617 (para 52).

188 *Ibid.*

189 *Id.* at 595 (para 7).

190 See, *Supra* note 176 and the accompanying text.

191 See also, Virendra Kumar, "Preliminary of a preliminary objection", *ASIL* Vol. XXXVI (2000) at 222-226.

192 *Id*. at 595 (para 7).

193 *Id.* at 595-96 (para 9).

194 *Id*. at 596 (para 9). This view is reinforced by *Mayar (H.K.) Ltd.* v. *Owners & Parties, Vessel M.V. Fortune Express*, (2006) 3 SCC 100 (para 12), when the Supreme Court, dealing with a

On their perusal of the averments in the election petition, the Supreme Court has satisfactorily found that the petition discloses "a cause of action," and therefore, "it is not necessary to remit the petition for a fresh enquiry in that regard."[195] Accordingly, the apex court has allowed the appeal by setting aside the impugned order, and further directing the High Court to try the petition on merits expeditiously, preferably within a period of four months from the date of the decision.[196]

II. WITHDRAWAL OF CANDIDATURE: WHETHER ILLEGAL ACCEPTANCE OFWITHDRAWAL NOTICE BY THE RETURNING OFFICERPER SE MATERIALLY AFFECT THE RESULT OF THE ELECTION[197]

This issue has been squarely dealt by the Supreme Court in *Kameng Dolo* v. *Atum Welly,*[198] whose factual matrix may be abstracted as under:

In the State Assembly Elections from a given constituency the Appellant and the Respondent were the only two candidates, who filed their respective nomination papers. On scrutiny, both the nominations were found to be in order. However, soon after the stipulated date and time of withdrawal, the Respondent learnt about the withdrawal of his candidature. He also learnt that on the same day, the website of State Election Commission displayed withdrawal of candidature by the Respondent from the constituency and consequential election of the Appellant from the said constituency unopposed. This led the Respondent immediately to lodge a police complaint under the relevant provisions of the of Indian Penal Code, 1860,[199] and also filed an Election Petition before the High Court challenging the legality and

similar issue observed: "it is apparent that the plaint cannot be rejected on the basis of the allegations made by the Defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the Plaintiff may not succeed cannot be a ground for rejection of the plaint. ..." Cited in *Id*. at 596 (para 10).

195 *Id*. at 596 (para 12).

196 *Id*. at 596 (para 13).

197 Cf., Virendra Kumar, "Refusal to receive nomination paper," *ASIL* Vol. XXXIII-IV (1997-98) at 319-320. See also, Virendra Kumar, "S. 100(1)(d)(iv) of the Act of 1951: Its inherent problematics," *ASIL* Vol. XXXV (1999) at 291-294). See also, Virendra Kumar, "Role of Returning Officers," *ASIL* Vol. XX (1984) at 231-241.

198 AIR 2017 SC 2859, per Dipak Misra, J. (for himself and A.M. Khanwilkar, J.). Hereinafter simply, *Kameng Dolo.*

199 Ss. 468 and 469 of Indian Penal Code, 1860.

validity of the Appellant's election under the Representation of People Act, 1951, by specifically pleading that acceptance of withdrawal notice in violation of statutory provisions had materially affected the election and prayed for declaration for setting aside the appellant's election.

The High Court allowed the election petition by holding that the election had been materially affected by Returning Officer accepting the withdrawal of Respondent's nomination in violation of statutory provisions, and accordingly declared the election result of the Appellant as void under section 100(1)(d)(iv) of the Act. This has given rise to the present appeal before the Supreme Court.

Recognizing centrality of the issue involved in the instant case that revolves around 'withdrawal of candidature', the Supreme Court has analyzed the provisions of section 36 of the Act of 1951.[200] The analysis is abstracted with the following effects:[201]

(a) A candidate is entitled to withdraw his candidature by notice in writing that shall contain all such particulars as may be prescribed.
(b) The withdrawal notice shall be signed by him and delivered to the Returning Officer before three O'clock in the afternoon on the stipulated date.[202]
(c) The delivery of the said notice to the Returning Officer shall be either by the candidate in person or by his proposer or election agent who has been authorized in this behalf in writing by such candidate.
(d) The sanctity of withdrawal notice is maintained by expressly providing that no person who has given a notice of withdrawal of his candidature shall be allowed to cancel the notice.
(e) The Returning Officer is statutorily obligated to fully satisfy himself as to the genuineness of the notice of withdrawal and the identity of the person delivering it.
(f) Thereafter, he shall cause the notice to be affixed in some conspicuous place in his office.

200 S. 37 of the Act of 1951 dealing with 'withdrawal of candidature' provides: (1) Any candidate may withdraw his candidature by a notice in writing which shall contain such particulars as may be prescribed and shall be subscribed by him and delivered before three O'clock in the afternoon on the day fixed under clause (c) of s. 30 to the returning officer either by such candidate in person or by his proposer, or election agent who has been authorised in this behalf in writing by such candidate. (2) No person who has given a notice of withdrawal of his candidature under sub-section (1) shall be allowed to cancel the notice. (3) The returning officer shall, on being satisfied as to the genuineness of a notice of withdrawal and the identity of the person delivering it under sub-section (1), cause the notice to be affixed in some conspicuous place in his office.

201 See, *Kameng Dolo*, at 2869 (paras 19 and 20).

202 The date is fixed under clause (c) of s. 30 of the Act of1951 specifically providing that the last date for the withdrawal of candidatures shall be the second day after the date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday.

In view of these prescriptive requirements, which are as "clear as crystal", the Supreme Court itself revaluated afresh the most crucial evidence - the evidence of the Returning Officer,[203] and has found that in the present case "it is explicit that withdrawal of the candidature was not made by the candidate or by his proposer or his election agent",[204] resulting into "total non-compliance of section 37 of the Act".[205]

In view of this scenario, the Supreme Court has considered the resulting "seminal question": "what is the effect of acceptance of such withdrawal of the candidature that is in total non-compliance with the law".[206] Here, at this juncture, it was argued on behalf of the appellant "that though withdrawal of the candidature is treated to be non-compliant with the statutory provisions, yet it is obligatory on the part of the elected candidate (sic – to be read as 'election petitioner'?) to satisfy the court or the election tribunal that it has materially affected the election".[207] The 'materially affected' argument instantly has drawn the attention of the apex court to section 100 of the Act of 1951, which deals with the grounds for declaring election to be void.

The provisions of section 100 that are relevant to the case in hand are contained in clause (d) read with sub-clause (iv) of sub-section (1) of section 100 of the Act of 1951. As a running statement, section 100(1)(d)(iv) of the Act lays down that "if the High Court is of opinion" "that the result of the election, in so far as it concerns a returned candidate, has been materially affected" "by any non-compliance with the provisions of the Constitution or of this Act or of any Rules or orders made under this Act", "the High Court shall declare the election of the returned candidate to be void". In view of this clear stipulation, the Supreme Court has examined in detail the specific question, whether the violation of conditions expressed in section 37 of the Act of 1951 is "inextricably connected with the concept and election being materially affected", "and unless that is proven or established, an election cannot be set aside".[208] On the basis of Supreme Court review-analysis of the plethora of case law, the following statement-principles may be abstracted:

203 The evidentiary statement of the Returning Officer (RO) is reproduced *in extenso*, see, *Kameng Dolo*, at 2869-70 (para 21). In his testimony, the RO clearly stated that he received the notice for withdrawal (a duly filled Form No. 5) from a named person (one Sri Tana Sanjeev) whom he knew "personally" and who was earlier associated with the respondent in some official capacity when he was a Minister in the government. Most importantly the RO also admitted that he knew that during the relevant point of time (that is, during. 2014 Arunachal Pradesh Legislative Assembly election), "Sri Tana Sanjeev was neither a proposer nor the election agent" of the appellant (Sri Atum Welly), and that under the law, "it is only either the candidate personally, the proposer or election agent duly authorised by candidate are competent and eligible to file Form No. 5 for withdrawal of nomination of a candidate". *Ibid.*

204 *Ibid*.

205 *Id*. at 2870 (22)

206 *Id.* at 2870 (para 23).

207 *Ibid*. This argument was raised before the Supreme Court by Mr. Sorabjee, though his name does not appear in the reported list of counsels representing the respective parties. However, his argument was carried forward by Mr. Preetesh Kapur, one of the counsels for the appellant, on the next date, see, *ibid*.

208 *Id.* at 2871 (para 24).

A. For the election Petitioner to succeed on the ground as stipulated under section 100(1)(d)(iv), the election Petitioner is required not only to plead and prove the ground but also to establish the result of the election of the returned candidate concerned has been materially affected.[209]

B. To record a finding whether 'the result of the election has been materially affected' in any given case is, indeed, a question of fact and has to be proved by positive evidence, and not by the test of mere possibility, asserting that the result could have been different in all probability.[210]

C. The burden of proving such material effect has to be discharged by the election Petitioner by adducing positive, satisfactory and cogent evidence, and if the Petitioner is unable to do so, the election must stand.[211]

However, the requirement under section 100(1)(d), wherein an election is liable to be declared void on the ground of improper acceptance of a nomination if such *improper acceptance* of the nomination has materially affected the result of the election, needs to be distinguished from the one under section 100(1)(c), wherein *improper rejection* of a nomination itself is a sufficient ground for invalidating the election without any further requirement of proof of material effect of such rejection on the result of the election.[212] The rationale for this critical distinction as spelled out by the Supreme Court in the instant case may be stated as under:[213]

209 *Id*. at 2863 (para 9), citing *Mangani Lal Mandal* v. *Bishnu Deo Bhandari*, (2012) 3 SCC 314 (para 11): AIR 2012 SC 1094, drawing support from *Jabar Singh* v. *Genda Lal*, AIR 1964 SC 1200; *L.R. Shivaramagowda* v. *T.M. Chandrashekar*, (1999) 1 SCC 666; and *Uma Ballav Rath* v. *Maheshwar Mohanty*, (1999) 3 SCC 357.

210 *Id*. at 2872 (para 27 and 28), citing *Santosh Yadav* v. *Narender Singh*, (2002) 1 SCC 160, which in turn reviewed *Vashist Narain Sharma* v. *Dev Chandra*, AIR 1954 SC 513, *Samant N. Balkrishna* v. *George Fernandez*, AIR 1969 SC 1201, *Shiv Charan Singh* v. *Chandra Bhan Singh*, (1988) 2 SCC 12, *Tek Chand* v. *Dile Ram,* (2001) 3 SCC 290 – in all these cases there were number of candidates (more than two) in the fray of contest including the appellant and the returned candidate as respondent, and miscarriage occasioned by improper acceptance of nomination paper.

211 *Id*. at 2874 (para 29), citing the summation of the Supreme Court in *Santosh Yadav* (supra note 197), the apex court had held that though it is very harsh and difficult burden of proof to be discharged by the election Petitioner adducing evidence to show the manner in which the wasted ballots would have been distributed amongst the remaining validly nominated candidates and yet in the absence of positive proof in that regard the election must be allowed to stand and the court should not interfere with the election on speculation and conjectures.

212 See, *Id*. at 2874-75 (para 32, 32), citing *Rajendra Kumar Meshram* v. *Vanshmani Prasad Verma,* (2016) 10 SCC 715. See also, Virendra Kumar, "Election of the returned candidate on ground of improper acceptance of his nomination paper: Can it be annulled without determining whether the result of election of that constituency was materially affected due to such acceptance?"*ASIL* Vol. LII 488-492 (2016); Virendra Kumar, "Improper rejection of nomination papers," *ASIL* Vol. XLV (2009) at 359-366; Virendra Kumar, "Improper acceptance of nomination papers," *ASIL* Vol. XLV (2009) at 372-374; Virendra Kumar, "Nomination papers: whether accepted improperly," *ASIL* Vol. XXXIX (2003) at 273-278; Virendra Kumar, "Quagmire of Improper acceptance of nomination papers," *ASIL* Vol. XXXVIII (2002) at

(i) Improper rejection (as opposed to improper acceptance) of a nomination paper 'presumably' "affects the whole election".[214]

(ii) Such a presumption is premised, owing to, "Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration".[215]

(iii) It is not difficult to imagine cases "where the most desirable candidates from the point of view of electors and the most formidable candidate from the point of view of the other candidates may have been wrongly kept out from seeking election".[216]

(iv) "By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available".[217]

(v) "On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field".[218]

(vi) It is, therefore, fair to conjecture that "the legislature realizing the difference between the two classes of cases has given legislative sanction to the view by amending section 100 by the Representation of the People (Second Amendment) Act, 27 of 1956, and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void".[219]

In the present case there were only two candidates in the fray – the appellant, the returning candidate; and the respondent, whose candidature was illegally accepted

304-307; Virendra Kumar, "Improper acceptance of any nomination materially affecting election result," *ASIL* Vol. XXIV (1988) at 266-269;and Virendra Kumar, "Improper acceptance of nomination papers," *ASIL* Vol. XX (1984) at 237-240.

213 *Id*. at 2876-7 (para 37), citing the decision of the Constitution Bench in *Surendra Nath Khosla* v. *S. Dalip Singh*, AIR 1957 SC 242.

214 *Ibid*, by making a reference *to Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*, 1954 SCR 817 at p. 842 and *Karnail Singh* v. *Election Tribunal, Hissar*, 10 Elec. Law Reports 189 (Five-Judge Bench of the Supreme Court) - both cited In *Surendra Nath Khosla* (supra note 210). This was so 'presumed' 'consistently' almost by all the Election Tribunals in the country even before the legislative recognition of this view, see, *infra*.

215 *Ibid*.

216 *Ibid*.

217 *Ibid*.

218 *Ibid*.

219 *Ibid*.

as withdrawn by the returning officer in complete violation of the statutory provision contained in section 37 of the Act of 1951, the election petitioner. In this situation, the appellant gets automatically declared elected, for there is no contest, and, therefore, no election. This amounts to saying, "a desirable candidate for some reason is kept out of fray".[220] At this juncture, the Supreme Court is "disposed to think"[221]: "when in transgression of the statutory provision, a candidate's candidature is allowed to be withdrawn, it will tantamount to sacrilege of democracy";[222] and "illegal acceptance of withdrawal has the potentiality to destroy the base of democracy and corrode its primary roots".[223] The Supreme Court further reiterated the principle to the effect that "the sanctity of the electoral process imperatively commands that each candidate owes and is under an obligation that a fair election is held and freedom in the exercise of the judgment which engulfs a voter's right, a free choice, in selecting the candidate whom he believes to be best fitted to represent the constituency, has to be given due weightage, are never to be eroded".[224]

The clear violation by the returning officer of his statutorily significant responsibility of observing safeguards provided against unlawful withdrawal of candidature under section 37 of the Act of 1951 has, indeed, created "a dent or hollowness in the election process".[225] Thus, non-holding the contest by itself amounts to materially affecting the result of the election, prompting the Supreme Court to uphold the decision of the High Court in voiding the election of the returned candidate under section 100(1)(d)(iv) of the Act of 1951.

IV CONCLUSION

We have critically analysed the four issues emanating from four decisions of the Supreme Court – each issue separately dealt in respective Parts, ranging from Part II to Part V. Each part is self-contained and concluded in itself. Nevertheless, endeavour here is made to sharpen the focus of those respective conclusions.

In *Abhiram Singh case* (2017), the 7-Judge Constitution Bench of the Supreme Court is deeply divided (4:3) on the issue of interpretation of section 123(3) of the Representation of Act of 1951, which, inter alia, prohibits an election candidate to appeal to the voter on ground of "his religion" – the majority court preferring the broader view on the basis of 'purposive' interpretation, while the minority court adopting the restrictive literal interpretation.[226] On relative evaluation of the two divergent opinions, we have raised in our analysis two distinct, and yet related,

220 *Id*. at 2878 (para 42).

221 *Ibid*.

222 *Ibid*.

223 Ibid.

224 *Ibid*, citing *Krishnamoorthy* v. *Sivakumar*, (2015) 3 SCC 467.

225 Ibid.

226 See, Part II, *supra.*

questions that: one, whether the strict interpretation of section 123(3) of the Representation of the People Act of 1951 by the minority court precludes the possibility of any abuse religion of the electorates by the election candidate in the electoral secular matters, notwithstanding the fact that he is merely espousing the collective cause of the targeted community; two, whether the liberal interpretation of the same section 123(3) by the majority court excludes the possibility of accommodating the play of fundamental right to religion in the electoral secular matters.[227] Our own response in both the cases is in the negative, inasmuch as the restrictive interpretation does not necessarily preclude the possibility of abuse of religion if the prohibition is confined to the religion of the candidate who made the appeal and not to the religion of the voter; whereas the liberal interpretation does not necessarily exclude the possibility of accommodating the play of fundamental right to religion in the electoral secular matters.[228] The critical question to be raised in either case is the same: whether the appeal made by the election candidate on ground of religion is destructive of the 'secular' character of our democratic social order, irrespective of the fact whether it is the religion of the contesting candidate or that of the electorate.[229] Viewed from this perspective, we have concluded that both the majority and the minority opinions tend to converge rather than deviating.[230]

In *Sagar Pandurang Dhundare* case (2017), the Supreme Court is required to resolve the conflicting views, reflected in the two strings of judicial decisions emanating from a High Court, in respect of a statutory provision relating to panchayat election, which, inter alia, stipulates that no person shall be a member of a Panchayat, or continue as such, who has encroached upon the Government land or public property.[231] The apex court opted to go in for restrictive interpretation of the said statutory provision keeping in view the scheme of the Panchayat Act as a whole in preference to the liberal view as recently propounded by the 7-Judge Constitution Bench of the Supreme Court in *Abhiram Singh* singularly for at least three reasons: one, there is no case that appellants are original encroachers on the public property; two, this is not the case where the alleged act of encroachment has influenced the will of the people in which case, going by the propounding in *Abhiram Singh* case, the court would have been justified in attempting a purposive interpretation to achieve a laudable object; three, once a person is elected by the people, he can be unseated only in the manner provided under law, because invariably the statute governing elections is a self-contained code, and that going beyond the clear statutory expression is 'permissible' in a situation when it is absolutely necessary, and where the intention is clear but the words used are either inadequate or ambiguous".[232]

227 *Ibid*.
228 *Ibid*.
229 *Ibid*.
230 *Ibid*.
231 See, Part III, *supra*.
232 *Ibid*.

In *Kuldeep Singh Pathania* (2017) the Supreme Court, while dealing with the basic question, namely, whether it is legitimate for the election court to go beyond the pleadings of the plaintiff and look into the correctness of allegations by entering into the merits of the case; that is, by considering evidence adduced by the opposite party, has pointed out the 'grave error' the High Court had committed.[233] Such a serious error, our analysis reveals, relates to lack of comprehending the purport of two Orders - Order VII Rule 11 and of Order XIV Rule (2) and Rule 2(2) of the Code of Civil Procedure, 1909 – the former Order deals with 'institutional defects', which need to be attended at the institution stage by solely enquiring whether pleadings of the Plaintiff, reveal 'a cause of action', while the latter Order obliges the Court to look into the entire pleadings and the materials available on record, to the extent not in dispute, for deciphering if the issue involved relates to (i) the jurisdiction of the court, or (ii) a bar to the suit created by any law for the time being in force.[234] Relative evaluation of the two Orders reveals that the trial on issues pertaining to the rejection at the institution stage for lack of material facts and for not disclosing a cause of action is undertaken at 'any stage' under Order VII Rule 11 of CPC; whereas the trial on 'preliminary issues' is held under Order XIV Rule 2(2) of CPC by considering the entire pleadings on both sides to see whether the court has jurisdiction and whether there is a bar for entertaining the suit.[235] It is this lack of understanding that led the High Court, sitting as Election Court, unwittingly perhaps, to treat some of the crystalized issues as 'preliminary', which essentially pertained to the rejection at the institution stage for lack of material facts and for not disclosing a cause of action under VII Rule 11, and not under Order XIV Rule (2) and Rule 2(2) of the Code.[236]

Kameng Dolo (2017) is the fourth case in which the Supreme Court has, while dealing with the issue, whether illegal acceptance of 'withdrawal of candidature' by the returning officer, *per se*, materially affects the result of the election and thereby merits annulling the election of the returned candidate, equated the acceptance of 'withdrawal of candidature' in violation of statutory provisions (under section 100(1)(d) read with section 37 of the Act of 1951) *with* the improper rejection of nomination paper by the Returning Officer (under section 100(1)(c) of the Act of 1951).[237] The rationale for doing is that illegal acceptance of 'withdrawal of candidature' amounts to keeping out from the election arena, virtually for all practical purposes, the most desirable candidates from the point of view of electors and the most formidable candidate from the point of view of the other candidates.[238] Ousting such a desirable candidate illegally, thus, becomes the conclusive proof of the election being void without requiring to do anything more by the election petitioner.[239]

233 See, Part IV, *supra*.
234 *Ibid*.
235 *Ibid*.
236 *Ibid*.
237 See, Part V, *supra*.
238 *Ibid*.
239 *Ibid*.