10

ELECTION LAW

*Virendra Kumar**

I INTRODUCTION

THIS SURVEY deals with the following five critical prepositions, which have emanated from the judgments of the Supreme Court delivered during the year 2018. First proposition relates to the dismissal of election petition *in limine* on grounds of non-disclosure of cause of action, which is one of the pivotal grounds of dismissal.[1]Although this is not a new preposition at all and it has come before the apex court for consideration many a time; its novelty perhaps lies in reminding afresh the judges of the election tribunal, how in the given fact matrix, it is required to be determined on the first principles laid down in the Code of Civil Procedure, 1908 (CPC).[2] Particularly it includes the basic lessons, how the disclosed facts could be termed as 'material facts' so as to make the election petition triable, and how to go about 'the striking off of the pleadings and rejection of the election petition *in limine*"?[3]

The second proposition that we have dealt with concerns electoral reforms, which is focused on decriminalization of politics, and how this objective, given the reluctance of legislature to intervene, could be accomplished through judicial intervention.[4] In the light of the constitution bench decision, we have exploredthe limit and limitation of reforms through judicial intervention under the Constitution.[5] Particularly, the exploration includes, whether through the process constitutional interpretation, it is possible to hold that a person is disqualified to be a member of Parliament or state legislature, not only when he is convicted by the trial court, but even earlier; that is 'upon framing of charges by the court or upon the presentation of the report by the investigating officer under section 173 of the Code of Criminal,

* LL.M., S.J.D. (Toronto, Canada), Professor Emeritus; Founding Director (Academics), Chandigarh Judicial Academy; Formerly: Chairman, Department of Laws; Dean, Faculty of Law; Fellow, Panjab University & UGC Emeritus Fellow. Email: vkumar1459_42@yahoo.co.in

1 See, infra, Part II: "Dismissal of Election petition *in limine*: How to determine the non-disclosure of cause of action, one of the pivotal grounds of dismissal?"

2 *Ibid*. See also*, infra* note 15, citing the surveys undertaken by the author in previous years dealing with this issue.

3 *Ibid*.

4 See, *infra*, Part III: "Decriminalization of politics through judicial intervention: Its limit and limitation under the Constitution."

1973 procedure,' and also with the issue whether to disqualify an election candidate *ipso facto* if he filed false affidavit.[6]

The third proposition included in the present survey relates to, whether the introduction of 'None of the Above (NOTA) Option' into the voting process of Council of States (Rajya Sabha) is valid and constitutional.[7] The provision of NOTA option in the EVMs/ballot papers, giving right to a voter not to vote for any candidate as an integral part of his right to vote, was made by the Election Commission of India on the basis of the judgment of the Supreme Court in PUCL (2013).[8]What is the avowed objective of introducing such an option, and how does it promote free and fair elections in a democracy, and also provide an opportunity to the elector to express his dissent or disapproval against the contesting candidates, and incidentally also to reduce the chances of bogus voting?[9] What is critically examined is whether NOTA option could be used in preferential system of voting by using single transferable vote in elections to Rajya Sabha and state legislative councils, especially in view of the Tenth Schedule in the Constitution, which disqualifies a member of a House belonging to any political party on ground 'if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs?'[10]

The fourth proposition critically analysis whether an election petition, which is unaccompanied by treasury challan, is constitutionally un-sustainable and, therefore, could be dismissed summarily?[11] The Supreme Court has, *inter alia*, examined whether the provision in the arena of election law requiring the deposit of treasury challan at the time of presentation of the election petition is truly 'mandatory in character,' or such a requirement could be relaxed on such basis as the he principle of 'substantial compliance,' or 'the doctrine of curability'?[12]

Fifth proposition relates to the issue, whether the high court in exercise of its power under article 226 of the Constitution could extend the statutory periodfor preferring an election petition?[13] The three-judge bench of the Supreme Court in this context has critically examined whether the division bench of the high court could extend the statutory period in the 'interest of justice'?[14]

5 *Ibid.*

6 *Ibid.*

7 See, *infra*, Part IV: "None of the Above (NOTA) Option: whether its introduction into voting process of Council of States (Rajya Sabha) is valid and constitutional?".

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 See, *infra,* Part V: "Election petition unaccompanied by treasury challan: Whether constitutionally invalid and can be dismissed summarily?".

12 *Ibid.*

13 See, *infra*, Part VI: "Statutory period for preferring an election petition: Whether it could be extended by the High Court in exercise of its power under Article 226 of the Constitution?"

14 *Ibid.*

II DISMISSAL OF ELECTION PETITION*IN LIMINE*: HOW TO DETERMINE THE NON-DISCLOSURE OF CAUSE OF ACTION, ONE OF THE PIVOTAL GROUNDS OF DISMISSAL?[15]

This issue has come before the three-judge bench of the Supreme Court in *Madiraju Venkata Ramana Raju* v. *Peddireddigari Ramachandra Reddy.*[16] In this case, on fact matrix, the appellant and the first respondent contested the Andhra Pradesh State Legislative Assembly election wherein the first respondent was declared as an elected candidate. The appellant challenged the election of the returned candidatethrough an election petition[17] before the High Court of Judicature at Hyderabad for Telangana and Andhra Pradesh on the ground that the he had grossly violated several instructions issued by the Election Commission as also the provisions of the Representation of the People Act, 1951.

The returned candidate in turn, filed two applications,[18] one, seeking to strike out certain paragraphs [paras 2 and 9 to 11] of the said election petition, being frivolous and vexatious and not containing any material facts and not disclosing any cause of action;[19] and the second application to dismiss the election petition filed by the appellant challenging the election of respondent no. 1 *in limine* for non-disclosure of cause of action.[20]

The high court by a composite judgment allowed the two applications filed by the returned candidate, and, thus, eventually dismissed the election petition *in limine* for want of cause of action. Aggrieved by the decision of the high court, the present appeal was preferred in the Supreme Court by the appellant/petitioner under section 116A of the Representation of People Act, 1951.[21]

15 See also, Virendra Kumar, "Whether election petition discloses any 'cause of action': ambit of court's enquiry," LIII *ASIL* at 349-353 (2017); Virendra Kumar, "corrupt practices under the representation of the people act, 1951: when does an election petition is held to disclose triable issues?" LII *ASIL* 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?" in *L ASIL* 545-550 (2014); Virendra Kumar, "Cause of action: when it is said to be disclosed in an election petition," in XLVIII *ASIL* 414-418 (2012); Virendra Kumar, "An election petition lacking material facts as required to be stated in terms of Section 83(1): whether could be dismissed summarily without trial," in XLVI *ASIL* 358-363 (2010); Virendra Kumar, "Material facts and particulars,"in XXXVI *ASIL* 245-248 (2001); Virendra Kumar, "Dismissal of election petition *in limine*," in XXXV *ASIL* 282-284 (1999); Virendra Kumar, "Modus operandi for determining cause of action," in XXIII *ASIL* 412-415 (1987); and Virendra Kumar, "Rejection of nomination paper," in XXI *ASIL* 409-418 (1985).

16 MANU/SC/0277/2018: AIR 2018 SC 3012, per A.M. Khanwilkar, J. (for himself and on behalf of Dipak Misra, CJI., and D.Y. Chandrachud, J.) (Hereinafter simply, *Madiraju Venkata Ramana Raju*).

17 Election petition no. 8 of 2014.

18 See, *MadirajuVenkataRamana Raju***,** para 5.

19 EA No. 329 of 2015.

20 EA No. 330 of 2015.

21 Herein after simply, the Act of 1951.

In the light of this fact matrix, the contentious"central issue"to be determined in this case is: "whether the contents of the subject election petition disclose cause of action warranting a trial."[22] For deciding this issue, right in the first instance, the Supreme Court has spelled out the basic rule laid down in the CPC that should prompt the election court to reject the election petition *in limine* for non-disclosure of cause of action.

An application for rejection of an election petition *in limine* for non-disclosure of cause of action is "ordinarily" is required to be considered under Order VII, Rule 11 of CPC, and such an application "ought to proceed at the threshold."[23] The underlying reason for according priority is that such an application" has to be considered only on the basis of institutional defects in the election petition in reference to the grounds specified in clauses (a) to (f) of Rule 11,[24] and that "non-disclosure of cause of action is covered by clause (a) therein."[25] The elaboration of the Supreme Court bench on this count is:[26]

> Concededly, Order VII of the Code of Civil Procedure generally deals with the institution of a plaint. It delineates the requirements regarding the particulars to be contained in the plaint, relief to be specifically stated, for relief to be founded on separate grounds, procedure on admitting plaint, and includes return of plaint. The rejection of plaint follows the procedure on admitting plaint or even before admitting the same, if the court on presentation of the plaint is of the view that the same does not fulfill the statutory and institutional requirements referred to in Clauses (a) to (f) of Rule 11. The power bestowed in the court in terms of Rule 11 may also be exercised by the court on a formal application moved by the defendant after being served with the summons to appear before the court. Be that as it may, the application under order VII rule 11 deserves consideration at the threshold.

On the other hand, the other application of the returned candidate, seeking to strike out certain paragraphs [paras 2 and 9 to 11] of the said election petition on ground of being frivolous and vexatious and not containing any material facts and not disclosing any cause of action, is distinguishable from the application for dismissal of the election petition *in limine* for want of cause of action at the threshold. The application for striking out pleadings is considered under different provisions of CPC.

22 See, *Madiraju Venkata Ramana Raju,* para 10.

23 *Id.*, at para 11.

24 *Ibid*.

25 *Ibid*. Concededly, Order VII of the Code of Civil Procedure generally deals with the institution of a plaint. It delineates the requirements regarding the particulars to be contained in the plaint, relief to be specifically stated, for relief to be founded on separate grounds, procedure on admitting plaint, and includes return of plaint.

26 *Ibid*.

Under Order VI, Rule 16 of CPC,[27] the application for striking out pleadings "may be resorted to by the Defendant(s)/Respondent(s) at any stage of the proceedings" "on grounds specified in clauses (a) to (c) of rule 16."[28]

Since in the instant case, the returned candidate had moved two separate applications at the same time, purportedly under order VII rule 11 and order VI, rule 16 of CPC, how should the high court deal with them? In such a situation, according to the Supreme Court, the established course to follow is:[29]

> …[I]t it would be open to the court in a given case to consider both the applications together or independent of each other. If the court decides to hear the application Under Order VII Rule 11 in the first instance, *the court would be obliged to consider the plaint as filed as a whole*. But if the court decides to proceed with the application Under Order VI Rule 16 for striking out the pleadings before consideration of the application Under Order VII Rule 11 for rejection of the plaint, on allowing the former application after striking out the relevant pleadings then the court must consider the remainder pleadings of the plaint in reference to the postulates of Order VII Rule 11, for determining whether the plaint (after striking out pleadings) deserves to be rejected *in limine*. [Emphasis added]

On the basis of perusal of the fact matrix in the present case, the Supreme Court clearly finds that the high court has presumably adopted the latter course:[30]

> "It first proceeded to examine the application for striking out the pleadings in paragraphs 2 & 9 to 11 of the election petition being frivolous and vexatious and *also because the same did not disclose any cause of action.* And having accepted that prayer, it proceeded to reject the election petition on the ground that it did not disclose any cause of action." (Emphasis added)

In this sequential approach of the high court, the Supreme Court has found that the election court "has muddled the analysis of the pleadings" by observing:[31]

> It merely focused on the pleadings in paragraphs 2 & 9 to 11 of the election petition. It is one thing to strike out the stated pleadings being frivolous and vexatious but then it does not follow that the rest of the pleadings which would still remain, were not sufficient to proceed with the trial or disclose any cause of action, whatsoever, for rejecting the plaint as a whole *in limine* or to hold that it did not warrant a trial. No

27 Civil Procedure Code, 1908, r.16: Striking out pleadings – The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading – (a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or (c) which is otherwise an abuse of the process of the Court."

28 *Madiraju Venkata Ramana Raju***,** at para 12.

29 *Id.*, at para 13,

30 *Ibid.*

31 *Ibid.*

> such finding can be discerned from the judgment under appeal. Be that as it may, the High Court committed manifest error in striking out the pleadings in paragraphs 2 & 9 to 11 of the election petition, being frivolous and vexatious by considering the factual matrix noted therein as untenable on merit. For striking out the pleadings or for that matter, rejecting the plaint (election petition), the High Court is not expected to decide the merits of the controversy referred to in the election petition….

The approach of the high court in dismissing the election petition *in limine* after striking off some paras without examining whether the remaining of the petition reveals any cause of action is not at all warranted. It is well settled, observes the Supreme Court, "that the election petition will have to be read as a whole and cannot be dissected sentence-wise or paragraph-wise to Rule that the same does not disclose a cause of action."[32]

Since then, "Cause of action embodies a bundle of facts which may be necessary for the Plaintiffs to prove in order to get a relief from the Court,"[33] the Supreme Court, in the first instance examined the contents of whole petition para-wise to find out if the reliefs claimed by the appellant are founded on grounds,*inter alia*, ascribable to section 100(1)(d)(i), and section 101 (a claim to declare the appellant himself as having been elected) under of the 1951 Act. The result of the para-wise scrutiny may be abstracted as under:

(a) Re para 1: The avowed objective of the election petitioner (Appellant) was to challenge the declaration of election of Respondent No. 1 as a returned candidate on the basis of "factual details relating to the election process (furnished by the Appellant in his petition), which concluded with the declarationof results on 16th May, 2014."[34]

(b) Re para 2: The Appellant "has asserted that he was challenging the election on the ground of improper acceptance of nomination of Respondent No. 1 by the Returning Officer (Respondent No. 8)," despite his "written objections" before him (Returning Officer),[35] which include "the violation of Rule 35 of Civil

32 *Id*., para 21.

33 *Ibid.*

34 *Id*., at para 15.

35 The five objections taken before the returning officer have been reproduced as follows: Objection no. 1: The 1st Respondent who filed nominations has failed to sign on bottom of each and every page of the affidavits in Form-26 as contemplated under Civil Rules of Practice and also deliberately violated the conduct of Election Rules. Objection no. 2: The 1st respondent as a candidate failed to fill up the affidavit at: a. the column no. 4 and column no. 2 under the head of total Income shown in Income Tax returns. b. The two sets of affidavits at column no. 6 have not properly strike off which ever not applicable. c. The respondent no. 1 in his two sets of affidavits kept blank at column no. 8 (B) (III), where the words stand of "Approximate Current market Price of ..." at Part-B of (11) abstract of the details given in (1) to (10) of Part-A. This is mandatory as per the Conduct of Election Rules and also the recent Apex Court judgment, circulated under Instruction No. 18 to the Returning Officer. Objection no. 3: The respondent no. 1 has not signed on each and every page in the affidavit of Form-26 as contemplated under

Rules of Practice and also Rule 4A of Election Rule, 1961 and non-signing of each and every page at the bottom of the nomination form."[36]

(c) Re para 3: The appellanthas specifically objected that "Respondent No. 1 had given authorization to one V. Sreerami Reddy to answer the objections, who then filed a reply to the objections taken by the Appellant by merely denying and asserting that the same were purely technical grounds and, therefore, to reject the same."[37]

(d) Re para 4: The appellant, referring to the proceedings before the returning officer, has clearly stated that howhis objections wererejected "for the reasons best known to the returning officer and contrary to the mandatory Conduct of Election Rules and governing provisions and instructions given to the Returning Officer by way of Compendium Instructions, Volume-2 supplied to the Returning Officer(s) in light of the Supreme Court judgment regarding the affidavits and blank columns."[38]

(e) Re para 5: The appellant states that he had applied "for a certificate of its objection, authorization given to the third party and counter, respectively."[39]

(f) Re para 6: It is asserted "that the Appellant secured second highest votes and respondent No. 1 was declared elected candidate."[40]

(g) Re para 7: The appellant, as a the ready reference for the Returning Officer,has "pointed out" that "the Government of India issued a notification in its extraordinary Gazette published on August 1, 2012 and amended Form-26 under Rule 4A of the Conduct of Election (Amendment) Rules, 2012," and that how "in the footnote of the Gazette Notification, Note-1 to Note-4 have been given which are relevant instructions for accepting a valid Form-26 given to the returning officer."[41]

Civil Rules of Practice and also contemplated under hand book of returning officers-2014 under chapter 5.20.1. Objection no. 4: the respondent no. 1 in his affidavit at column no. 6 has not properly struck off "which ever not applicable". Objection no. 5: The proxy of the 1st Respondent namely P. Dwarakanath Reddy did not file his affidavit properly and also not put his signatures and date on each and every page of form-26. Later he has withdrawn his nomination.

36 *Ibid.*

37 *Id*., at para 16.

38 *Ibid.* The appellant reinforced his assertion by adding: "It is then stated that the Returning Officer had also circulated "do's and dont's" along with the check-list to every candidate contesting the election which clearly stated that the candidates must strictly follow the procedure stipulated under the Election Rules. The said instructions were supplied to the candidates along with the set of nomination papers highlighting the decision of this Court in Resurgence India (supra), regarding the consequence of keeping the relevant columns in the nomination Form-26, blank."

39 *Ibid.*

40 *Ibid.* To substantiate his assertion, the Appellant has furnished the tally of votes secured by the 8 candidates who contested the election.

41 *Ibid.* For the pointed attention of the Returning Officer, the appellant reproduced those notes as under: Note: 1: Affidavit should be filed latest by 3.00 PM on the last day of filing nomination.

(h) Re para 8: It is asserted by the appellant that "after the aforementioned Government Notification, the Election Commission of India issued proceedings bearing No. 3/4/2012/SDR dated 24.8.2012, Annexure-X directing all the State Election Commissions, political parties and other organizations to follow the single affidavit strictly in accordance with Form-26."[42]

(i) Re para 9: The appellant has asserted that the objections taken by him were not considered by the returning officer, for which reason the decision of the returning officer was contrary to the decision of the Supreme Court in the case of *Resurgence India*, and still more particularly when the contents of para 27 of this judgment were "circulated along with the nomination papers by the Returning Officer to every candidate."[43] This implies that the returned candidate, being aware of these specific directions, "did not sign each page of Form-26 in both the sets of nomination papers filed before the Returning Officer," and that the "two sets of nomination papers were attested by the same Notary on the last page of both the sets of nomination papers filed by respondent no. 1, and so the omission of signature and blank columns are 'not in the nature of technical mistakes at all'."[44]

(j) Re para 10:In view of the assertions made, the appellant has averred that "the returning officer ought to have rejected the nomination form of respondent no. 1 at the threshold in light of the decision of this court," inasmuch as "it was improper nomination of respondent No. 1, wrongly accepted by the returning officer as contemplated under section 100(1)(d)(i) of the 1951 Act."[45]

Note: 2: Affidavit should be sworn before on Oath Commissioner or Magistrate of the First Class or before a Notary Public.

Note: 3: All column should be filled up and no column to be left blank. If there is no information to furnish in respect of any item, either 'Nil' or 'Not applicable' as the case may be, should be mentioned.

Note: 4: The Affidavit should be either typed or written legibly and neatly.

42 *Id*., at para 17.

43 *Id*., at para 18.

44 *Ibid.*

45 *Ibid.* In support his averments, the appellant has stated that "the Returning Officer was fully aware about the requirements as per the decision of this Court, including the election material such as Handbook for Returning Officer-2014, General Elections-2014, Compendium Instructions, Volume-2 and Form-26 circulated by him. It is then asserted that in spite of that the Returning Officer accepted the nomination of Respondent No. 1, which enabled the Respondent No. 1 to contest the election and eventually get elected. The declaration of election of Respondent No. 1 by the Returning Officer (Respondent No. 8) was thus a clear abuse of the process of law in light of the decision of this Court. It is also asserted that Respondent No. 1 misrepresented the Election Commission as well as the Returning Officer (Respondent No. 8) by giving false information in a casual manner, at paragraph 7A regarding the details of Immovable Assets in the two sets of affidavits in Form-26, by showing the gross total value of Rs. 2,79,67,680/- instead of Rs. 3,00,67,680/- and deliberately did not count the column amount at 7(vii) of Rs. 21,00,000/-."

(k) Re para 11: After having stated that "the nomination forms (Form-26) filed by the Appellant and Respondent No. 1 in two sets, may be treated as forming part of the election petition along with the grounds of the election petition."[46]

On the basis of these pleadings, the appellant has prayed for the following reliefs in para 17 of his election petition that high court may be pleased to:[47]

a) declare the election of the Returned to be null and void and set-aside the same;
b) declare that the appellant (petitioner) has been duly elected under section 84 of the Representation of the People Act 1951;
c) award the costs of the petition; and
d) pass such other order or orders as it may deem fit and proper in the circumstances of the case.

In the light of this detailed exercise, as abstracted above, the Supreme Court on its own examination has inferred that the "cause of action for filing the election petition, therefore, was perceptibly in reference to the material facts depicting that the nomination form of Respondent No. 1 was improperly accepted by the Returning Officer."[48] And, on reading the election petition "as a whole," the Supreme Court has observed that "we have no hesitation in taking a view that the High Court misdirected itself in concluding that the election petition did not disclose any cause of action with or without paragraphs 2 & 9 to 11 of the election petition."[49]

This is the outcome of the examination of the election petition on, what we may call, 'structural basis'; that is, whether the pleadings on their bare perusal, as a whole, reveal the requisite reasonable 'cause of action.' In this respect, the exposition of

46 *Id.*, at para 19. The appellant has articulated the following four grounds:

a). Whether the 8th Respondent has ignored the Constitutional Spirit of Representation of the People Act (Act 43 of 1950) and Act 43 of 1951 with allied Acts, Rules, Orders, Model Code of Conduct for Guidance of Candidates supplied by the Election Commission for the Election 284, Punganur Assembly Constituency failing to conduct a fair scrutiny in accordance with the law while conducting a fair scrutiny of the nomination of the Respondent No. 1 Form-26 in accordance with law?

b). Whether the 8th Respondent acceptance of the improper nomination of Forum-26 application as contemplated despite the fatal omission of blank column Under Section 100(1)(d)(i) of Representation of the People Act, 1951 of the two sets of affidavits of the Respondent No. 1 kept in blank at Column No. 8 (B) (III), where the words stand of "Approximate Current market Price of ..." at Part-B of (11) abstract of the details given in (1) to (10) of Part-A?

c). Whether the Respondent No. 1 election to 284, Punganur Assembly Constituency can be set aside on the grounds that the Respondent No. 8/Returning Officer has accepted the improper nomination Form vide Form-26 with omissions of not signing on each and every page of the affidavit and not keep intact of filling of the blanks contrary to the spirit of the Apex Court judgment rendered in *Resurgence India* v. *Election Commission of India*, held in Writ Petition (Civil) No. 121 of 2008 dt. 13.09.2013?

d). Whether the Respondent No. 1 Affidavit with blank particulars will render the affidavit nugatory and hit by Section 125 A(i) of Representation of Peoples Act, 1951 directly and has to set aside the election?

47 *Id.*, at para 20.

48 *Id.*, at para 21.

49 *Id.,* at para 22.

'reasonable cause of action,' culled by the Supreme Court in the instant case is worth quoting:[50]

"A reasonable cause of action is said to mean a cause of action with some chances of success when only the allegations in the pleading are considered. But so long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The implications of the liability of the pleadings to be struck out on the ground that it discloses no reasonable cause of action are quite often more known than clearly understood. It does introduce another special demurrer in a new shape. *The failure of the pleadings to disclose a reasonable cause of action is distinct from the absence of full particulars.* The distinctions among the ideas of the "grounds" in Section 81(1); of "material facts" in Section 83(1)(a) and of "full particulars" in Section 83(1)(b) are obvious…"[51] [Emphasis added]

This exercise, in turn, has led the Supreme Court to find out if the election petition is also liable to the dismissed *in limine* for want of 'material facts' and 'full particulars' thereof, because "the pleadings of the election petition should be precise and clear containing all the necessary details and particulars as required by law."[52] The result of the exercise, distinguishing between 'material facts' and 'full particulars' in the light of judicial precedents,[53] may be abstracted as under:

(a) 'Material facts' would mean "all the basic facts constituting the ingredients of the grounds stated in the election petition in the context of relief to declare the election to be void."[54]

50 *Ibid*.

51 See, *ibid*., cited in *Mohan Rawale* v. *Damodar Tatyaba* MANU/SC/0637/1994 : (1994) 2 SCC 392 at para 10, in which Chitty, J., with reference to *Republic of Peru* v. *Peruvian Guano Co*. (1887) 36 Ch D 489) makes this elaboration. It is further observed: "The provisions of Section 83(1)(a) and (b) are in the familiar pattern of Order VI, Rules 2 and 4 and Order 7, Rule 1(e) Code of Civil Procedure. There is a distinction amongst the 'grounds' in Section 81(1); the 'material facts' in Section 83(1)(a) and "full particulars" in Section 83(1)(b)."

52 *Madiraju Venkata Ramana Raju*, at para 22.

53 See also, Virendra Kumar, "whether election petition discloses any 'cause of action': ambit of court's enquiry," LIII *ASIL* at 349-353 (2017); Virendra Kumar, "corrupt practices under the representation of the people act, 1951: when does an election petition is held to disclose triable issues?" LII *ASIL* at 482-488 (2016); Virendra Kumar, "Election Petition: When could it be said to disclose 'no cause of action' LI *ASIL* at 524-530 (2015); Virendra Kumar, "Nomination paper: when does it amount to its proper or improper rejection by the returning officer?" in L *ASIL* 545-550 (2014); Virendra Kumar, "Cause of action: when it is said to be disclosed in an election petition," in XLVIII *ASIL* at 414-418 (2012); Virendra Kumar, "An election petition lacking material facts as required to be stated in terms of Section 83(1): whether could be dismissed summarily without trial," XLVI *ASIL* at 358-363 (2010); Virendra Kumar, "Material facts and particulars," XXXVI *ASIL* in 245-248 (2001); Virendra Kumar, "Dismissal of election petition *in limine*," in XXXV *ASIL* 282-284 (1999); Virendra Kumar, "Modus operandi for determining cause of action," in XXIII *ASIL* 412-415 (1987); and Virendra Kumar, "Rejection of nomination paper," XXI *ASIL* 409-418 (1985).

54 *MadirajuVenkata Ramana Raju*, at para 22.

(b) In an election petition, "whether a particular fact is material or not and as such required to be pleaded, is a question which depends on the nature of the grounds relied upon and the special circumstances of the case."[55]

(c) 'Full particulars', on the other hand, "are the details of the case set up by the party."[56]

(d) The distinction between "material facts" and "full particulars" is not sharp; it is "one of degree" only.[57]

(e) "Material facts" are those "which a party relies upon and which, if he does not prove, he fails at the trial."[58]

(f) The purpose of "material particulars", on the other hand, "is in the context of the need to give the opponent sufficient details of the charge set up against him and to give him a reasonable opportunity."[59]

(g) "The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs," and that this "function has been variously stated, namely either to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required."[60]

(h) "The distinction between 'material facts' and 'particulars' which together constitute the facts to be proved—or the factaprobanda—on the one hand and

55 *Ibid.*

56 *Ibid.*

57 *Id.*, citing *Mohan Rawale* v. *DamodarTatyaba,* MANU/SC/0637/1994: (1994) 2 SCC 392 at para 12. See also, id., citing *Rawale* v. *DamodarTatyaba,* para 23, citing in turn, *Harkirat Singh,* MANU/SC/2461/2005: (2005) 13 SCC 511, para 48: "The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'. Burton's Legal Thesaurus (3rd edn.) at 349.

58 *Id.,* citing *Mohan Rawale* v. *Damodar Tatyaba,* at para 13, which in turn, cites *Bruce* v. *Odhams Press Ltd.* (1936) 1 KB 697: (1936) 1 All ER 287, in which Scott L.J. said: "The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad."

59 *Ibid.*

60 *Id.*, citing *Mohan Rawale* v. *Damodar Tatyaba*, at para 14, which in turn, cites *Halsbury,*Pleadings Vol. 36, para 38. See also, *id.,* citing *Mohan Rawale* v. *DamodarTatyaba*, at para 15, which in turn, cites

Bullen and Leake and Jacob's "Precedents of Pleadings" 1975 edn. at 112, in which it is, *inter alia*, stated:

"The object of particulars is to 'open up' the case of the opposite party and to compel him to reveal as much as possible what is going to be proved at the trial, whereas, as Cotton L.J. has said, 'the old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial'."

the evidence by which those facts are to be proved—factaprobantia—on the other must be kept clearly distinguished."[61]

(i) "It is an elementary Rule in pleading that, when a state of facts is relied it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegations."[62]

(j) Conjointly speaking, "'Material facts' are primary or basic facts which must be pleaded by the Plaintiff or by the Defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise."[63]

(k) "All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."[64]

(l) The 'material facts', as distinguished from 'particulars', "are facts, if established would give the Petitioner the relief prayed for. The test is whether the Court could have given a direct verdict in favour of the election Petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition."[65]

(m) "[T]he pleadings must be taken as a whole to ascertain whether the same constitute the material facts involving triable issues."[66]

61 *Id.,* citing *Mohan Rawale* v. *Damodar Tatyaba*, at para 16, citing, in turn, *Philipps* v. *Philipps* (1878) 4 QBD 127, 133, Brett, L.J. said: "I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. ... The distinction is taken in the very Rule itself, between the facts on which the party relies and the evidence to prove those facts…."

62 *Id.,* citing *Mohan Rawale* v. *DamodarTatyaba*, at para 17, citing, in turn, Lord Denman, C.J. in *Willians* v. *Wilcox* (1838) 8 Ad & EI 331.

63 *MadirajuVenkata Ramana Raju*, at para 23**,** citing *Harkirat Singh,* MANU/SC/2461/2005: (2005) 13 SCC 511, para 51.

64 *Id*., citing *Harkirat Singh*, para 52.

65 *Id.*, citing *Harkirat Singh*, para 72. *Ashraf Kokkur* v. *K.V. Abdul Khader* MANU/SC/0739/2014 : (2015) 1 SCC 129.

66 *Id.*, para 24, citing *Ashraf Kokkur* v. *K.V. Abdul Khader* MANU/SC/0739/2014 : (2015) 1 SCC 129, in which the Supreme Court adverted to the exposition *in M. Kamalam* v. *V.A. Syed Mohammed*, MANU/SC/0242/1978 : (1978) 2 SCC 659 and *G.M. Siddeshwar* v. *Prasanna Kumar* MANU/SC/0220/2013 : (2013) 4 SCC 776.

(n) "[S]o long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."[67]

(o) "Under Order VII Rule 11(a), only the pleadings of the Plaintiff-Petitioner can be looked at as a threshold issue. Whereas, entire pleadings of both sides can be looked into for considering the preliminary issue Under Order XIV Rule 2. Neither the written statement nor the averments or case pleaded by the opposite party can be taken into account for answering the threshold issue for rejection of election petition in terms of Order VII Rule 11 (a) of the Act."[68]

In the light of statements of law as abstracted above from various decisions, in the instant case the three-judge bench has observed:[69]

> Whether the material facts as asserted by the Appellant can stand the test of trial and whether the Appellant would be able to bring home the grounds for declaring the election of Respondent No. 1 to be void, is not a matter to be debated at this stage. Suffice it to observe that the averments in the concerned paragraphs of the election petition, by no standard can be said to be frivolous and vexatious as such. The High Court committed manifest error in entering into the tenability of the facts and grounds urged in support thereof by the Appellant on merit, as is evident from the cogitation in paragraphs 16 to 22 of the impugned judgment.

After elaborate examination of the contents of paragraphs 2 and 9 to 11 of the election petition, the Supreme Court, differing from the analysis of the high court, has concluded: "We find force in the argument of the Appellant that the said paragraphs plainly disclose the facts, which are material facts for adjudicating the grounds for declaring the election of respondent no. 1 as being void, because of improper acceptance of his nomination form by the returning officer (respondent no. 8)."[70] In

67 *Id.,*para 25, citing a three-judge bench in the case of *V. Achuthanandan* v. *P.J. Francis* MANU/SC/0197/1999 : (1999) 3 SCC 737, wherein it has been observed that an election petition was not liable to be dismissed *in limine* merely because full particulars of corrupt practice alleged were not set out. The three-Judge bench decision also adverts to the case of *Ponnala Lakshmaiah* v. *Kommuri Pratap Reddy*, MANU/SC/0529/2012: (2012) 7 SCC 788 wherein the court observed that the courts need to be cautious in dealing with request for dismissal of the petition at the threshold and exercise their power of dismissal only in cases where on a plain reading of the petition no cause of action is disclosed. Cf., *PendyalaVenkata Krishna Rao* v. *Pothula Rama Rao,* MANU/AP/0117/2005 (particularly para 8-10, 11 and 16: In this case, on facts, the court found that necessary material facts in relation to the ground of improper acceptance of nomination form were not pleaded by the election petitioner. In contrast, in the present case, the Supreme Court has observed, "we have held that there is discernible pleading as to what objections were taken before the Returning Officer and as to why he was in error in not rejecting the nomination of Respondent no. 1," *MadirajuVenkataRamana Raju*, at para 26.

68 *Id.,* at para 28, citing *Kuldeep Singh Pathania* v. *Bikram Singh Jaryal* MANU/SC/0074/2017*,* in which the Supreme Court, while pointing out the distinction between an order under order VII rule 11 to reject the election petition *in limine* for non disclosure of cause of action and an order under order XIV rule 2 for disposal of the petition on a preliminary issue, adverted to the decisions *in Mayar (H.K.) Ltd.* v. *Owners and Parties Vessel M.V. Fortune Express* (2006) 3 SCC 100 and *VirendraNathGautam* v. *Satpal Singh*., (2007) 3 SCC 617.

69 *Id.*, at para 29.

70 *Id*., at para 30.

order to reinforce theirconclusion, the Supreme Court benchhas cited as many as ten distinct statements to show, how the disclosed facts could be termed as 'material facts' so as to make the election petition triable:[71]

(i) The Returning Officer has improperly accepted the nomination paper of the Respondent No. 1 despite the categorical objections raised, being contrary to Rule 35 of Civil Rules of Practice, Rule 4A of the Conduct of Election Rules, 1961 and also contrary to the judgment of this Court in Resurgence India (supra).

(ii) Respondent No. 1 failed to sign each and every page of the affidavit (Form No. 26), which is in violation of Civil Rules of Practice, Conduct of the Election Rules and Hand Book of Returning Officer-2014 under Chapter 5.20.1.

(iii) Respondent No. 1 failed to fill up the Column No. 4 and Column No. 2 under the head of Total Income shown in Income Tax Returns, of the said affidavit (Form No. 26).

(iv) The Column No. 6 of said two sets of affidavit has not been properly struck off, whichever is not applicable.

(v) Column No. 8(B)(III), where the words stand for "Approximate Current Market Price of..." at Part-B of 11 abstracts of the details given in (1) to (10) of Part A of the said affidavits, which is mandatory as per Election Rules, judgments of this Court and Circular and Instructions issued by the Returning Officer.

(vi) Omission and blank Columns left in the said affidavits are not at all a technical mistake. The Respondent No. 1 was very much aware of the said Rules and the law.

(vii) The Returning Officer did not follow the stated Rules and law, and has favoured the Respondent No. 1 by accepting the improper nomination/affidavit filed by him, enabling him to contest the election, which is abuse of the processes of law in light of the judgment of this Court (Resurgence India).

(viii) The Returning Officer (R-8) ought to have rejected the improper nomination of the Respondent No. 1 on 21.04.2014 itself at the threshold as contemplated Under Section 100(1)(d)(i) of the Representation of People Act.

(ix) The Respondent No. 1 misrepresented the Election Commission as well as the Returning Officer (R-8) in a casual manner by giving false information at Para 7A of details of Immovable Assets in his two set of affidavits under Form-26 by showing the gross total value of Rs. 2,79,67,680 instead of 3,00,67,680 and deliberately did not count the Column amount at 7(vii) of Rs. 21,00,000/-.

(x) Form No. 26 of two sets of nomination paper of Respondent No. 1 be read as Annexure-XIII for prosecution of the election petition along with the grounds mentioned in the petition. In the grounds at para 11 of the election petition, the Appellant has re-agitated these contentions.

In view of the established proposition of law that "the requirement of putting one's signature on each and every page on the affidavit" is mandatory, and that "when a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory," because "the purpose of filing affidavit (form no. 26) along with nomination

71 *Ibid*.

papers is to effectuate the fundamental right of the citizens Under article 19(1)(a) of the Constitution of India, who are entitled to have the necessary information of the candidate at the time of his filing of the nomination papers in order to make a choice of their voting."[72] Furthermore, "the candidate must take the minimum effort to explicitly remark as "NIL" or "Not Applicable" or "Not Known" in the columns and not to leave the particulars blank, if he desires that his nomination paper be accepted by the returning officer during the scrutiny of nomination in exercise of powers under section 36 (6) of the 1951 Act being invalid nomination found and hit by section 125-A(i) of the 1951 Act."[73] The candidate who has filed an affidavit with particulars left blank cannot be treated on a par with the candidate who has filed an affidavit with false information, inasmuch as "it will result in breach of fundamental right guaranteed Under article 19(1) (a) of the Constitution *viz.,* 'right to know' which is inclusive of freedom of speech and expression as interpreted in *Assn. for Democratic Reforms*."[74]

With a view to, as if consolidating the format which is to be kept in view at the time of filing the election petition and the requirements to be observed by the returning officer, the Supreme Court bench in the instant case reproduced the "conclusions and directions" articulated earlier in *Resurgence India* (paragraph 29) may be reproduced as under:[75]

29. What emerges from the above discussion can be summarized in the form of the following directions:

29.1. The voter has the elementary right to know full particulars of a candidate who is to represent him in Parliament/Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.

29.2. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens Under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

29.3. Filing of affidavit with blank particulars will render the affidavit nugatory.

29.4. It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the "right to know" of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of the Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

72 *Id*., para 31, citing *Resurgence India* v. *Election Commission of India* (2014) 14 SCC 189.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

29.5. We clarify to the extent that para 73 of People's Union for Civil Liberties case will not come in the way of the Returning Officer to reject the nomination paper when the affidavit is filed with blank particulars.

29.6. The candidate must take the minimum effort to explicitly remark as "NIL" or "Not Applicable" or "Not known" in the columns and not to leave the particulars blank.

29.7. Filing of affidavit with blanks will be directly hit by Section 125-A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her.

The purpose of reproducing the "conclusions and directions"in detail, even at the cost of repetition,is "to highlight" the legitimacy of "assertions made in the election petition" "in support of the ground for declaring the election of Respondent No. 1 as being void on account of improper acceptance of his nomination form by the Returning Officer (Respondent No. 8)."[76]

In the light of the foregoing analysis, the three-Judge Bench has conclusively stated:[77]

> …[T]he approach of the High Court in considering the two applications is, in our opinion, manifestly erroneous, if not perverse. For, it has ventured into the arena of analysis of the matter on merit. That is a prohibited area at this stage. Since the conclusion reached by the High Court that the pleadings in paragraphs 2 and 9 to 11 of the election petition are frivolous and vexatious is untenable, it would necessarily follow that the election petition, as filed, will have to be examined as a whole without subtracting any portion therefrom. If so read, it is not possible to take a view that the same does not disclose any cause of action at all. On this finding, the application preferred by Respondent No. 1 for rejection of election petition *in limine* under order VII Rule 11, cannot be countenanced and must also fail.

Another plea of respondent no. 1, the returned candidate, that the Supreme Court has examined, is about the absence of averment in the election petition that because of improper acceptance of nomination form of respondent no. 1, it has materially affected the election results of respondent no. 1.[78] This contention has also been counteracted by the Supreme Court, showing why in the given fat matrix this plea of the returned candidate is misplaced and, therefore, untenable. In this respect, the differential analysis presented by the Supreme Court in the light of various judicial precedents may be abstracted as under:

(a) In the case of election to a single member constituency, if there are more than two contesting candidates, "there is a difference between the improper acceptance

76 *Id.*, para 32.

77 *Id.*, para 33.

78 See, *id*., para 34.

of a nomination of a returned candidate and the improper acceptance of nomination of any other candidate."[79]

(b) "If the nomination of a candidate other than the returned candidate is found to have been improperly accepted, it is essential that the election Petitioner has to plead and prove that the votes polled in favour of such candidate would have been polled in his favour."[80]

(c) "On the other hand, if the improper acceptance of nomination is of the returned candidate, there is no necessity of proof that the election has been materially affected as the returned candidate would not have been able to contest the election if his nomination was not accepted."[81]

(d) In where there are only two candidates in the fray, as distinguished from a situation where there are more than two candidates contesting the election, and if the returned candidate's nomination is declared to have been improperly accepted, "his election would have to be set aside without any further enquiry and the only candidate left in the fray is entitled to be declared elected."[82]

The third and the last contention raised by the returned candidate in the instant caseis that "the election petitioner cannot be permitted to bring or introduce a new ground or cause of action beyond limitation period of 45 days of declaration of the result of the election."[83] This contention has been summarily disposed of by observing:[84]

> In our opinion, this contention will have to be addressed by the High Court in the first instance. The High Court, without recording any reason has disposed of the applications filed by the election Petitioner (Appellant) as the election petition itself was dismissed *in limine*. Since the election petition will stand restored before the High Court, to subserve the ends of justice, the applications preferred by the election Petitioner (Appellant) will also stand restored for being heard by the High Court on its own merit and to decide it in accordance with law.

79 *Durai Muthuswami* v. *N. Nachiappan* (1973) 2 SCC 45 (para 23), noticed in *MairembamPrithviraj* v. *Pukhrem Sharathchandra Singh* (2017) 2 SCC 487.

80 *Ibid.* See, *id.*, para 37, analysing the decision in the cases of *Mangani Lal Mandal* v. *Bishnu Deo Bhandari* (2012) 3 SCC 314, in which the election was challenged by invoking the ground under s.100(1)(d)(iv), and not under s. 100(1)(d)(i), and *Shambhu Prasad Sharma* v. *Charandas Mahant* (2012) 11 SCC 390, in which the ground for declaring the election to be void was not because of improper acceptance of nomination form of the returned candidate per se but because of improper acceptance of nomination papers of other defeated candidates. See also, *id.*, para 38, analysing *L.R. Shivaramagowda* v. *T.M. Chandrashekar (Dead) by L.Rs.* (1999) 1 SCC 666, in which the plea to declare an election to be void was under s. 100(1)(d)(iv), wherein it is absolutely necessary for the election petitioner to plead that the result of the election insofar as it concerns the returned candidate has been materially affected and not under s.100(1)(d)(i), which specifically deals with the election petition in reference to the ground of improper acceptance of nomination form of the returned candidate.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

84 *Id.*, para 39.

> As a result, it is not necessary for us to dilate on the decision relied by the Respondents in the case of *Harmohinder Singh (supra*). We leave this contention open to be decided by the High Court at the appropriate stage.

In the light of the foregoing detailed analysis, the Supreme Court has held that "the judgment of the High Court in allowing both the applications filed by Respondent No. 1 (the returned candidate) cannot stand the test of judicial scrutiny."[85] The court has not found "any merit in the plea of the Respondent No. 1 that paragraphs 2 and 9 to 11 of the election petition are frivolous and vexatious, which contention erroneously commended to the High Court."[86] On the contrary, the three-judge bench is of "considered opinion that the subject election petition plainly discloses cause of action for filing of the election petition to declare the election of Respondent No. 1 to be void on the ground of improper acceptance of his nomination."[87] Consequentially, the original Election Petition No. 8 of 2014 "shall stand restored to the file of the High Court to its original number for being proceeded further in accordance with law."[88] "Similarly, the applications filed by the Appellant shall stand restored (except the application for early hearing), to their original numbers to be decided by the High Court in accordance with law."[89] Thus, while allowing the appeals, by way of extreme caution the bench has added that their analysis is "limited to the threshold matter considered in this judgment about the striking off of the pleadings and rejection of the election petition *in limine*."[90]

As regards the application for early hearing of the election petition filed by the appellant before the high court, the Supreme Court reiterated the "imperativeness of expeditious disposal of the election petition" as envisaged under the provisions of section 86(7) of the Act of 1951, which stipulates that the trial of the election petition is required to be disposed of preferably within six months from the date of its presentation before the high court.[91] In view of these express provisions, the bench has deemed desirable to "request the High Court to expeditiously dispose of the election petition preferably within three months from the production of a copy of this judgment by either party before it."[92]

85 *Ibid*.

86 *Id.*, para 40. Accordingly, the court has held that both the applications, E.A. No. 329 of 2015 and EA No. 330 of 2015, filed by respondent no. 1 in the subject election petition, "deserve to be rejected," *id.* at para 42.

87 *Id*., at para 40.

88 *Ibid*.

89 *Id*., at para 42.

90 *Ibid*.

91 *Id.,* para 41 red with para 44.

92 *Id.*, para 43, citing *Mohd. Akbar* v. *Ashok Sahu* MANU/SC/0194/2015: (2015) 14 SCC 519), which highlighted the necessity of discharging the pious hope expressed by the Parliament in S. 86(7) of the Act of 1951.

III DECRIMINALIZATION OF POLITICS THROUGH JUDICIAL INTERVENTION: ITS LIMIT AND LIMITATION UNDER THE CONSTITUTION

This issue has come up for consideration before the Constitution Bench of the Supreme Court in *Public Interest Foundation* v. *Union of India (UOI)*,[93] in a broader conceptual form. Conceptually stated, the question is: whether disqualification for membership can be laid down by the court beyond article 102 and the law made by the Parliament under article 102(e).[94]

This issue initially emerged before the three-judge bench hearing the matter, and that bench was of the view that since this issue 'involving a substantial question of law as to the interpretation of this Constitution,'it is required "to be addressed by the Constitution Bench under Article 145(3) of the Constitution."[95]

However, for understanding and appreciating the depth of this hypothetical issue, we need to comprehend the context in which it has surfaced. The Constitution bench itself provides the context. It lies in the "covering letter of the 244th Law Commission Report titled 'Electoral Disqualifications'," which the Chairman of the Law Commission, had addressed to the then Minister of Law and Justice.[96] In the said 'covering letter', it is stated:[97]

1. "While the Law Commission was working towards suggesting its recommendations to the Government on Electoral Reforms, an Order was passed by the Hon'ble Supreme Court dated 16.12.2013 in *Public Interest Foundation* v. *Union of India vide* D.O. No. 4604/2011/SC/PIL(W] dated December 21, 2013.
2. In the aforesaid Order, the Supreme Court noted that Law Commission may take some time for submitting a comprehensive report on all aspects of electoral reforms. However, the Hon'ble Court further mentioned that "the issues with regard to de-criminalization of politics and disqualification for filing false affidavits deserve priority and immediate consideration" and accordingly requested the Law Commission to "expedite consideration for giving a report by the end of February, 2014, on the two issues, namely:

1. Whether disqualification should be triggered upon conviction as it exists today or upon framing of charges by the court or upon the presentation of the report by the Investigating Officer under Section 173 of the Code of Criminal procedure? [Issue No. 3.1 (ii) of the Consultation Paper], and

93 *Ibid.*

94 Writ Petition (Civil) No. 536 of 2011 (under art. 32 of the Constitution of India), criminal appeal nos. 1714-1715 of 2007, writ petition (criminal) no. 208 of 2011 and writ petition (civil) no. 800 of 2015 (under article 32 of the Constitution of India), AIR 2018 SC 4550: (2019)3 SCC 244: 2019 (2) SCJ 39, per Dipak Misra, CJI (for himself and on behalf of Rohinton Fali Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra, JJ.) (Hereinafter simply, *Public Interest Foundation*)

95 *Public Interest Foundation*, at para 3.

96 *Ibid.* Art. 145(3) specifically mandates the minimum number of judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under art. 143 shall be five.

97 *Id.*,para 35.

2. Whether filing of false affidavits Under Section 125A of the Representation of the People Act, 1951 should be a ground for disqualification? And if yes, what mode of mechanism needs to be provided for adjudication on the veracity of the affidavit? [Issue No. 3.5 of the Consultation Paper]

A bare perusal of the contents of the 'covering letter' instantly reveals that the broader question "whether disqualification for membership can be laid down by the court beyond article 102 and the law made by the Parliament under article 102(e),"needs to be explored by the Constitution Bench in terms of two specific concrete questions.

One,whether it is possible to extend the range of disqualification from the existing stage of conviction of a candidate of criminal offence to earlier stage of "upon framing of charges by the court or upon the presentation of the report by the Investigating Officer under section 173 of the Code of Criminal procedure"? And two, "whether filing of false affidavits Under Section 125A of the Representation of the People Act, 1951 should be a ground for disqualification"ipso facto? And if so, what sort of "mechanism" needs to be evolved "for adjudication on the veracity of the affidavit?"

Since both these questions in the opinion of the three-judge bench deserved "priority and immediate consideration," the Law Commission dealt with these issues as an integral part of their 244th Law Commission Report on electoral disqualifications. In view of the elaborate exercise undertaken by the Law Commission in its report, impliedly the cut out task before the Constitution Bench is to explore, whether through the process constitutional interpretation, it is possible to holdthat a person is disqualified to be a member of Parliament or State Legislature, not only when he is convicted by the trial court, but even earlier; that is"upon framing of charges by the court or upon the presentation of the report by the investigating officer under section 173 of the Code of Criminal procedure,"and also to disqualifyan election candidate ipso facto if he filed false affidavit.

In the light of this backdrop, the Constitution Bench perused the 244th Law Commission report. The very title of this report, "Electoral Disqualifications", reveals that the desired electoral reforms are directed towards protecting and preservingthe democratic, representative, form of government[98] by disqualifying the undesirable persons to enter the legislative bodies. This, in turn, envisages the critical importance of "free and fair elections," stemming from two factors –" instrumentally, its central role in selecting persons who will govern the people, and intrinsically, as being a legitimate expression of popular will."[99]

Turning to the issue of 'criminalization in politics', the Constitution Bench has cited the observations made by C. Rajagopalachari who, as back as in 1922, had anticipated the present state of affairs twenty-five years before independence, when he wrote in his prison diary: "Elections and their corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom

98 *Ibid.*

99 *Id.,* para 36, citing the 244th Report of the Law Commission to the effect that 'India' as 'a Sovereign Democratic Republic' is " a part of the 'basic structure' of the Constitution," and as such this basic premise is "immune to amendment."

is given to us..."[100] May be, it is this prophetic vision that might have prompted the founding fathers of our Constitution to provide for 'disqualifications for membership' of either House of Parliament under article 102, and legislative assembly or legislative council of the state under article 191 of the Constitution on certain specified grounds.

However, additionally, articles 102(1)(e) and 191(1)(e) of the Constitution have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or legislative assembly or legislative council of the state other than those specified in sub-clauses (a), (b), (c) and (d) of Clause (1) of articles 102 and 191 of the Constitution.[101]In pursuance of exercise of this specific power, our first Parliament has hitherto enacted the Representation of the People Act, 1951, incorporating various grounds of disqualifications under its section 8.[102]

The Constitution Bench has also noticed the changing pattern of criminalization of politics, as portrayed by the Law Commission in its 244th report. It was observed:

> The Commission also observed that the nature of nexus changed in the 1970s and instead of politicians having suspected links to criminal networks, as was the case earlier, it was persons with extensive criminal backgrounds who began entering politics and this fact was confirmed in the Vohra Committee Report in 1993 and again in 2002 in the report of the National Commission to Review the Working of the Constitution (NCRWC). The Commission referred to the judgment of this Court in Union of India v. Association for Democratic Reforms MANU/SC/0394/2002: (2002) 5 SCC 294 which had made an analysis of the criminal records of candidates possible by requiring such records to be disclosed by way of affidavit and this, as per the Commission, had given a chance to the public to quantitatively assess the validity of such observations made in the previous report.[103]
>
> As for the extent of criminalization that has pervaded Indian politics, the Commission observed that in the ten years since 2004, 18% of the candidates contesting either national or state elections have criminal cases pending against them (11,063 out of 62,847). In 5,253 or almost half of these cases (8.4% of the total candidates analysed), the charges are of serious criminal offences that include murder, attempt to murder, rape, crimes against women, cases under the Prevention of Corruption Act, 1988 or under the Maharashtra Control of Organised Crime Act, 1999 which, on conviction, would result in five years or more of jail,

100 *Id.*, para 37, *Mohinder Singh Gill* v. *Chief Election Commissioner,* AIR 1978 SC 851, wherein the Supreme Court, *inter alia*, observed: "It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

101 *Id.*, para 38, reproducing what the Law Commission stated in its report.

102 It needs to be noticed here is that the specific power to provide for additional disqualifications of membership at both the levels of the Centre and the states is given only to the Parliament, and that no such power is vested in the state legislature to make law laying down disqualifications of membership of the legislative assembly or legislative council of the state.

103 It deals with disqualification on conviction for certain offences.

etc., 152 candidates had 10 or more serious cases pending, 14 candidates had 40 or more such cases and 5 candidates had 50 or more cases against them. Further, the Commission observed that the 5,253 candidates with serious cases together had 13,984 serious charges against them and of these charges, 31% were cases of murder and other murder related offences, 4% were cases of rape and offences against women, 7% related to kidnapping and abduction, 7% related to robbery and dacoity, 14% related to forgery and counterfeiting including of government seals and 5% related to breaking the law during elections. The Commission was of the further view that criminal backgrounds are not limited to contesting candidates, but are found among winners as well, for, of the 5,253 candidates with serious criminal charges against them, 1,187 went on to winning the elections they contested, i.e., 13.5% of the 8,882 winners analysed from 2004 to 2013 and overall, including both serious and non-serious charges, 2,497 (28.4% of the winners) had 9,993 pending criminal cases against them.[104]

Elaborating further, the Commission took note of the fact that in the current Lok Sabha, 30% or 162 sitting Members of Parliaments (MPs) have criminal cases pending against them, of which about half, *i.e.,* 76 have serious criminal cases and further, the prevalence of MPs with criminal cases pending has increased over time as statistics reveal that in 2004, 24% of Lok Sabha MPs had criminal cases pending which increased to 30% in the 2009 elections and this situation is similar across States with 31% or 1,258 out of 4,032 sitting MLAs with pending cases, with again about half being serious cases. Not only this, the Commission also observed that some states have a much higher percentage of MLAs with criminal records: in Uttar Pradesh, 47% of MLAs have criminal cases pending and a number of these MPs and MLAs have been Accused of multiple counts of criminal charges, for example, in a constituency of Uttar Pradesh, the MLA has 36 criminal cases pending including 14 cases relating to murder. As per the Commission, it is clear from this data that about one-third of the elected candidates at the Parliament and State Assembly levels in India have some form of criminal taint and also that the data elsewhere suggests that one-fifth of MLAs have pending cases which have proceeded to the stage of charges being framed against them by a court at the time of their election. What the Commission found to be more disturbing was the fact that the percentage of winners with criminal cases pending is higher than the percentage of candidates without such backgrounds, as the data reveals that while only 12% of candidates with a "clean" record win on an average, 23% of candidates with some kind of criminal record win which implies that candidates charged with a crime actually

104 *Public Interest Foundation*, para 39.

> fare better in elections than 'clean' candidates. This, as per the Commission, has resulted in the tendency for candidates with criminal cases to be given tickets a second time and not only do political parties select candidates with criminal backgrounds, but there is also evidence to suggest that untainted representatives later become involved in criminal activities and, thus, the incidence of criminalisation of politics is pervasive thereby making its remediation an urgent need.[105]

The avowed objective of quoting in full the telling analysis of the ever increasing incidence of criminalization inour politicsis to bring home the urgency, how tocontrol criminalization? Where should we begin from?

In this respect, the Supreme Court Constitution bench has taken note of the Law Commission's initiative to bring about electoral reforms by reforming the existing legal framework relating to disqualification. Under the existing law relating to "the prevention of entry of criminals into politics,"[106] the disqualification comes into play only at the stage of conviction as spelled out currently in the provisions of Section 8 of the Act of 1951.The current law,in the opinion of the Law Commission, "suffers from three main problems: the rate of convictions among sitting MPs and MLAs is extremely low, trials of such persons are subject to long delays, and the law does not provide adequate deterrence to political parties granting tickets to persons of criminal backgrounds."[107] "This has resulted in a massive increase in the presence of criminal elements in politics, which affects our democracy in very evident ways."[108]

In order to overcome these problems, the Constitution Bench has reviewed the analysis of the Law Commission for introducing a disqualification at the stage earlier than conviction of the election candidate. Law Commission's recommendations, as considered by the Supreme Court in the present case, may be abstracted as under:

(a) To tackle the menace of willful concealment of information or furnishing of false information and to protect the right to information of the electors, the Commission recommended that to protect the right to information of the electors, the punishment under section 125A of RPA must be made more stringent by providing for imprisonment of a minimum term of two years and by doing away with the alternative clause for fine. Additionally, conviction under section 125A RPA should be made a part of section 8(1)(i) of the Representation of People Act, 1950.[109]

(b) Insertion of Schedule I to the Representation of the People Act, 1951 enumerating offences under Indian Penal Code 1860 befitting the category of 'heinous' offences.[110] It would also require amendment of section 8(1) of RP Act to cover, *inter alia*, the offences listed in the proposed Schedule 1, and this, in turn, would provide that a person in respect of whose acts or omissions a court of competent jurisdiction has taken cognizance under section 190(1)(a),(b) or (c) of the Code of Criminal

105 *Id*., para 40.
106 *Id*., at para 41.
107 See, *id.*, at para 44.
108 *Id*., at para 47.
109 *Ibid*.

Procedure or who has been convicted by a court of competent jurisdiction with respect to the offences specified in the proposed expanded list of offences under section 8(1) shall be disqualified from the date of taking cognizance or conviction, as the case may be.[111] The Commission also referred to the proposal made in the said Report which was to the effect that disqualification in case of conviction shall continue for a further period of six years from the date of release upon conviction and in case of acquittal, the disqualification shall operate from the date of taking cognizance till the date of acquittal.[112]

The Constitution Bench has taken note of the fairly Law Commission's extensive analysis for introducing a disqualification at the stage of *framing of charges*.[113] The Law Commission specifically addressed to the issue why and why not it would not be appropriate stage for disqualification,[114] and then concluded by observing that "disqualification at the stage of framing of charges is justified having substantial attendant legal safeguards to prevent misuse."[115] Why?

The reasons adduced for this change may be abstracted as under:

(i) "[T]he framing of charges Under Section 228 of the Code of Criminal Procedure requires an application of judicial mind to determine whether there are sufficient grounds for proceeding against the Accused."[116]

(ii) Since the "burden of proof at this stage is on the prosecution who must establish a prima facie case where the evidence on record raises 'grave suspicion'," it" offers protection against false charges being imposed."[117]

(iii) Additional protection is available in the shape of Section 311 of the Code of Criminal Procedure, which "grants power to the Court to summon or examine any person at any stage of the trial if his evidence appears essential to the just decision of the case."[118]

(iv) The framing of charges is therefore not an automatic step in the trial process, but one that requires a preliminary level of judicial scrutiny[119]

110 *Public Interest Foundation*, at para 45, taking note of the decisions in *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294*;Lily Thomas* v. *Union of India* (2013) 7 SCC 653*;* and *People's Union for Civil Liberties* v. *Union of India* (2003) 4 SCC 399 and, after referring to the previous reports recommending reforms.

111 *Id*., at para 46, after noticing the observations made by the Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013).

112 *Ibid.*

113 *Ibid.*

114 See, *id.,* para 47.

115 See, *id.,* paras 48-51.

116 See generally, *id.*, para 52.

117 *Ibid.*

118 *Ibid.*

119 *Ibid*. According to the Law Commission, although this s. 311 of the Code "is not very widely used, and the Supreme Court has cautioned against the arbitrary exercise of this power, it grants wide discretion to the court which may even be exercised *suomotu* … to examine additional evidence before framing charges where the consequence of such framing may disqualify the candidate." *Ibid.*

(v) Moreover, since the right to be elected is neither a fundamental nor a common law right buta statutory right, an enlargement in certain specified offences, therefore,"does not infringe upon any Fundamental or Constitutional right of the candidate."[120]

Since a potential fear of misuse of legislative cannot provide justification for not reforming the law *per se*, and more specially when the exercise of such power is made subject to certain safeguards in the form of limiting the disqualification to operate only in certain cases, defining cut-off period and period of applicability.[121]

The detailed analysis, as abstracted above, has led the Constitution Bench in the instant case to reproduce the "eventual recommendations" made by the Law Commission, which read as follows:[122]

1. x xxxx
2. The filing of the police report under section 173 Code of Criminal Procedure is not an appropriate stage to introduce electoral disqualifications owing to the lack of sufficient application of judicial mind at this stage.
3. The stage of framing of charges is based on adequate levels of judicial scrutiny, and disqualification at the stage of charging, if accompanied by substantial attendant legal safeguards to prevent misuse, has significant potential in curbing the spread of criminalisation of politics.
4. The following safeguards must be incorporated into the disqualification for framing of charges owing to potential for misuse, concern of lack of remedy for the Accused and the sanctity of criminal jurisprudence:

i. Only offences which have a maximum punishment of five years or above ought to be included within the remit of this provision.

ii. Charges filed up to one year before the date of scrutiny of nominations for an election will not lead to disqualification.

iii. The disqualification will operate till an acquittal by the trial court, or for a period of six years, whichever is earlier.

iv. For charges framed against sitting MPs/MLAs, the trials must be expedited so that they are conducted on a day-to-day basis and concluded within a 1-year period. If trial not concluded within a one year period then one of the following consequences ought to ensue:

-The MP/MLA may be disqualified at the expiry of the one-year period; OR

-The MP/MLA's right to vote in the House as a member, remuneration and other perquisites attaching to their office shall be suspended at the expiry of the one-year period.

5. Disqualification in the above manner must apply retroactively as well. Persons with charges pending (punishable by 5 years or more) on the date of the law

120 *Ibid*. "The provisions in the Code of Criminal Procedure require adequate consideration of the merits of a criminal charge before charges are framed by the Court," and such a consideration is "sufficient to prevent misuse of any provision resulting in disqualification from contesting elections." *Ibid.*

121 *Ibid*.

122 See*, id.,* paras 53-57.

coming into effect must be disqualified from contesting future elections, unless such charges are framed less than one year before the date of scrutiny of nomination papers for elections or the person is a sitting MP/MLA at the time of enactment of the Act. Such disqualification must take place irrespective of when the charge was framed.

x xx

1. There is large-scale violation of the laws on candidate affidavits owing to lack of sufficient legal consequences. As a result, the following changes should be made to the RPA:

i. Introduce enhanced sentence of a minimum of two years Under Section 125A of the RPA Act on offence of filing false affidavits

ii. Include conviction Under Section 125A as a ground of disqualification Under Section 8(1) of the RPA.

iii. Include the offence of filing false affidavit as a corrupt practice Under Section 123 of the RPA.

2. Since conviction Under Section 125A is necessary for disqualification Under Section 8 to be triggered, the Supreme Court may be pleased to order that in all trials Under Section 125A, the relevant court conducts the trial on a day-to-day basis.

3. A gap of one week should be introduced between the last date for filing nomination papers and the date of scrutiny, to give adequate time for the filing of objections to nomination papers."

These recommendations were made by the 20thLaw Commission under the chairmanship of Justice A.P. Shah, formerly a distinguished judge of the Supreme Court,[123]in their report, *Electoral Disqualifications*,[124] submitted to the Union Government in February 2014. The proposed recommendationshave been reproduced in fullso as to show that these are fairly functional and pragmatic in nature, and could be legitimately taken care of by the competent legislature within the existing constitutional framework. Reflecting upon this state of affairs, the Constitution Bench has observed:[125]

The aforesaid recommendations for proposed amendment never saw the light of the day in the form of a law enacted by a competent legislature but it vividly exhibits the concern of the society about the progressing trend of criminalization in

123 See*, id.,* para 58.

124 The 20th Law Commission was constituted for a period of three years from Sep. 1, 2012 by order no. A-45012/1/2012-Admn.III (LA) dated the Oct. 8, 2012 issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi. The Law Commission consists of a full time chairman, four full-time members (including member-secretary), two ex-officio members and five part-time members. Chairman Justice A.P. Shah Full-time Members, Justice S.N. Kapoor, Prof. (Dr.) Moolchand Sharma, Justice Usha Mehra, N.L. Meena, Member-Secretary, Ex-officio, and Member P.K. Malhotra, Secretary (Legislative Department and Department of Legal Affairs). Part-time Members include: Prof. (Dr.) G. Mohan Gopal, Shri R. Venkataraman, Prof. (Dr.) Yogesh Tyagi, Dr. Bijai Narain Mani, and Prof. (Dr.) Gurjeet Singh.

125 Report no. 244, submitted in Feb, 2014

politics that has the proclivity and the propensity to send shivers down the spine of a constitutional democracy.

It is this backdrop of "indifference" shown to the Law Commission's report by the Union Government for years in succession, the petitioners and intervenors in the instant case have pleaded if the Constitution Bench could take the initiative of issuing "certain directions" to the Election Commission "so that the purity of democracy is strengthened."[126] "It is urged by them that when the Election Commission has been conferred the power to supervise elections, it can control party discipline of a political party by not encouraging candidates with criminal antecedents."[127] Otherwise also, "political parties play a central role in the interface between private citizens and public life, they have also been chiefly responsible for the growing criminalisation of politics."[128] It is surmised that if the political parties that form the government, man the Parliament and run the governance of the country, refrain from accepting persons with a criminal record in their organizational structure, the same is eventually bound to be reflected in the complexion of Parliament and the state legislatures.[129]

This pleading of the petitioners and intervenors has led the Constitution bench of the Supreme Court to specifically examine the role of Election Commission and whether the Supreme Court bench can legitimately prompt the Election Commission that in the excise of its wide powers with respect to superintendence, direction and control of elections, it may include "some conditions in the Election Symbols (Reservation and Allotment) Order, 1968," to the effect that "a candidate against whom criminal charges have been framed in respect of heinous and grievous offences should not be allowed to contest with the symbol of the party."[130]

On their perusal of a catena of Supreme Court judgments,[131] elucidating the role of the Election Commission and the extent to which it can exercise its power under the constitutional framework, the Constitution Bench has observed:[132]

> … There is no denial of the fact that the Election Commission has the plenary power and its view has to be given weightage. That apart, it has power to supervise the conduct of free and fair election. However, the said power has its limitations. The Election Commission has to act in conformity with the law made by the Parliament and it cannot transgress the same.

126 *Public Interest Foundation*, at para 59.

127 See *id.*, at para 60.

128 *Ibid.*

129 See *id.*, at para 42

130 See *id*., at para 43, wherein the Law Commission in its 244th Report referred to the observations of the 170th report, which was also quoted in *Subhash Chandra Agarwal* v. *Indian National Congress* (2013) CIC 8047 by the Central Information Commission.

131 See the submissions made on behalf of the petitioner and the *Amicus Curiae*, *id.,* at para 74.

132 *Public Interest Foundation*, at para 62, read paras 63-69, reviewing the decisions of the Supreme Court in *Election Commission of India* v. *Subramaniam Swamy* (1996) 4 SCC 104, *Brundaban* v. *Election Commission*, [1965] 3 SCR 53, *Election Commission of India* v. *N.G. Ranga*, [1979] 1 SCR2 10, *Mohinder Singh Gill* v. *Chief Election Commissioner* AIR 1978 SC 851; *A.C. Jose* v. *Sivan Pillai* AIR 1984 SC 921, *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294; and *Kuldip Nayar* v. *Union of India* (2006) 7 SCC 1.

In view of this broad principle as enunciated above, the singular question to be answered by the Constitution bench is whether it can issue directions to the Election Commission of India beyond what is already provided under the Constitution and the law made by the Parliament? Specifically stated, whether the Supreme Court can direct the Election Commission to (a) deregister a political party, (b) refuse renewal of a political party or (c) to not register a political party if they associate themselves with persons who are merely charged with offences?

The stand of the petitioners and intervenors is that such directions "would not amount to adding a disqualification beyond what has been provided by the legislature but would only deprive a candidate from contesting with the symbol of the political party."[133] This view of is "seriously opposed" by the Union Government[134] in the light of the judicially settled propositions, which may be abstracted as follows:

(a) The 'pure law' in the nature of constitutional provisions and the provisions of the RP Act "cannot be substituted or replaced by judge made law," as it "would result in violation of the doctrine of separation of powers."[135]

(b) Section 29A (5) of the Representation of the People Act "is a complete, comprehensive and unambiguous provision of law and any direction to the Election Commission of India to deregister or refuse registration to political parties who associate themselves with persons merely charged with offences would result in violation of the doctrine of separation of powers as that would tantamount to making addition to a statute which is clear and unambiguous."[136]

(c) Any directions to be issued by the Supreme Court under Article 32 of the Constitution could operate only " in areas left unoccupied by legislation", and in the instant case "the Constitution of India and the Representation of the People Act, 1951 already contain provisions for disqualification of Members of Parliament."[137]Therefore, the proposed directions to the Election Commission "would amount to adopting a colourable route, that is, doing indirectly what is clearly prohibited under the Constitution of India and the Representation of the People Act, 1951."[138]

(d) Speaking specifically, "adding a condition to the recognition of a political party under the Symbols Order would also result in doing indirectly what is clearly prohibited."[139]

(e) "[T]he presumption of innocence until proven guilty is one of the hallmarks of Indian democracy and the said presumption attaches to every person who has

133 *Id*., at para 70

134 See *id.*, at para 74.

135 See *id.*, at para 75.

136 See *id.*, at para 78, *citing State of Himachal Pradesh* v. *Satpal Saini*: (2017) 11 SCC 42 and *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225, wherein the doctrine of separation of powers was concretised by the Supreme Court.

137 See *id.*, at para 78. See also, *id*., para 75, to the same effect, citing *Indian National Congress (I)* v. *Institute of Social Welfare* (2002) 5 SCC 685.

138 See *id*., at para 76, citing *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294.

139 *Ibid.*

been charged of any offence and it continues until the person has been convicted after a full-fledged trial where evidence is led." And, therefore,"[p]enal consequences cannot ensue merely on the basis of charge."[140]

(f) The "standard of charging a person is always less than a prima facie case, *i.e.,* a person can be charged if the facts emerging from the record disclose the existence of all the ingredients constituting the alleged offence and, therefore, the consequences of holding that a person who is merely charged is not entitled to membership of a political party would be grave as it would have the effect of taking away a very valuable advantage of the symbol of the political party."[141]

(g) "[E]very citizen has a right Under Article 19(1)(c) to form associations which includes the right to be associated with persons who are otherwise qualified to be Members of Parliament under the Constitution of India and under the law made by the Parliament. Further, this right can only be restricted by law made by the Parliament and any direction issued by the Election Commission of India Under Article 324 is not law for the purpose of Article 19(1)(c)."[142]

(h) The RP Act "already contains detailed provisions for disclosure of information by a candidate in the form of Section 33A which requires every candidate to disclose information pertaining to offences that he or she is accused of," and this"information is put on the website of the Election Commission of India and requiring every member of a political party to disclose such information irrespective of whether he/she is contesting election will have serious impact on the privacy of the said member."[143]

(i) Moreover, Article 142 of the Constitution of India does not empower the Supreme Court "to add words to a statute or read words into it which are not there and Article 142 does not confer the power upon this Court to make law."[144]

(j) The argumentthat "there is a vacuum which necessitates interference of this Court," "is untenable as the provisions of the Constitution and the Act are clear and unambiguous" and, therefore, issuing any directions as pleaded by the petitioners "would be in the teeth of the doctrine of separation of powers and would be contrary to the provisions of the Constitution and to the law enacted by the Parliament."[145]

Most seemingly, after having agreed with the legal propositions as stated above, the Constitution Bench has scanned and analyzed "the relevant provisions of the Symbols Order which deals with allotment, classification, choice of symbols by candidates and restriction on the allotment of symbols."[146] The avowed objective of

140 *Id.,* at para 77, citing *Jagir Singh* v. *Ranbir Singh* (1979) 1 SCC 560 and *M.C. Mehta* v. *Kamal Nath* (2000) 6 SCC 213.

141 *Id.*, at para 80.

142 *Id*., at para 81, citing *Amit Kapoor* v. *Ramesh Chander* (2012) 9 SCC 460.

143 *Id.*, at para 82.

144 *Id*., at para 83.

145 *Id.*, at para 84, citing *Union of India* v. *DeokiNandan Aggarwal* (1992) Supp (1) 323 and *Supreme Court Bar Association* v. *Union of India* (1998) 4 SCC 409.

146 *Id*., at para 85.

the analysis is to decide the issue, as put forth by the petitioners, whether the Benchcould legitimately direct the Election Commission that if a political party sets up a candidate in elections against whom charges have been framed for heinous and/ or grievous offences, then such a candidate cannot be allowed to contest with the reserved symbol for the political party. In the opinion of the Constitution Bench such a proposition is constitutionally untenable as "it would tantamount to adding a new ground for disqualification which is beyond the pale of the judicial arm of the State," and that "[a]ny attempt to the contrary will be a colourable exercise of judicial power for it is axiomatic that 'what cannot be done directly ought not to be done indirectly' which is a well-accepted principle in the Indian judiciary."[147]"A candidate bereft of party symbol is, in a way, disqualified from contesting under the banner of a political party."[148]In short, "without a legislation," in the opinion of the Constitution Bench,"it may be difficult to proscribe the same;"[149] that is, it is not possible to introduce a disqualification indirectly by way of denying party symbol to the so-called tainted person except through the introduction of proper legislative measure.[150] Be that as it may, though "criminalization in politics is a bitter manifest truth, which is a termite to the citadel of democracy," yet "the Court cannot make the law;"[151] "it is not constitutionally permissible."[152] "The judicial arm of the State being laden with the

147 See, *id*., at para 86, read with paras 87-96.

148 See, *id.*, at para 98. In support of this view, the Constitution Bench has profitably derived support from the following judicial precedent: *Allied Motors Limited* v. *Bharat Petroleum Corporation Limited* (2012) 2 SCC 1, wherein reference was made to the celebrated judgment of the Privy Council in *Nazir Ahmad* v. *King Emperor,* AIR 1936 PC 253 wherein the principle has been enunciated "that where a power is given to do a certain thing in a certain way, the thing must be done in that way, or not at all." Other methods of performance are necessarily forbidden. This principle has been reiterated and expanded by the Supreme Court in several decisions, see, id., at para 100. See also ,to the same effect: *D.R. Venkatachalam* v. *Dy. Transport Commissioner,* AIR 1977 SC 842; *State through P.S. Lodhi Colony New Delhi* v. *Sanjeev Nanda*, AIR 2012 SC 3104; and *Rashmi RekhaThatoi* v. *State of Orissa* (2012) 5 SCC 690, cited in, *id.*, paras 101-103.

149 *Id.,* para 104. The argument of the petitioners that the person so disqualified can contest the election as an independent candidate has been counteracted by the Bench by observing that "the impact would be the same," ibid.

150 *Id.*, para 104.

151 It is on the strength of this settled principle of law that 'if something is required to be done in a particular manner, then that has to be done only in that way or not, at all,' the Supreme Court Bench has aptly noted the observations of the Supreme Court in *Shailesh Manubhai Parmar* v. *Election Commission of India* 2018 (10) SCALE 52, which dealt with the issue of introduction of NOTA to the election process for electing members of the Council of States: the Supreme Court "refused to allow the introduction of NOTA for election of members of the Council of States, for the Court was of the view that if the availability of NOTA option in elections for Rajya Sabha would be allowed, the same would amount to colourable exercise of power by attempting to introduce or modify a disqualification for being or becoming a member, which power falls completely within the domain of the legislature," *id.*, at para 105, read with the preceding para 104.

152 *Id*., para 106.

duty of being the final arbiter of the Constitution and protector of constitutional ethos cannot usurp the power which it does not have."[153]

In this predicament of "multi-party democracy, where members are elected on party lines and are subject to party discipline," the Constitution Bench has thus spoken:[154]

> …[W]e recommend to the Parliament to bring out a strong law whereby it is mandatory for the political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences and not to set up such persons in elections, both for the Parliament and the State Assemblies. This, in our attentive and plausible view, would go a long way in achieving decriminalisation of politics and usher in an era of immaculate, spotless, unsullied and virtuous constitutional democracy.

Reverting to the issue that has been raised at the very threshold, namely, whether disqualification for membership can be laid down beyond article 102 and the law made by the Parliament under article 102(e), the response of the Constitution bench is that in the light of the analysis, as presented above, through judicial interpretation it is not constitutionally permissible. It is this exercise, which has prompted the court once again to turn to the Parliament and recommend it 'to bring out a strong law' addressing to the issue of decriminalization of politics by making it mandatory for the political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences.

Having thus renewed the 'expression of hope', of which there is little chance to be realized in the light of the fate of the 244th Report of the Law Commission under the stewardship of A.P. Shah J (submitted in February 2014), the Constitution bench, as if with an 'agonizing' pricking conscience, has recalled: "In spite of what we have stated above, we do not intend to remain oblivious to the issue of criminalization of politics."[155] The bench has become suddenly alive and started building upon the 'break through' made earlier by the Supreme Court intwo three-Judge Bench decisions in *Association for Democratic Reforms*(2002) and *People's Union for Civil Liberties* (2003).[156] This breakthrough was attained by holding that the fundamental right to freedom of speech and expression "includes right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy."[157] Accordingly, direction were issued to the Election Commissionto make it mandatory for the election candidates to furnish details, inter alia, about their criminal antecedents.

153 *Id*., at para 107.

154 *Ibid*.

155 *Id*., at para 108.

156 *Id.,* at para 109.

157 See, *id.,* at paras 109 and 110. For the analysis of the two three-Judge Bench decisions, see, Virendra Kumar, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies," 47(2) *Journal of the Indian Law Institute*, (2005) 135-157.

As a matter of course, the directives given by the Supreme Court in *Association for Democratic Reforms* (2002) were intended to operate only till the appropriate law was enacted by the Parliament. Soonafter, therefore, the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002) was promulgated,[158] introducing, *inter alia,* section 33-B, stipulating: "Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the Rules made thereunder."

Since the statutory provision completely diluted the essential thrust of the Supreme Court directives, the validity of the amending law was called in question under Article 32 of the Constitution. The three-judge bench in *People's Union for Civil Liberties* (2003) declared the amended law unconstitutional to the extent it ran contrary to the directives of the Supreme Court. The reasons for doing are spelled out as under:

Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even if they be tentative or ad hoc in nature, *should be given due weight and substantial departure therefrom cannot be countenanced.* [159]

> Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly, for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.[160]
>
> The right to information provided for by Parliament Under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure.[161]
>
> [T]he citizen's fundamental 'right to information' should be recognised and fully effectuated. This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a

158 *Id.*, at para 109.

159 The Ordinance was soon replaced by the Representation of the People (Third Amendment) Act, 2002.

160 *Id.*, at para 111 (3), per P. Venkata Reddy, J. [Emphasis added].

161 *Id.*, at para 111(2).

> voter which is to be regulated by statutory law on the election like the RP Act.[162]

The linkage between the right of the voter to know the criminal past of the election candidate and his fundamental right to freedom of speech and expression has been upheld by the apex court successively thereafter and thus become entrenched since then. In *Resurgence India* v**.** *Election Commission of India*,[163] for instance, the Supreme Court, in the light of the past precedents, has summarized the effect of the directives hitherto issued by the apex court, which may be abstracted as under:[164]

> [The] right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.
>
> The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens Under Article 19(1)(a) of the Constitution of India.
>
> Filing of affidavit with blank particulars will render the affidavit nugatory.
>
> If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected.
>
> The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

The other contemporary decision considered by the Constitution Bench in the instant case is *People's Union for Civil Liberties* v. *Union of India*.[165] On the basis of the Supreme Court holding in this case, the observations of the Constitution bench are required to be substantially quoted as under:[166]

> … It has been further ruled that for democracy to survive, it is essential that the best available men should be chosen as the people's representatives for the proper governance of the country. The best available people, as is expected by the democratic system, should not have criminal antecedents and the voters have a right to know about their antecedents, assets and other aspects. We are inclined to say so, for in a constitutional democracy, criminalization of politics is an extremely disastrous and lamentable situation. The citizens in a democracy cannot be compelled to stand as silent, deaf and mute spectators to corruption by projecting themselves as helpless. The voters cannot be allowed to resign to their fate. The information given by a candidate must express everything that is warranted by the Election Commission as per law. Disclosure of antecedents makes the election a fair one and the exercise of the right of voting by the electorate also

162 *Id*., para 111(6).

163 *Id.,* para 112 (127), per Dharmadhikari, J., in his supplementing opinion.

164 (2014) 14 SCC 189, referred in, *id.*, para 113.

165 *Id*., para 113.

166 (2013) 10 SCC 1, cited in, *id.*, para 115.

> gets sanctified. It has to be remembered that such a right is paramount for a democracy. A voter is entitled to have an informed choice. If his right to get proper information is scuttled, in the ultimate eventuate, it may lead to destruction of democracy because he will not be an informed voter having been kept in the dark about the candidates who are accused of heinous offences.

Reflecting on the linkage between the constitutional obligation of the election candidate to reveal his criminal past to the voters,and the fundamental right of the voters to know fully the criminal antecedents of the election candidates, the Constitution Bench in the present case has deciphered a serious lacunathat prevented the full fructification of the value of this linkage. This is discovered by observing that in"the present scenario, the information given by the candidates is not widely known in the constituency and the multitude of voters really do not come to know about the antecedents," and thereby"[t]heir right to have information suffers."[167]Realization of this lacunahas led the Constitution Bench to issue the following "appropriate" "directions", "which are in accord with the decisions of this Court":[168]

(i) Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein.

(ii) It shall state, in bold letters, with regard to the criminal cases pending against the candidate.

(iii) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her.

(iv)The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.

(v) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers.

The singular objective of all such directions as laid down by this Court from time to time is "to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that 'we shall be governed no better than we deserve', and thus, complete information about the criminal antecedents of the candidates forms the bedrock of wise decision-making and informed choice by the citizenry."[169] "Be it clearly stated that informed choice is the cornerstone to have a pure and strong democracy," is the emphatic statement of the Constitution bench.[170]

167 *Id.*,para 115.

168 *Ibid.*

169 *Id.*, para 116.

170 *Id.*, para 117.

However, the Constitution bench "issued the aforesaid directions with *immense anguish*."[171]Why? Perhaps, the underlying reason is that these directions are at the best, what we may call, 'palliative in nature', and not a substitute for the needed cure, "for the Election Commission [under the existing law] cannot deny a candidate [charged with serious criminal offences] to contest on the symbol of a party."[172] Real cure of ensuring "that persons facing serious criminal cases do not enter into the political stream," can come only through proper legislation by the Parliament.

While enacting such a law, the Legislature may bear in mind the following prescription of the Constitution Bench:[173]

> It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation. It is true that false cases are foisted on prospective candidates, but the same can be addressed by the Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance. The voters cry for systematic sustenance of constitutionalism. The country feels agonized when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay.

The Constitution Bench have parted with their judgment with an optimistic noteby stating that they are "sure" that"the law making wing of the democracy of this country will take it upon itself to cure the malignancy," for "such a malignancy is not incurable."[174] "It only depends upon the time and stage when one starts treating it; the sooner the better, before it becomes fatal to democracy."[175]

IV NONE OF THE ABOVE (NOTA) OPTION: WHETHER ITS INTRODUCTION INTO VOTING PROCESS OF COUNCIL OF STATES (RAJYA SABHA) IS VALID AND CONSTITUTIONAL?[176]

This issue has emerged before the three-Judge Bench of the Supreme Court in a writ petition under Article 32 of the Constitution in *Shailesh Manubhai Parmar* v. *Election Commission of India*[177] In this case, the petitioner (who was the Chief Whip of the Indian National Congress party in Gujarat Legislative Assembly)has challenged the Circular (dated August,1 2017) issued by the Secretary, Gujarat Legislature Secretariat, which introduced 'None of the Above' (NOTA) option in relation to the conduct of elections for the Council of States (Rajya Sabha). The issued circular

171 *Ibid.*

172 *Id*., para 118. Emphasis added.

173 *Ibid.*

174 *Ibid.*

175 *Id*., para 119.

176 *Ibid*.

wasin pursuance of the directions of the Election Commission of India to the chief electoral officers of all the states and the union territories,[178] directing them that the option of NOTA should be printed on the ballot paper in the language or languages in which the ballot paper is printed as per the directions issued earlier by the Election Commission in pursuance of sub-rule (1) of rule 22 and sub-rule (1) of rule 30 read with Rule 70 of the Conduct of Election Rules, 1961.[179]

Essentially, the contention in the petition is that the circulars issued by the Election Commission of India introducing NOTA to the elections in respect of members of the Rajya Sabha are contrary to the mandate of article 80(4)[180] of the Constitution of India and the decision of this Court in *People's Union for Civil Liberties and Anr. v. Union of India (*PUCL).[181] The Election Commission, one of the respondents in this case, vehemently contended on the contrary. The main grounds of counter[182]included: one, "that as per the pronouncement in PUCL's case, there is no distinction between direct and indirect elections and, hence, the provision of NOTA in the ballot paper of the elections has been made applicable by the Election Commission to Rajya Sabha to effectuate the right of electors guaranteed to them Under Section 79A of the Act;"[183] two, " that though there is no need for secrecy in Rajya Sabha elections because the law makes it open voting, yet that does not take away the right of the elector not to vote by expressing the option of NOTA;"[184] three, "that even assuming the position that the judgment in PUCL's case does not indicate that this Court ever intended to apply the option of NOTA to Rajya Sabha elections", and yet the Election Commission

177 See also, Virendra Kumar, "Citizen's Right to Vote: Role of the Supreme Court in empowering citizenry to bring about 'a systemic change' through NOTA for cleansing our body politic (A juristic critique of constitutional development)," 56(1) *Journal of the Indian Law Institute* 25- 46 (2014).

178 Writ Petition (Civil) No. 631 of 2017. AIR 2018 SC 3918:, (2018) 9 SCC 100: 2019 (1) SCJ 191. Per Dipak Misra, C.J.I. (for himself and A.M. Khanwilkar and Dr. D.Y. Chandrachud, JJ.) Hereinafter, simply *Shailesh Manubhai Parmar.*

179 Except Andaman & Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu and Lakshadweep.

180 See, *ShaileshManubhaiParmar,* at para 2.

181 Art. 80(4) of Constitution of India provides that members of Rajya Sabha shall be elected by the elected members of State Legislative Assemblies through the system of proportional representation by means of the single transferable vote.

182 (2013) 10 SCC 1. Hereinafter, simply *PUCL.*

183 The preliminary grounds for ousting the petition included, "that the constitutional courts do not interdict in the election process and challenge can only be made after the election is over by filing an election petition before the appropriate court," *ShaileshManubhaiParmar,* at para 3. In the instant case, in fact, the elections had already been held by applying the said option and, therefore, the other preliminary objection was that "there was no justification to challenge the said directions at a belated stage." *Ibid.* Since regarding these preliminary issues, involving the question of maintainability of the writ petition, "no argument was advanced in that regard," and, "correctly so", said the Supreme Court, the consideration of preliminary issues fell out of determination. See, *id.*,para 4.

184 *Ibid.* elections had already been held by applying the said option and, therefore, there is no justification to challenge the said directions at a belated stage.*Shailesh Manubhai Parmar,* at para 3

was empowered to so, and thus had"issued letter dated January 24, 2014 and further reiterated by letter dated November 12, 2015 that the option of NOTA would be applicable to elections in Rajya Sabha."[185]

It is in this backdrop, the singular issue for determination before the three-judge Bench of the Supreme Court is whether the circular issued by the Election extending the application of NOTA to elections in Rajya Sabhais constitutionally consistent.

The plea for introduction of the provision of NOTA option in the EVMs/ballot papers, giving right to a voter not to vote for any candidate as an integral part of his right to vote, was made by the Election Commissionon the basis of the judgment of the Supreme Court in *PUCL* (2013).[186] Such an option,"apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent or disapproval against the contesting candidates and will have the benefit of reducing bogus voting."[187] Recognizing the value of that plea, the Supreme Court observed:[188]

> Giving right to a voter not to vote for any candidate *while protecting his right of secrecy* is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realise that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity. {Emphasis added]

NOTA provision will also help in eschewing bogus voting by eliminating the unscrupulous elements to impersonate, who invariably manage to cast their vote as 'in the existing system a dissatisfied voter ordinarily does not turn up for voting."[189] Being alive to these pitfalls, the Supreme Court "directed the Election Commission to make necessary provision in the ballot papers/EVMs for another button called 'None of the above (NOTA)' so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy."[190]

By considering NOTA as the means of maintaining the right of secrecy, and secrecy of ballot is vital principle for ensuring free and fair elections, the Election Commission, thus, decided that the NOTA option would also be applicable for elections to Rajya Sabha. The circular issued by the Election Commission[191] also demonstrated that how and in what manner NOTA option could be used in preferential system of

185 *Ibid*.
186 *Ibid*.
187 See, *id.,* para 10.
188 *Ibid*.
189 *Ibid*, citing *PUCL*, para 57.
190 *Ibid,* citing *PUCL*, para 58.
191 *Id.*, para 11.

voting by using single transferable vote in elections to Rajya Sabha and State Legislative Councils.[192]

Since the Election Commission treated "the pronouncement in PUCL's case as its source of power" for the introduction of NOTA in elections to Rajya Sabha and state legislative councils, the three-judge bench has closely examined the veracity of this claim.[193] The result of their critical scrutiny may be abstracted as under:

(a) The decision in PUCL'scase relates to "direct elections", and the directions envisaged in that case "pertain to the Parliament and State Legislative Assemblies which is constituency based and grants an option to the voters to exercise the benefit of NOTA."[194]

(b) In 'direct elections', emphasis is laid on "universal adult suffrage conferred on the citizens of India by the Constitution and the entitlement of a voter to come to the polling booth and decide [in a secret manner without fear] to vote for any candidate or to exercise the right not to vote."[195]

(c) There is distinction between direct and indirect elections. In the case of former, "[t]here is no party affiliation and hence the choice is entirely with the voter;"[196]whereas in the latter case, "the electors are elected Members of the Legislative Assemblies who in turn have party affiliations."[197]

(d) In case of 'direct election' to Parliament and State Legislative Assemblies, the election connotes "constituency-based representation;" whereas in case of 'indirect election' to Rajya Sabha, the election isthrough, what is termed as,"proportional representation."[198]

(e) Since in "proportional representation" members are elected on "party lines," they are subject to "party discipline," and as such they are "liable to be expelled for breach of discipline."[199]

(f) For enforcing party discipline with a view to fructify Rajya Sabha elections through proportional representation, "Parliament can suggest "open ballot."[200]

In the light of the critical distinction that in "constituency-based representation, 'secrecy' is the basis;" whereas "in the case of proportional representation in a representative democracy the basis can be 'open ballot'," the Supreme Court has emphasized that the introduction of "open ballot" in the Rajya Sabha elections "would not violate the concept of 'free and fair elections', a concept which is which is "one of the pillars of democracy."[201]

192 Circular issued on Nov.12, 2015.

193 See, *Shailesh Manubhai Parmar*, at paras 16 and 17.

194 See, *id*., para 18.

195 *Ibid.*

196 *Ibid.*

197 *Ibid*, citing *KuldipNayar.* v. *Union of India* (2006) 7 SCC 1 (para 441).

198 *Ibid.*

199 *Ibid*, citing *KuldipNayar.* v. *Union of India* (2006) 7 SCC 1 (para 454).

200 *Ibid.*

201 *Ibid.*

In fact, voting by 'open ballot'has been introduced "to sustain the foundational values of party discipline and to avoid any kind of cross voting," and "thereby ensuring purity in the election process."[202] To realize this very objective of purity, there is a provision of issuing "party whip" whereby "the elector is bound to obey the command of the party."[203] "The party discipline in this kind of election is of extreme significance, for that is the fulcrum of the existence of political parties," and the "thought of cross voting and corruption is obnoxious in such a voting.[204]

The Tenth Schedule in the Constitution by the Constitution (Fifty-Second Amendment) Act, 1985 specifically introduced to cut down the evil of "political defection."[205] It disqualifies a member of a House belonging to any political party on ground "if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs."[206] This very objective of disqualifying a defector shall be "indirectly defeated by the introduction of NOTA."[207]

In view of the above analysis, the following propositions may be abstracted from the analysis of the three-judge bench decision of the Supreme Court:

(i) In the voting process of the Council of States where open ballot is permissible, secrecy of voting through NOTA has no room.[208]

(ii) In the election of Council of States, where the discipline of the political party/ parties matters, the choice of electors through NOTA will have a negative impact, amounting to saying, what cannot be done directly, can be done indirectly.[209]

(iii) Introduction of NOTA as conceived by the Election Commission, the on the basis of the PUCL judgment is absolutely erroneous, for the said judgment does not say so.[210]

(iv) "The introduction of NOTA in such an election will not only run counter to the discipline that is expected from an elector under the Tenth Schedule to the Constitution but also be counterproductive to the basic grammar of the law of disqualification of a member on the ground of defection."[211]

202 *Ibid,* citing the Australian judgment in *R.* v. *Jones* (1972) 128 CLR 221.

203 *Id*., para 19.

204 *Ibid*.

205 *Ibid*, citing the authority in *Ravi S. Naik* v. *Union of India* 1994 Supp (2) SCC 641, in which the question arose relating to the disqualification of a member of the state legislature under art. 191(2) read with the Tenth Schedule to the Constitution.

206 See the Statement of Objects and Reasons of the Constitution (Fifty-Second Amendment) Act, 1985, which *inter alia*, provides: "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it…."

207 See para 2(1)(b) of the Tenth Schedule, cited in *Shailesh Manubhai Parmar*, at para 20.

208 See, *id.*, para 22.

209 *Id*., para 23.

210 *Ibid.*

211 *Ibid*. The singular "purpose of introduction of NOTA in PUCL's case is that a provision for negative voting can send a clear message to the political parties and what a voter thinks about the candidates in the fray," and, thus, "the said decision is directly relatable to a direct election, one man, one vote and one value." See, *id.*, at para 24.

(v) "[i]f NOTA is allowed in the election of the members to the Council of States, the prohibited aspect of defection would indirectly usher in with immense vigour."[212]

(vi) Though, Article 324 of the Constitution is a reservoir of power for the Election Commission to act for the avowed purpose of pursuing the goal of a free and fair election, and yet the power is not absolute: "the limitations on the exercise of 'plenary character' of the Election Commission include one to the effect that 'when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions."[213]

(vii) Apart from the law made by the Parliament and the directions issued by the Supreme Court while "interpreting a provision for furtherance of purity of election, it will be obligatory on the part of the Commission to act in accordance with the same."[214] "The Commission cannot be allowed to conceive of certain concepts or ideas or, for that matter, think of a different dimension which would not fit into the legal framework."[215]

In the light of the above, the three-judge bench has "without a speck of doubt" that the decision of the Election Commission,introducing NOTA in the election of the members to the Council of States, is contrary to the very basis on which the concept of NOTA was conceived in the setting of elections tothe Parliament and State Legislatures.[216]If the same concept is introduced into the different setting of elections to the Council of States, it would result in destroying "the concept of value of a vote and representation and encourage defection that shall open the doors for corruption which is a malignant disorder."[217] In an indirect election, "the elector's vote has value and the value of the vote is transferrable."[218] While allowing the writ petition and quashing the circulars issued by the Election Commission, introducing NOTA in respect of elections to the Council of States, the three-Judge Bench has added "that the option of NOTA may serve as an elixir in direct elections but in respect of the election to the Council of States which is a different one," "it would not only undermine the purity of democracy but also serve the Satan of defection and corruption."[219]

V ELECTION PETITION UNACCOMPANIED BY TREASURY CHALLAN: WHETHER CONSTITUTIONALLYIN VALID AND CAN BE DISMISSED SUMMARILY?

This issue has been specifically dealt with by the three-Judge bench of the Supreme Court in *Sitaram* v. *Radhey Shyam Vishnav*.[220] In this case, the appellant and

212 *Id*., at para 23.

213 *Ibid*.

214 *KuldipNayar* v. *Union of India* (2006) 7 SCC 1, at para 424, cited in *id.*, para 26.

215 *Shailesh Manubhai Parmar*, at para 26.

216 *Ibid.*

217 *Id.,* para 27.

218 *Ibid.*

219 *Ibid*.

220 *Id*., para 27, read with para 28.

the respondent contested for the post of chairperson of the municipal corporation. The appellant was declared elected. The respondent filedan election petition challenging the election of the appellant alleging, *inter alia*, that the votes in favor of the appellant were erroneously counted and deserved to be rejected. The appellant filed an application[221]seeking rejection of the election petition on the foundation that there had been non-compliance of Rule 3(d) of the Rajasthan Municipalities Election Petition Rules, 2009,[222] which, *inter alia*, provide that an election petition must be accompanied by treasury challan.The respondent, in turn, contended that he had filed an application before the court to file the receipt of challan and the amount was subsequently deposited. The election tribunal dismissed the appellant's application. Aggrieved by an appeal was preferred in the high court, which was also dismissed. Against the dismissal, the appellanthas come to the Supreme Court by special leave to the appeal. In this fact matrix, the singular question addressed by the three-judge bench is whether deposit of treasury challan at the time of presentation of the election petition is "mandatory in character."[223]

For responding to this issue, the Supreme Court has taken note of the relevant Rules 3 and 7 of the 2009 Rules for their consideration. The genesis of Rule 3, which deals with election petition *inter alia,* provides the grounds on which the election of any person as chairperson or vice-chairperson or member of a municipality can be questioned.[224] Sub rule (5)(d) of Rule 3, while dealing with the requirements of an election petition, specifically states shall that an election petition "shall be accompanied by a treasury challan of rupees one thousand."[225]

The rule 3(5)(d) is required to be read with rule 7(3), which obligates the Judge trying the election petition that he "shall dismiss an election petition, which does not comply with the provisions of these rules."

In order to decipher the true import of non-compliance with Rule 3(5)(d) read with Rule 7(3) of the 2009 Rules*,* the three-judge benchhas examined the approach of the apex court while dealing with the analogous provisions contained in section 117 of the Representation of People Act, 1951, which requires that at the time of presenting an election petition, the petitioner shall deposit in the high court in accordance with the rules of the high court a sum of two thousand rupees as security for the costs of the petition and it also confers power on the high court to call upon the election petitioner to give such further security for costs as it may direct. The result of their scrutiny of relevant judicial precedents on this count may be abstracted as under:

221 Civil Appeal No. 1200 of 2018 (arising out of S.L.P. (C) No. 20768 of 2017), decided on Mar. 6, 2018, AIR 2018 SC 1298: (2018) 4 SCC 507: 2018 (3) SCJ 273, per Dipak Misra, C.J.I. (for himself and A.M. Khanwilkar and D.Y. Chandrachud, JJ.). Hereinafter simply *Sitaram.*

222 The application was preferred under Order VII Rule 11(d) and (e) read with Order XIV Rule 2 along with s.151 of the CPC.

223 Hereinafter simply referred to as the 2009 Rules.

224 See, *Sitaram,* at para 8.

225 Rule 3(3) of the 2009 Rules.

(a) The right to challenge an election is a statutory right (and not any common law right), and, therefore, the terms of that statute "had to be complied with."[226]
(b) If the statute "leaves no option with the court but to reject the election petition," then it must be so done.[227]
(c) The principle of 'substantial compliance' spelled out on the basis of *un-amended provision* of section 117 of the 1951 Act, commending that section 117 should not be strictly or technically construed, is also not applicableinasmuch as the same is distinguishable in view of the later constitution bench decision.[228]
(d) The question as to whether a statute is mandatory or directory depends not only upon the phraseology of the provision, but also upon the intent of the legislature

226 The other requirements under rule 3(5) of the said rules include that an election petition (a) shall contain a concise statement of the material facts on which the petitioner relies; (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including names of the person alleged to have committed such corrupt practice and the date and place of the commission of such practice; (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Central Act V of 1908) for the verification of pleadings, and that. Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition

227 *Sitaram,* at para 13, citing *Charan Lal Sahu* v. *Nandkishore Bhatt* (1973) 2 SCC 530, in which the two-judge Bench referred to art. 329(b) of the Constitution of India which provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. If no discretion to absolve the petitioner from payment of security for costs is provided under the statute governing election disputes, then none can be exercised under any general law or on any principle of equity. Citing *N.P. Ponnuswami* v. *Returning Officer, Namakkal Constituency*: 1952 SCR 218: AIR 1952 SC 64, it is further emphasized it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

228 *Id.,* para 14. Cf. *K. KamarajaNadar* v. *Kunju Thevar* 1959 SCR 583: AIR 1958 SC 687 where the election Petitioner under the unamended provision of s. 117 of the 1951 Act had deposited the amount in government treasury but had neither mentioned the complete head of account in the government treasury receipt nor was the deposit made in favour of the Secretary to the Election Commission as provided in the aforesaid Section. In this context, it was held that the words "in favour of the Secretary to the Election Commission" used in Section 117 are directory and not mandatory in their character. However, the ratio of this judgment is no more available and applicable after the provision of section 117 was amended, see id., at para 15. This view was reinforced in the light of the constitution bench decision in *Charan Lal Sahu* v. *Fakruddin Ali Ahmed* (1975) 4 SCC 832, wherein interpreting the analogous provisions of s. 5-C, introduced in the Presidential and Vice-Presidential Elections Act, 1952 by an amendment made by Act 5 of 1974, it was held that enclosing a cheque for Rs. 2500/- did not comply with the mandatory requirement of Sub-section (2) of s. 5-C, which expressly required that a candidate has to either deposit in cash or enclose with the nomination paper a receipt showing that the said sum had been deposited by him or on his behalf in the Reserve Bank of India or in a Government Treasury, see, *Sitaram,* at para 16, for the analysis. See also, *id.*, at paras 17 and 18 stating again that "there has to be compliance with the provision relating to deposit failing which the Court has no option but to reject an election petition," citing *Aeltemesh Rein* v. *Chandulal Chandrakar* (1981) 2 SCC 689.

"to be ascertained … by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."[229]

(e) The principle of substantial compliance or the doctrine of curability apply in areas like verification, signature of parties, service of copy, etc., but not in the fact matrix of the present case.[230]

In the case in hand, the election petition was filed on September 9, 2015 but the treasury challan was not filed on that day. The election tribunal had passed an order on a later date permitting the deposit.In terms of Rule 3(5)(d), it isexpressly commanded that the election petition shall be accompanied by the treasury challan.Expounding the provisions of this Rule, the three-judge bench in the instant case has held:

(i) "The word used in the Rule is 'accompanied' and the term 'accompany' means to co-exist or goalong," implying thereby that" the election petition has to be accompanied by the treasury challan,"without any "separation or segregation."[231] Here, the treasury challan, as has been understood by this Court, means that "there has to be a deposit in the treasury."[232]

(ii) "Once the election petition is presented without the treasury challan," "Rule 7 leaves no option to the Judge but to dismiss the petition."[233]

Thus, regard being had to the language employed in both the Rules - Rule 3(5)(d) and Rule 7(3) of the *2009 Rules* –the three-judge bench is obligated to hold that "the deposit of treasury challan which means deposit of the requisite amount in treasury at the time of presentation of the election petition is mandatory," and, therefore, "the inevitable conclusion is that no valid election petition was presented."[234] Accordingly, in this fact matrix, the election tribunal (additional district judge) was

229 See, *id.*, at para 20 read with para 19, citing the analysis of a three-Judge Bench decision in *Chandrika Prasad Tripathi v. Shiv Prasad Chanpuria* MANU/SC/0111/1959: 1959 SUPP (2) SCR 527: AIR 1959 SC 827 in the light of *Charan Lal Sahu (I)* (supra).

230 *Crawford on Statutory Construction*, at 516, cited in, id., at para 21. This statement had been quoted with approval by the Court in State of *U.P.* v. *Manbodhan Lal Srivastava* MANU/SC/0123/1957 : AIR 1957 SC 912, *State of U.P.* v. *Babu Ram Upadhya* MANU/SC/0312/1960: AIR 1961 SC 751 and *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur* MANU/SC/0226/1964: AIR 1965 SC 895. However, eventually, in these cases, relying on the authorities in *K. Kamaraja Nadar* (supra), *Chandrika Prasad Tripathi* (supra), *Om Prabha Jain* v. *Gian Chand* MANU/SC/0110/1959 : AIR 1959 SC 837: 1959 SUPP (2) SCR 516 and *Budhi Nath Jha v. Manilal Jadav* MANU/SC/0254/1959 : (1960) 22 ELR 86, it was held that s. 117 of the 1951 Act should not be strictly or technically construed and substantial compliance with its requirement shall be treated as sufficient. But in the ultimate analysis, in view of the decisions in *Charan Lal Sahu (I)* (supra) and *Aeltemesh Rein* (supra) the two-judge bench in *M. Karunanidhi* v. *H.V. Hande* MANU/SC/0210/1983 took note of the fact that "there is no provision to absolve the election Petitioner of payment of security for costs," see, *id.*, at paras 21-23.

231 See *id.*, at para 37, abstracting the discussion in preceding paras regarding the deposit and non-deposit of security along with the election petition.

232 *Id.*, at para 37.

233 *Ibid.* This exposition and meaning is also reinforced by the 2012 Rules, which convey that there has to be deposit in the treasury, ibid. 1

234 *Ibid.*

bound in law to reject the election petition.[235] In view of the aforesaid analysis, the bench has allowed the appeal and set aside the order passed by the high court affirming the order of the additional district judge as a result of which the election petition shall stand rejected.[236]

VI STATUTORY PERIOD FOR PREFERRING AN ELECTION PETITION: WHETHER IT COULD BE EXTENDEDBY THE HIGH COURT IN EXERCISE OF ITS POWER UNDER ARTICLE 226 OF THE CONSTITUTION?

Thisissue has come to the fore before the Supreme Court in *Reji Thomas* v. *The State of Kerala*[237] In this case, a writ was filed before the High Court of Kerala pertaining to the election to the cooperative society. *Inter alia*, the petitioners contended that exclusion of large number of members of the cooperative society from the voters list prepared under section 16A and 19A of the Cooperative Societies Act be declared "inoperative" and "that in view of the exemption order issued by the government by G.O. (P) No. 100/16 dated October 15, 2016 all members of the society are entitled to exercise their franchise in the election."[238]

On a reference from a single bench, the division bench of the high court, in view of the"startling developments," unfolding that the polling that was to take place as per the election calendar on the stipulated date[239]on the basis of the "final voters list" contained "only 28 members as against 611 members found in the preliminary voters list published."[240] The reason for such drastic depletion in the number of members eligible to vote, as disclosed in the statement filed by the electoral officer,was that as many as 583 members had not attended "three general body meetings of the society consecutively in order to be eligible for figuring as a voter."[241]

The exclusion of 583 members was done by the electoral officer on the basis of his reading of statutory provision contained in section 16A(1) (b) of the Kerala Co-

235 *Id.*, at paras 37 and 38. Contrary view taken by a single Judge in *Ashok Kumar* v. *Learned A.D.J. No. 2 Chittorgarh* 1 Civil Writ (CW) No. 7637 of 2016 decided on Aug. 8, 2016, cannot be treated to lay down the correct law. The three-Judge Bench have arrived at this conclusion as they have not found "that there is really any Rule which prescribes filing of treasury challan before the Election Tribunal in election petition after seeking permission at the time of presenting an election petition," *id.*, at para 38. However, permission, if any, may be sought earlier, as was done in *Bajrang Lal* v. *Kanhaiya Lal* RLW 2007 (2) Raj 1551, where the election petition was submitted on 31.8.2005 and an application was submitted before the court below on Aug. 31, 2005 under Section 53 of the Act of 1959 with the signature of the advocate and an order was passed by the court on the same application itself on Aug. 30, 2005 allowing the advocate to deposit the security amount under section 53 of the Act of 1959 for election petition. The election petition was submitted on Aug. 31, 2005. In such a fact situation, the high court found that there was compliance with the provision. See, *ibid*.

236 *Id.,* para 38.

237 *Id.*, para 39.

238 AIR 2018 SC 2236: (2018)16 SCC 778: 2018 (7) SCJ 154, per Kurian Joseph, J. (for himself and Mohan M. Shantanagoudar and Navin Sinha, JJ.). Hereinafter, *Reji Thomas.*

239 *Reji Thomas,* at para 3(iii).

240 The election calendar was published pursuant to the judgment in W.A. No. 1869/2016 as per which the polling has to take place on Nov. 5, 2016. See, *id.*, para 4(1).

241 *Ibid.*

operative Societies Act.[242] Such a reading, opined the division bench of the high Court 'without any hesitation', was simply a 'misconstruction' of the said statutory provisions, inasmuch as on bare reading of those provisions reveals that only those members alone are ineligible to continue as a member of the co-operative bank of the society "who have not attended at least *any one of the three [and not all the three] consecutive general body meetings*." [243] Thus, the "exclusion of 583 members from the preliminary voters list in the final voters list on the basis of the misinterpretation of the statutory provision is prima facie illegal."[244]

Besides, no "election can be conducted even if all the 28 members are present in the General Meeting when the number falls short of 50 as the quorum specified in the bye-laws."[245] In view of this, convening the general meeting to conduct an election in compliance with the judgment in W.A. No. 1869/2016, "would be reduced into a mockery in the circumstances."[246]

Before the division bench in the writ petitions there were several issues to be considered, including the one whether all the 611 members found in the preliminary voters list are eligible to vote. Since all such issues wereopen to question in an election dispute pending before the high court, the division bench, without going into the merit of any one of such issues, in their interim order of November 1, 2016 observed:[247]

> Interest of justice would be met by directing the election to go on as scheduled permitting all the 611 members aforesaid to cast their vote in the election to the managing committee. The same would however be provisional and subject to these writ petitions and also the invocation of Section 69 of the Kerala Co-operative Societies Act.

242 *Ibid.* This number of 28 members was worked out as follows: Out of more than 70,000 members of the society in the 57th General Body Meeting, only 94 members attended the meeting. In 58th General Body Meeting, 121 members attended the meeting. It is recorded that in the 59th General Body Meeting, 749 members attended the meeting. A perusal of the attendance in three consecutive General Body Meetings would show that only 33 members have attended all the three consecutive General Body Meetings and out of the said 33 members, only 28 members availed the service of the Bank for the two consecutive years.

243 S. 16A of the Kerala Co-operative Societies Act that ensures "participation of members in the management of societies", provides: "(1) no member shall be eligible to continue to be a member of a co-operative society if he, (a) is not using the services of the society for two consecutive years or using the services below the minimum level as may be prescribed in the Rules or the bye-laws; (b) has not attended three consecutive general meetings of the society and such absence has not been condoned by the members in the general meeting."

244 See, *id.,* para 2.

245 *Ibid*.

246 *Id.*, at para 3. An Annual General Body Meeting is required to be convened for the purpose of election in the prescribed manner as per S. 29(1) (b) of the Kerala Co-operative Societies Act. But the quorum for a General Meeting in order to transact business therein is 50 as per Clause 22 of the bye-laws of the Co-operative Bank in question. The number of 28, thus, falls short of the minimum required number of 50 members, see, *ibid*.

247 *Ibid*.

This order of the division bench was challenged before the Supreme Court.[248] The appeals were disposed of by a common judgment dated December 5, 2016.[249] In their judgment, the Supreme Court "took note of the fact that the writ petitions were pending before the High Court and [therefore] it was only appropriate that the writ petitions be disposed of on merits."[250] It was specifically made clear that "all contentions raised by the writ Petitioners are left open before the High Court."[251] It was also noted in the judgment that elections have been conducted on November 5, 2016 and 13 members have been elected to the managing committee and, therefore, the Supreme Court "permitted the said Committee to continue in office subject to final orders passed in the writ petitions."[252] It was also made clear "that the Committee shall not take any policy decisions."[253]

Pursuant to the directions of the Supreme Court in their judgment of December 5, 2016, the division bench of the high court heard the writ petitions. Since the division bench was of the view "that the disputes raised in the writ petitions were fit to be tried as an election dispute under section 69 of the Act and hence," it "declined to consider the contentions on merits,"[254] and made the order to the following effect:[255]

> …[S]ince the writ Petitioners had approached the High Court prior to the election and since by way of an interim order, the election was permitted to be conducted as scheduled making it subject to the result of the writ petitions and also Section 69 of the Act, it is only appropriate that while relegating the parties to the Arbitration Court trying the election dispute, a further period of thirty days be granted.

It is this order of the division bench of the high court, granting an extension of a "further period of 30 days," which has become the subject of appeal by way of special leave before the Supreme Court. Since this order militates against the provisions of section 69(3) of the Act,[256] the legal issue that needs to be resolved in the first instance is: "Whether, in view of the statutory period prescribed Under Section 69(3), the High Court could have extended the period, is the question."[257]

The Supreme Court has analyzed the provisions of section 69 of the Kerala Co-operative Societies Act with the constitutional perspective as laid down under Article 243ZK of the Constitution, which provides for election of members to the managing

248 *Id.*, at para 4.

249 See, *id*., at para 5.

250 See paras 5 and 6 of the Supreme Court judgment dated December 5, 2016.

251 *Reji Thomas,* at para 5.

252 *Ibid*.

253 *Ibid*.

254 *Ibid*.

255 *Id*., at para 6, citing the operative para 11 of the impugned judgment the division bench judgment, dated Mar. 2, 2017.

256 *Id.*, para 8.

257 S. 69(3) of the Act specifically provides: "No dispute arising in connection with the election of the Board of Management or an officer of the society shall be entertained by the Cooperative Arbitration Court unless it is referred to it within one month from the date of the election."

committee of a cooperative society.[258] Under clause (2) of Article 243ZK of the Constitution, it is clearly mandated that the "conduct of all elections to a co-operative society shall vest in such an authority or body, as may be provided by the Legislature of a State, by law." Since section 69 of the Kerala Co-operative Societies Act is in response to the constitutional mandate, the Supreme Court has resolved the legal knot by observing:[259]

Section 69 of the Act is the mechanism provided by the State Legislature as contemplated under article 243ZK(2) of the Constitution of India. Once the mechanism provided under the Statute provides for a time Schedule for preferring an election petition, in the absence of a provision in the statute for enlarging the time under any given circumstances, no court, whether the high court under article 226 or this court under article 32, 136 or 142 of the Constitution can extend the period in election matters.

The Supreme Court has strengthened this constitutional mandate both in letter and spirit by observing: "In the matter of limitation in election cases, the Court has to adopt strict interpretation of the provisions."[260] "In the absence of any provision made in the Act for condoning the delay in filing the election petition, the chief judge had no power to condone the delay in filing the election petition beyond the period of limitation prescribed in law."[261] "The power conferred by articles 226/227 is designed to effectuate the law, to enforce the Rule of Law and to ensure that the several authorities and organs of the State act in accordance with law."[262] "It cannot be invoked for directing the authorities to act contrary to law."[263] "Nor can there be any question of the high court clothing the authorities with its power under article 226 or the power of a civil court."[264] "No such delegation or conferment can ever be conceived."[265]

Interestingly, the extension granted by the high court its order of March 2, 2017 runs contrary to its own interim order passed in the first instance on November 1,

258 *Reji Thomas,* at para 9.

259 Art. 243ZK of the Constitution provides: "(1) Notwithstanding anything contained in any law made by the Legislature of a State, the election of a board shall be conducted before the expiry of the term of the board so as to ensure that the newly elected members of the board assume office immediately on the expiry of the office of members of the outgoing board. (2) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to a co-operative society shall vest in such an authority or body, as may be provided by the Legislature of a State, by law: Provided that the Legislature of a State may by law, provide for the procedure and guidelines for the conduct of such elections."

260 *Reji Thomas,* at para 11.

261 *Ibid.*

262 *Smita Subhash Sawant* v. *Jagdeeshwari Jagdish Amin* (2015) 12 SCC 169, at para 33 cited in *Reji Thomas*, at para 11.

263 *Union of India* v. *Kirloskar Pneumatic Co. Ltd*., (1996) 4 SCC 453, at para 10, the Supreme Court in relation to the Customs authorities, who are the creature of the Customs Act, observed that such authorities "cannot be directed to ignore or act contrary to S. 27, whether before or after amendment," as they are bound by the said provisions even if "the High Court or a civil court is not bound" by those provisions. Cited in *Reji Thomas*, at para 12.

264 *Ibid.*

265 *Ibid.*

2016 wherein it had"specifically noted that the same was subject to the writ petitions and also Section 69 of the Act."[266]

In view of the foregoing analysis, the Supreme Court has held that "the matters need to be considered afresh by the high court since the court could not have relegated the parties to the alternative remedy under the statute by enlarging the time for preferring the election dispute."[267] Accordingly, by setting aside the impugned judgment of the high court, the writ petitions have been remitted to the high court "for fresh consideration" and expeditious disposal,[268] without disturbing in the meanwhile the interim arrangement spelled out by the Supreme Court in their judgment of December 5, 2016 till the disposal of the appeals.[269]

VII CONCLUSION

In the light of the foregoing analysis of the five propositions as emerged from the decisions of the Supreme Court, the following conclusions may be abstracted in respect of each one of thosepropositions.

Re first proposition, dealing with the dismissal of election petition *in limine* on grounds of non-disclosure of cause of action, which is one of the pivotal grounds of dismissal, emanating from the Supreme Court judgment in *Madiraju Venkata Ramana Raju*.[270] The Supreme Court analysis the judgement in the in the light of the "well settled" judicial precedents admirably shows how the court trying an election petition not to 'muddle the analysis of the pleadings,' and how it should not "misdirect" itself in concluding that "the election petition did not disclose any cause of action."[271]

Re second proposition, relating to de-criminalization of politics, arising out the Constitution Bench decision in *Public Interest Foundation* [272] In this case, the Supreme Court Bench has critically examined the recommendations made by the 20th Law Commission in their 244th Report, titled, *Electoral Disqualifications* (2014).[273] The proposed recommendations are fairly functional and pragmatic in nature, and could be legitimately taken care of by the competent legislature within the existing constitutional framework.[274] Nevertheless, those recommendations never saw the light of the day in the form of a law enacted by a competent legislature.[275] In this backdrop of "indifference" shown to the Law Commission's report by the Union Government for years in succession, at the behest of the petitioners and intervenors the Constitution Bench closely examined if something tangible could be done towards de-criminalizing politics by issuing "certain directions" to the Election Commission beyond what is

266 *Ibid*.

267 See, *id.*, para 13.

268 *Id.*, at para 14.

269 *Ibid.*

270 The 13-member managing committee elected in pursuance of elections held November 5, 2016 shall continue in office subject to final orders passed in the writ petitions for managing day-to-day affairs without of course taking any "policy decisions." See, *id.*, para 15.

271 See, *supra* note 7, and the analysis of this case, as presented in Part II, *supra*.

272 *Ibid.*

273 See, *supra* note 84, and the analysis of this case, as presented in Part III, *supra*.

274 See *supra* note 88 and the accompanying text.

already provided under the Constitution and the law made by the Parliament.[276] Specifically, it has been explored, whether the Supreme Court can direct the Election Commission to (a) deregister a political party, (b) refuse renewal of a political party or (c) to not register a political party if they associate themselves with persons who are merely charged with offences? On all these counts, the response of the Constitution Bench is that through judicial interpretation it is not constitutionally permissible.[277] It is this exercise, which has eventually prompted the Court once again to turn to the Parliament and recommend to it 'to bring out a strong law' addressing to the issue of decriminalization of politics by making it mandatory for the political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences.[278]

However, the contribution that the bench has made in the instant case is to build uponthe 'break through' made earlier by the Supreme Court in two three-Judge Bench decisions in Association for Democratic Reforms (2002) and People's Union for Civil Liberties (2003). This breakthrough was attained by holding that the fundamental right to freedom of speech and expression "includes right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy."[279]

Reflecting on the linkage between the constitutional obligation of the election candidate to reveal his criminal past to the voters, and the fundamental right of the voters to know fully the criminal antecedents of the election candidates, the Constitution bench in the present case has deciphered a serious lacuna that prevented the full fructification of the value of this linkage. Such a lacuna is discovered by observing that in "the present scenario, the information given by the candidates is not widely known in the constituency and the multitude of voters really do not come to know about the antecedents," and thereby "[t]heir right to have information suffers."[280] Realization of this lacuna has led the Constitution Bench to issue "appropriate" "directions", which include the obligation of the candidate to fill in in the prescribed form information "in bold letters' with regard to the criminal cases pending against the candidate, inform the political party about the criminal cases pending against him/her, if he or she is contesting an election on the ticket of that party; the concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents; and the candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers.[281]

275 See *supra* note 113 and the accompanying text.
276 See *supra* note 116 and the accompanying text.
277 See *supra* notes 117-123 and the accompanying text.
278 See *supra* note 143-144 and the accompanying text.
279 See *supra* note 145 and the accompanying text.
280 See *supra* notes 156-157 read with note 164 and the accompanying text.
281 See *supra* note 167 and the accompanying text.

The singular objective of all such directions as laid down by this court from time to time is "to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation.[282]

Re third proposition, relating to the introduction of 'None of the Above (NOTA) Option' into the voting process of Council of States (Rajya Sabha) arising out of the Supreme Court judgment in *Shailesh Manubhai Parmar*.[283] The analysis on this count reveals that the decision of the Election Commission, introducing NOTA into the election of the members to the Council of States, is counter-productive, inasmuch as it destroys 'the concept of value of a vote and representation' and encourages defection, opening the doors for rampant corruption, 'which is a malignant disorder.'[284] The option of NOTA, as pithily put in by the three-judge bench, 'may serve as an elixir in direct elections but in respect of the election to the council of states, which is a different one,' it would undermine the 'purity of democracy', especially if we bear in mind the singular objective of introducing the tenth schedule into the Constitution.[285]

Re the fourth proposition, resulting from the case of *Sitaram*, in which the three-judge bench has examined the nature of the provision which specifically provides that an election petition "shall be accompanied by a treasury challan" of stipulated amount of money.[286] In their exposition, reversing the judgment of the trial court, they have found that the nature of such a provision is 'mandatory', because the term 'accompany' means "to co-exist or go along," implying thereby that "the election petition has to be accompanied by the treasury challan," without any "separation or segregation."[287] Logically, therefore, once the election petition is presented without the treasury challan, the election Judge under the law has no option but to dismiss the petition without looking for anything more.[288]

*Re fifth proposition*arising from the decision of the Supreme Court in *Reji Thomas* relates to the extension of statutory period by the high court in the exercise of its power under article 226 for preferring an election petition.[289] The three-judge bench of the Supreme Court has reversed the decision of the division bench of the high court extending the statutory period in the 'interest of justice.' In this respect, they have derived support from the constitutional mandate given under article 243ZK of the Constitution, which provides for a time schedule for preferring an election petition, as stipulated under law enacted by the competent legislative body, no court could

282 See supra note 168 and the accompanying text.

283 See supra notes 169-170 and the accompanying text.

284 See, supra note 177, read with note 176, and the analysis of the noted case, as presented in Part IV, *supra.*

285 *Ibid.*

286 *Ibid.*

287 See, supra note 220, and the analysis of the noted case, as presented in Part V, *supra.*

288 *Ibid.*

289 *Ibid.*

extend the given time schedule. The Supreme Court has clinched the issue by observing that "in the absence of a provision in the Statute for enlarging the time under any given circumstances, no court, whether the High Court Under Article 226 or this Court Under Article 32, 136 or 142 of the Constitution can extend the period in election matters."[290]

290 See, note 237, and the analysis of the noted case, as presented in Part VI, supra.

291 See, supra, notes 259-265, and the accompanying text.