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ELECTION LAW

*Virendra Kumar**

I INTRODUCTION

IN THE realm of Election Law, there are only few cases reported in All India Reporter (AIR) during the calendar year 2013 that have reached the Supreme Court. Nevertheless, the sweep of those cases is extremely wide and significant. The Supreme Court has raised and responded to very many critical issues that have come to the fore specifically or otherwise by way of writ petitions, special leave to appeal, interlocutory applications/petitions.

The principal issue how and under what circumstances inspection of the 'record of register of voters' (Form 17-A) is allowed or permissible is dealt with by the Supreme Court in *Markio Tado* v. *Takam Sorang*.[1] While doing so, incidentally or collaterally the court has clarified on, how the principle of judicial propriety is inherent under article 141 of the Constitution; how the offences of booth capturing and impersonation or double voting are distinctly different; why should inspection of 'record of register of voters' be allowed only grudgingly or sparingly; what is the basic premise of discouraging 'fishing and roving inquiry'; how the election judge should stay put within its own jurisdiction; how not to construe the settled judicial precedents; why and under what circumstances an election petition deserves to be dismissed at threshold; and how the precious time of the court could be saved by adhering to judicial discipline.[2]

The Supreme Court in *Lily Thomas* v. *Union of India* [3] has examined the critical question of constitutionality of section 8(4) of the Act of 1951.[4] In their decision-making the Supreme Court has raised and responded quite a few basic

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* LL.M., S.J.D. (Toronto, Canada), Advisor (Honorary), J & K State Judicial Academy. Formerly: Founding Director (Academics), Chandigarh Judicial Academy; Professor & Chairman, Department of Laws; Dean, Faculty of Law; Fellow, Panjab University; and UGC Emeritus Fellow.

1 AIR 2013 SC 3202. (Hereinafter as *Markio Tado*). See Part II, "Inspection of 'record of register of voters' (form 17-A): why permitted only sparingly?" *infra*.

2 *Ibid*.

3 AIR 2013 SC 2662. (Hereinafter *Lily Thomas*).

4 See Part III, "Deferment of disqualification on conviction under section 8(4) of the Representation of the People Act, 1951: Whether it is constitutionally valid,"*infra*.

issues, such as how the question of constitutionality is required to be addressed; what are the fundamental principles of interpretation of a written Constitution, and how those principles should prompt the court to construe the Constitutional provisions by looking to the terms of those provisions by which, affirmatively, the legislative powers are created, and by which, negatively, they are restricted; and why should the court make the impact of the declared voided law prospective and not retrospective.[5] However, after dealing with the main writ petitions in this case, the Supreme Court has also decided two appeals by way of special leave under article 136 of the Constitution by affirming the order of the high court, seemingly acting on the principle propounded by it in the disposal of main writ petition.[6]

Order VI, rule 16 of Code of Civil Procedure, 1908 (CPC) empowers the court at any stage of the proceedings to pass order to strike out or amend any matter in any pleading, which may be unnecessary, scandalous, frivolous or vexatious, or which may tend to prejudice, embarrass or delay the fair trial of the suit, or which is otherwise an abuse of the process of the Court. The wide ambit of this Rule has been examined by the Supreme Court in *Neena Vikram Verma* v. *Balmukund Singh Gautam*,[7] especially in the context of restoration of recrimination petition by consent in the realm of election law. [8] In the course of examining this issue, the court also dealt with such basic principles of litigation as, whether a court is expected to permit any matter which might and ought to have been made ground of defence or attack, once the same is relinquished by the party concerned; how the court should draw 'an adverse inference' when the respondent chose not to reply to the notice served on him by the appellant 'to admit facts'; whether a defect in the verification in the matter of election petition, which is curable and can be removed in accordance with the principles of CPC, is fatal to the election petition.

Whether non-compliance with the requisite of filing two affidavits - one in support of the allegations of corrupt practices and the other in support of the pleadings - as envisaged under the provisions of section 83 of the Act of 1951 warrants dismissal or rejection of the election petition under section 86 of the said Act has been examined afresh by a three-judge bench of the Supreme Court in *G.M. Siddheshwar* v. *Prasanna Kuma* .[9] (In order to resolve this issue, the court has adverted to basic questions that include: whether an affidavit in support of the pleadings under section 83(1)(c) of the Act is 'a part' of the verification of the

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5 *Ibid.*

6 *Ibid.*

7 (2013)5 SCC 673 (Hereinafter *Neena Vikram Verma*).

8 See Part IV: "Scope and application of Order VI, Rule 16 of Code of Civil Procedure *vis-a-vis* restoration of recrimination petition by consent in the realm of election law," *infra.* See Part V: "Affidavit in terms of Order VI, Rule 15(4) of the Code of Civil Procedure *in addition* to affidavit as required by the proviso to section 83(1) of the Representation of People Act, 1951: Whether mandatory,"*infra.*

9 AIR 2013 SC 1549.

pleadings; whether filing a 'composite affidavit', that is a single affidavit both in support of the averments made in the election petition and with regard to the allegations of corrupt practices by the returned candidate, may serve the need of two separate affidavits under section 83(1)(c) of the Act; whether 'substantial compliance' instead of 'absolute compliance' with the Form 25 under Rule 94-A of the Conduct of Elections Rules, 1961 should suffice to meet the requirement of the proviso to section 83(1) of the Act of 1951.[10] Besides, while overruling the recent two-judge bench decision of the Supreme Court in *P.A. Mohammed Riyas* v. *M.K. Raghvann*,[11] the three-judge bench has expressly pointed out how, where and in what respect they (the two-bench) had gone astray in their decision-making process, and how did they "unfortunately" discard the submissions made by the election petitioner without discussion and without adducing any cogent reasons.[12]

II INSPECTION OF 'RECORD OF REGISTER OF VOTERS' (Form 17-A): WHY PERMITTED ONLY SPARINGLY?[13]

Although in the realm of election law the principle and practice relating to the inspection of 'record of register of voters,' which is kept in the format of Form 17-A, is well-settled, nevertheless an election Judge, while trying an election petition, ventured to unsettle this established course of electoral process. The Supreme Court sternly disapproved that deviation, which was in clear disregard of judicial precedents, in *Markio Tado.*[14] Such an act, says the Supreme Court, "amounts to nothing but judicial indiscipline and disregard of the mandate of Article 141 of the Constitution of India."[15] "This is shocking, to say the least, and most unbecoming of a judge holding a high position such as that of a High Court Judge."[16] Lest such acts of "judicial impropriety" are repeated in spite of clear judicial precedents of binding in nature, it would be in order to analyse the counts to show where the election judge has gone astray, and how and in what manner the Supreme Court has corrected that course.

The fact matrix of *Markio Tado* that constitutes the basis of decision is as under. In a state assembly election, the appellant was declared elected by defeating the respondent, the nearest rival, by a margin of 2713 votes. The respondent challenged the election of the appellant on the ground of corrupt practice of booth

10 *Ibid.*

11 AIR 2012 SC 2784. (Hereinafter simply, *Mohammed Riyas*).

12 *Ibid*.

13 See also, Virendra Kumar, "Election papers including the record of register of voters' counterfoils (in form 17-A): when can an order for their production and inspection be made?" in XLVIII *ASIL* 432-435 (2012);Virendra Kumar, "Secrecy of voting and purity of election," in XLV*ASIL* 366-369 (2009); Virendra Kumar, "Election papers cannot be opened as a matter of course under Rule 93(1)," in XLV*ASIL* 369-372 (2009) and Virendra Kumar, "Recount of ballot papers," in XXXVII *ASIL* 271-274 (2001).

14 *Supra* note 1.

15 *Id*. at 3209.

16 *Ibid*.

capturing. His central argument was if the votes received by the appellant in the captured booths were disregarded, he would be declared as elected having secured the highest number of votes. The petition was contested by the appellant. On the basis of submissions made by the two opposite parties, the election Judge formulated certain issues, including particularly the ones relating to two identified polling stations where the offence of booth capturing was committed.[17]

However, before the evidence could start, the respondent filed an interlocutory application alleging the instances of double voting on the basis of double enrolment. In support his contention, he prayed again that the record of register of voters as reflected in Form 17-A of certain polling stations located in certain districts of the assembly constituency be called for inspection. This application was opposed by the appellant. In view of appellant's submission that there was no allegation of double enrolment, and no issue had been framed in that respect in the election petition, the election judge rejected the application by observing that he was of the "considered view" that calling of records as sought by the petitioner was "not justified at that stage."[18]

Thereafter, the evidence began to be recorded. When nothing substantial was emerging to substantiate his allegation of booth capturing as pleaded by the him initially in his election petition, the respondent moved another application with the avowed objective of bringing the allegation of 'double voting' consequent to 'double enrolment' within the ambit of 'booth capturing.'[19] This time the election judge yielded in favour of the respondent by observing:[20]

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

Noting the judicial precedents that held that the record of register of voters in Form 17-A[21] should be called "sparingly and only when sufficient material is placed before the Court,"[22] and that inspection of that record "would be permissible where clear case is made out,"[23] the election judge nevertheless passed the order calling

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17 See, *id*. at 3203 (para 6).

18 *Id*. at 3204 (para 8).

19 See, *id.* at 3205-3206 (para 14).

20 *Ibid*.

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

22 *Hari Ram* v. *Singh*, AIR 1984 SC 396.

23 *Fulena Singh* v. *Vijay Kr. Sinha*, 2009 (5) SCC 290.

for the record of register of voters from certain polling stations from the given assembly constituency. This was done because in his wisdom "the official record would be the most reliable evidence to decide as to whether there was impersonation."[24] This order was challenged by the appellant in the Supreme Court, the court allowed the civil appeal and reversed the order of the election judge dated 14.9.10[25] by clearly holding that "there was no material whatsoever [on record] to justify the production of the register of counterfoils of votes in Form 17-A." The rationale of the apex court to reach this conclusion may be abstracted as follows: [26]

(a) Since the respondent failed to adduce any material with respect to either booth capturing or impersonation, he resorted to 'fishing and roving inquiry' to improve his case by calling for the record of voters register from certain polling booths in support of his grievance of double voting, which is simply impermissible.[27]

(b) Reliance of the election Judge upon the Supreme Court's decision in *Fulena Singh* to justify his direction to produce the record of register of voters' counterfoils in Form 17-A of certain polling stations was 'legally incorrect' inasmuch as that decision read with the judgment of the Constitution Bench of the Supreme Court in *Ram Sevak Yadav v. Hussain Kamil Kidwai*[28] clearly held that "an order for inspection cannot be granted as a matter of course having regard to the secrecy of the ballot papers."[29]

(c) For ordering inspection, one of the most critical conditions that is required to be fulfilled is "that the petition for setting aside an election contains an adequate statement of material facts on which the petitioner relies in support of his case."[30] Such a condition is conspicuous by its absence in the instant case.[31]

(d) The petitioner-respondent tried to claim impersonation and double voting as facets of booth capturing. This pleas was also

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24 See *Markio Tado*, at 3206 (para 15).

25 See *supra* note 1.

26 *Markio Tado*, at 3207 (para 18).

27 See, *id*. at 3206 (para 17).

28 AIR 1964 SC 1249.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

> rejected by the Supreme Court by holding that "impersonation and double voting would amount to deception and it will be a facet of improper reception of votes and not booth capturing."[32] Moreover, observed the Supreme Court, "[b]ooth capturing involves use of force and that was not established," and that the "petition was not filed on the ground of improper reception of votes."[33]

(e) Although the election petition did not raise the issue of improper reception of votes, nevertheless the apex court countered the reasoning of the election Judge by showing that his stand was untenable in the face of the factual matrix that could not show that the result of the election was materially affected.

Thus, despite the clear and categorical negation of the intervening judgment and order of the election judge both in view of the relevant Rule 93 of the Conduct of Elections Rules, 1961 and the judgments of the apex court governing the field,[34] he (the election judge), while proceeding further with the main election petition, still passed an order calling for the record,[35] because in his view:[36]

> (i)t is considered expedient to send the registers of voters (Form 17-A) … to the Director of Regional Forensic Science Laboratory (FSL), Police Training Centre, … to conduct scientific examination and verification of signatures/finger prints appearing in From 17-A and to ascertain as to whether the thumb impression and signatures contained and recorded in Form 17-A (voters register) were put single-handedly and fraudulently by few persons as a measure of impersonation of the genuine concerned…

On the basis of the report so received, the election Judge examined the court witnesses, defence witnesses, heard arguments of counsels of both the parties, and eventually allowed the election petition by holding the election of the appellant void, and, thereby declaring the respondent as elected by virtue of his securing more votes than the appellant.[37]

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32 *Markio Tado*, at 3208 (para 23).

33 *Ibid.*

34 See, *supra* notes 24 and 25, and the accompanying text.

35 This order, which was passed the election judge on March 19, 2012, was challenged by the appellant by SLP 12707 of 2012, by pointing out that such an order could not be made in the teeth of the judgment and order rendered by the apex court in civil appeal no. 1539 of 2012. However, the appellant preferred to withdraw the said SLP subsequently, with a liberty to agitate the question raised therein, if required, when the main election petition was decided. See, *Markio Tado*, at 3208 (para 21).

36 *Markio Tado*, at 3207-08 (para 21).

37 *Id*. at 3208 (para 22).

In appeal, this decision has been reversed by the Supreme Court. However, the perusal of the decision-making process of the apex court reveals that it is not the case of reversal *simpliciter* on grounds error of judgment in law or on facts, or both. It is a glaring instance of 'judicial impropriety', because the election Judge has transgressed the limits of his jurisdiction laid down by the Constitution under article 141 that ordains: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

In the instant case, while adjudication of the election petition was in progress, the issue arose whether the election judge could order inspection of Form 17-A in the light of facts and circumstances of the case. On this count, when the matter was put to the Supreme Court in the intermediate civil appeal, the court clearly ruled "that in the facts of the present case, no case was made out for calling of the counterfoils."[38] In spite of this clear ruling of the Supreme Court, the election judge of the high court went into the exercise of calling for the handwriting and finger experts, and comparing the voters' signatures and finger prints with the help of the records in Form 17-A, when that was clearly to be impermissible in the present case itself."[39]

Worse still, the 'transgression of the limits of jurisdiction' took place, not because of ignorance of the law but, with the full awareness of the judgment earlier rendered by the Supreme Court in the fact situation of this very case. Lamentingly, on this count the Supreme Court states:[40]

> … (I)t is not that he [the election Judge] was unaware of the judgment rendered by this court. He referred to this judgment in Para 9(i) by stating that CA No. 1539 of 2010 was preferred against his judgment and order dated 14.9.2010. Thereafter, he specifically noted 'the said Civil Appeal was allowed vide judgment and order dt. 2.2.2012 dismissing the aforesaid M.C. (EP) No. 5 (AP) of 2010 under Section 83(1) of R.P. Act as reported in (2012) 3 SCC 236: AIR 2012 SC 993.' *Thereafter, however, he proceeded to act exactly contrary to the direction emanating from the dismissal of M.C. (EP) No. 5 (AP) of 2010, which amounts to nothing but judicial indiscipline and disregard to the mandate of Article 141 of the Constitution of India*. (emphasis added).
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> Such a stance of the election Judge, says the Supreme Court, as quoted earlier, "is shocking, to say the least, and most unbecoming of a judge holding high position such as that of a High Court Judge." Without precipitating the matter further in this respect, the apex court pensively observes: "'we fail to see

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38 *Id*. at 3209 (para 26).

39 *Id*. at 3208 (para 24).

40 *Id*. at 3209 (para 26).

> as to what made the judge act in such a manner, though we refrain from going into such aspect.

However, for avoiding the happening of such acts of 'judicial impropriety' in future in spite of the clear judgments of the Supreme Court on the significance of article 141 of the Constitution, a few leading principles may be crystalized from the judgment in *Markio Tado:* [41]

> Subordinate courts, including the High Courts, shall not ignore "the settled decisions and then pass a judicial order which is clearly contrary to the settled legal position. Such "judicial adventurism" cannot be permitted "in passing whimsical orders which necessarily has the effect of passing wrongful and unwarranted relief to one of the parties.

If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to the judgment. One cannot in the same proceedings or in collateral proceedings between the same parties, re-write the overruled judgment. [42]

The patent advantages of following the judicially well-settled principles are manifold. One, summary dismissal of an election petition at the threshold that does not disclose clearly the cause of action instantly avoids a litigation "which is meaningless and bound to prove abortive."[43] Two, it saves the precious time of the court.[44] Three, it avoids the sad spectacle of keeping the 'sword of Damocles' keep hanging over the head of respondent "unnecessarily without point or purpose."[45]

III DEFERMENT OF DISQUALIFICATION ON CONVICTION UNDER SECTION 8(4) OF THE REPRESENTATION OF THE PEOPLE ACT, 1951: WHETHER IT IS CONSTITUTIONALLY VALID

Section 8 of the Representation of the People Act, 1951[46]deals with the disqualification of a person for being chosen as, and for being, a member of either

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41 *Id*. at 3209 (para 27), citing the judgment by a bench of three judges of the Supreme Court in *Dwarikesh Sugar Industries Ltd.* v. *Prem Heavy Engineering Works (P) Ltd.* (1997) 6 SCC 450.

42 *Id*. at 3210 (para 27), citing *State of West Bengal* v. *Shivanand Pathak* (1998) 5 SCC 513.

43 *Id*. at 3208-09 (para 24), citing *Azar Husssain* v. *Rajiv Gandhi*, AIR 1986 SC 1253 (para 12).

44 *Ibid.* In the instant case, for instance, a lot of time of the court was wasted in recording evidence on a number of dates and so many witnesses, including public officers, were called when their evidence was not required, see *Markio Tado,* at 3208 (para 24).

45 *Ibid.*

46 Hereinafter simply the Act of 1951.

House of Parliament or of the legislative assembly or legislative council of a state. Its sub-sections (1), (2), and (3) provide for disqualification somewhat differentially depending upon the nature of the offence resulting in imposition of fine, or imprisonment, or duration of imprisonment.

Under sub-section (1), if a person is convicted of an offence punishable under various statutory provisions as specifically provided in its clauses (a) to (n),[47] where the convicted person is sentenced to: (i) *only fine*, he shall be disqualified for a period of six years from the date of such conviction; (ii) *imprisonment*, then from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. Sub-section (2) provides if the person is convicted for the contravention of certain provisions indicated in its clauses (a) to (c),[48] and sentenced to imprisonment for *not less than six months*, then he shall be disqualified "from the date of such conviction and shall continue to be disqualified for a further period of six years since his release." Under sub-section (3), a person convicted of any offence and sentenced to imprisonment for *not less than two years* [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

Sub-section (4) of section 8, however, provides for deferment of disqualification on conviction in case of sitting members of the legislature by using a non-obstante clause:[49]

> Notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3), a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of conviction or the sentence, until that appeal or application is disposed of by the court.

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47 Cl. (a) to (n) of s. 8(1) of the Act of 1951 provide conviction for offences under various statutes, including IPC, 1860 (45 of 1860), Protection of Civil Rights Act, 1955 (22 of 1955), Unlawful Activities (Prevention) Act, 1967 (37 od 1967), Narcotic Drugs and Psychotropic Substances Act,1987 (28 of 1987), Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988), Prevention of Insults to National Honour Act, 1971 (69 of 1971), Prevention of Terrorism, (15 of 2002), Prevention of Corruption Act 1988 (49 of 1988), Commission of Sati (Prevention) Act, 1987 (3 of 1988).

48 S. 8(2) of the Act of 1951 provide conviction for contravention of any law providing for the prevention of hoarding or profiteering; or any law relating to the adulteration of food or drugs; or any provision of Dowry Prohibition Act, 1961 (28 of 1961), and sentenced to imprisonment for not less than six months.

49 *Ibid.*

This deferment-disqualification-provision was questioned on ground of its constitutional validity in a couple of writ petitions filed in public interest before the Supreme Court under article 32 of the Constitution. Collectively those writ petitions along with pending civil appeal have been considered by the apex court in *Lily Thomas*[50] The critical question to be considered before the court in this case is whether the Parliament is constitutionally competent to enact the provision of section 8(4) that puts the sitting members of Parliament and state legislatures on different footing so as to allow them the privilege of continuing as members for some more period, albeit conditional, even though they are convicted of the offences stipulated in sub-sections (1), (2) and (3) of section 8 of the Act of 1951.

The issue whether or not the Parliament lacked the legislative power to enact sub-section (4) of section 8 of the Act of 1951 has not been hitherto decided authoritatively by the apex court.[51] Accordingly, the Supreme Court, in order to examine the issue of legislative competency *vis-à-vis* the said section 8(4), has, in the first instance, located the constitutional provisions in the form of articles 102 and 191 that specifically deal with disqualification of membership of the legislature.

The provisions of article 191 are *in pari materia* with article 102, except with the difference that article 102 deals with the disqualification of membership of Parliament, whereas article 191 deals with the disqualification of membership of the legislative assembly or legislative council of a state.

A bare perusal of sub-section (1) [with all its five clauses (a) to (e)] and sub-section (2) of article 102 and similar corresponding provisions also those of article 191 of the Constitution reveals that there is only one clause (e) of article 102(1) article 191(1), which is somewhat open-ended[52] and enables the Parliament to prescribe disqualification by enacting an appropriate 'law' under which a person shall be disqualified "for being chosen as, and for being, a member of" either House of Parliament, or legislative assembly or legislative council of a state. The issue, therefore, before the Supreme Court is how to interpret this open-ended clause (e) of article 102 or article 191 in order to determine the constitutional legitimacy of section 8(4) of the Act of 1951?

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50 *Supra* note 3. This was decided along with *Lok Prahari, through its General Secretary S.N. Shukla* v. *Union of India; Basant Kumar Chaudhary* v. *Union of India*, and *Chief Election Commissioner* v. *Jan Chaukidar (Peoples Watch)*.

51 On behalf of the respondent, Union of India, it was vehemently argued that the Constitution bench of the Supreme Court in *K. Prabhakaran* v. *P. Jayarajan,* AIR 2005 SC 688 has impliedly upheld the constitutionality of s. 8(4) of the Act of 1951, because its avowed objective is "not to confer an advantage on sitting members of Parliament or of a State Legislature but to protect the House." See, *Lily Thomas*, at 2670 (paras 10, 12). The Supreme Court counteracts this argument by observing that whatever may be the exposition of s. 8(4), the issue of its constitutionality "was not at all considered by the Constitution Bench." *Id.* at 2761 (para 14).

52 All other provisions in art. 102 and 191 of the Constitution are 'closed', inasmuch as they do not leave any option for the Parliament to prescribe disqualifications as specifically indicated in those provisions.

Since this issue, which was *res nova*,[53] the Supreme Court turned to the "fundamental principles of a written Constitution laying down the powers of the Indian Legislatures"[54] as spelled out by the Privy Council more than 130 years ago in *The Empress* v. *Burah*.[55] The Privy Council, speaking through Selborne J *inter alia*, observed:[56]

> …. (T)he established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited…, it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

This fundamental principle of interpreting the written constitution has been reaffirmed by the majority court in *Kesavananda Bharti* v. *State of Kerala*.[57]

Acting on this basic principle of constitutional interpretation, the Supreme Court has held that since the specific power to make law laying down disqualification both for membership of Parliament and legislative assembly or legislative council of a state "can be located only in Articles 102(1)(e) and 192(1)(e), of the Constitution,"[58] these provisions "contain the *only source of legislative power* to lay down disqualifications for membership of either House of Parliament and Legislative Assembly or Legislative Council of a State."[59]

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53 See *supra* note 52 and the accompanying text.

54 *Lily Thomas*, at 2671 (para 14).

55 (1878) 5 I.A. 178, cited in *Lily Thomas*, at 2671 (para 14).

56 *Id*. at 2671-72 (para 14).

57 AIR 1973 SC 1461, cited in *Lily Thomas*, at 2672 (para 14), by referring to the H.M. Seervai's monumental work, *Constitutional Law of India*, (14th edn. 2013), para 2.4 at 174.

58 *Lily Thomas*, at 2673 (para 15).

59 *Id*. at 2673 (para 16). Emphasis added. On this count, the Supreme Court clearly and categorically negated stand of the respondent, Union of India, that the legislative power to enact s. 8(4) of the Act of 1951 can be found in art. 246(1) read with entry 97 of list I of the seventh schedule and art. 248 of the Constitution. See, *id*., at 2672-73 (para 15). The negation was essentially on two counts. One, the matter of disqualification is directly dealt with under the specific provisions of the Constitution, and, therefore, we must look at those provisions. Two, art. 246(1) read with entry 97 of List I of the seventh schedule and art. 248 of the Constitution fall in ch I [Distribution of Legislative Powers] of part XI [Relations between the Union and the States] of the Constitution, and, therefore, these provisions regulate the legislative power only in respect of Centre-State relationship and not *qua* disqualification of membership. *Id*. at 2672 (para 15).

A bare reading of clause (e) of the articles 102(1) and 191(1) of the Constitution, says the Supreme Court "would make it abundantly clear that Parliament is to make *one law* for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State."[60]This means, the said clause (e) "lays down 'the same set of disqualifications for election as well as for continuing as a member".[61] In view of this clear construction of the said clause (e), the court has held:[62]

> Parliament thus does not have the power under Articles 102(1)(e) and 192(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislative Assembly. To put it differently, if because of a disqualification a person cannot be chosen as a member of Parliament or the State Legislative Assembly, *for the same disqualification, he cannot continue as a member of Parliament or the State Legislature*…

Moreover, this line of reasoning is reinforced by the Supreme Court by observing that "once a person who was a member of either House of Parliament or House of the State Legislature becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 192(1)(e) of the Constitution, *his seat automatically falls vacant* by virtue of articles 101(3)(a)[63] and 190(3)(a)[64] of the Constitution and Parliament cannot make a provision as in sub-section (4) of section 8 of the Act to defer the date on which disqualification of a sitting member will have the effect and prevent his seat becoming vacant on account of the disqualification under article 102(1)(e) and article 192(1)(e) of the Constitution."[65]

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60 *Ibid Emphasis added.*

61 Lily Thomas, citing the observation of Constitution Bench of the Supreme Court in *Election Commission, India* v. *Saka Venkata Rao,* AIR 1953 SC 210.

62 *Ibid*. *Emphasis added.*

63 Art. 103(3)(a) of the Constitution, dealing with vacation of seats, provides that if a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1) or (2) of art. 102, his seat shall thereupon become vacant.

64 Art. 190(3)(a) of the Constitution, which is identical to the provision of Article 103(3)(a), lays down that that if a member of a House of the Legislature becomes subject to any of the disqualifications mentioned in clause (1) or (2) of Art. 102, his seat shall thereupon become vacant.

65 *Supra* note 3. at 2674 (para 17). *Emphasis added*. This is how the Supreme Court has rejected the contention of the Union of India that 88(4) of the Act of 1951 does not differentiate between the and non-sitting members of the legislature in terms of disqualifications laid down under art. 102(1)(e) and art. 192(1)(e), but "merely states that the same disqualifications will have effect only after the appeal or revision, as the case may be, against the conviction is decided by the Appellate

The reasoning of the Supreme Court that has led them to the result that enactment of section 8(4) of the Act of 1951, which defers the date on which the disqualification will take effect in the case of sitting member of Parliament or a State Legislature, is beyond the powers conferred on Parliament by the Constitution, may be abstracted as under: [66]

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or the Revisional Court if such appeal or revision is filed within 3 months from the date of conviction."*Id*. at 2673 (para 17). Likewise, the Supreme Court has declined to accept the contention of the respondent that filling of the seat which falls vacant under art 103 or art.192 of the Constitution may await the decision of the President or the Governor till he takes the view that the member become subject to any of the disqualifications mentioned in clause (1) of art 102 and 191 of the Constitution. See, *id.* at 2674 (para 18).

66 Alongside the main writ petitions, the Supreme Court has also decided two appeals that have been presented before it by way of special leave under art. 136 of the Constitution against the common order of the Patna High Court in C.W.J.C. No. 4880 of 2004 and C.W.J.C. No. 4988 of 2004. The issue to be decided by the high court was whether a person, who is confined in prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police is not entitled to vote by virtue of ss. (5) of s. 62 of the Act of 1951, and accordingly is not an 'elector' and is, therefore, not qualified to contest elections to the House of People or the legislative assembly of a state because of the provisions in s.4 and 5 of the Act of 1951. See, at 2678 (para32). The high court answered this issue in the affirmative. The underlying reason for this holding is: The right to vote is a statutory right, the Law gives it, the Law takes it away…. The Law temporarily takes away the power of such persons to go anywhere near the election scene. To vote is a statutory right. It is privilege to vote, which privilege may be taken away. In that case, the elector would not be qualified, even if his name is on the electoral rolls. The name is not struck off, but the qualification to be an elector and the privilege to vote when in the lawful custody of the police is taken away. On appeal, not finding any infirmity in the order of the High Court as quoted above, the Supreme Court upheld the said order by observing "that a person who has no right to vote by virtue of the provisions of sub-section (5) of Section 62 of the 1951 Act is not an elector and is therefore not qualified to contest the election to the House of the People or the Legislative Assembly of a State."*Id.* at 2678 (para 33). Since the observations of the high court as cited above have met the approval by the Supreme Court, a minor comment would be in order with a view to bring about conceptual clarity. There is absolutely no difficulty in appreciating the decision of the high court and its endorsement by the Supreme Court. However, in our respectful submission, though the eventual decision is right, but the elaborative reason to reach that decision is somewhat suspect: it seems to run contrary to the propounding of the Supreme Court in the instant case. The central thrust of our criticism is that 'right to vote' is not a statutory right pure and simple. It is basically and essentially a 'constitutional right' under art. 326 of the Constitution. The legislature may give shape to this right, but only in accordance with the basic principles of the Constitution. If the proposition that the right to vote is a statutory right, that is, a right given to a citizen by the legislature and that legislature is free to give or not to give this right to him is accepted, then we would

(a) "[T]he affirmative words used in Articles 102(1)(e) and 192(1)(e) of the Constitution confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or a member of the Legislative Assembly or Legislative Council of a State and for a person who is a sitting member of either House of Parliament or a member of the Legislative Assembly or Legislative Council of a State."[67]

(b) Articles 101(3) (a) and 190(3)(a) of the Constitution "put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have the effect."[68]

(c) Once it is held that Section 8(4) of the Act of1951 is ultra vires the Constitution without making a reference to the provision of Article14 of the Constitution, it is no more necessary "to decide the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution."[69]

(d) The operation of the declaration, namely that Section 8(4) of the Act of 1951 is ultra vires the Constitution, shall be prospective, and not retrospective, because "it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws or which they had no knowledge and of which they could not even with exercise of due diligence have acquired any knowledge."[70]

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not have succeeded to dismantle the authority of s. 8(4) of the Act of 1951, as has been rightly done in the instant case. On this perspective, seeVirendra Kumar, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies"47 (2) *JILI* 135-157 (2005).

67 Lily Thomas at 2674 (para 19). To the same effect, see also at 2675 (para 20).

68 *Ibid.*

69 *Id*. at 2676 (para 22).

70 *Id*. at 2676 (par 23), citing *Harla* v. *State of Rajasthan*, AIR 1951 SC 467. For the proposition that whether the Court has power to determine the ambit of the law declared by it, the Supreme Court cited *Golak Nath and Others* v. *State of Punjab and Another*, AIR 1967 SC 1643, in which Subba Rao, C.J. (for himself and Shah, Sikri, Shelat and Vaidialingam, JJ.) has held that "Articles 32, 141 and 142 of the Constitution are couched in such a wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice and has further held that this court has the power not only to declare the law but also to restrict the operation of the law as declared to future and save transactions, whether statutory or otherwise, that were effected on the basis of the earlier law."

IV SCOPE AND APPLICATION OF ORDE VI, RULE 16 OF CODE OF CIVILPROCEDUR *VIS-A-VIS* RESTORATION OF RECRIMINATION PETITION BY CONSENT IN THE REALME OF ELECTION LAW[71]

For streamlining and expediting the procedure in the Courts of Civil Judicature, Order VI, Rule 16 of the Code of Civil Procedure (CPC) empowers the court at any stage of the proceedings to pass order to strike out or amend any matter in any pleading, which may be unnecessary, scandalous, frivolous or vexatious, or which may tend to prejudice, embarrass or delay the fair trial of the suit, or which is otherwise an abuse of the process of the court. This indeed is a very wide power, which can be exercised at '*any stage of the proceedings'* and '*in any pleading'*. One of the basic questions is, whether this power can be exercised in all circumstances and in all situations, irrespective of any other consideration. Such a question has come to be considered in *Neena Vikram Verma*.[72]

In order to put this question in proper perspective, we may take note of the factual matrix in *Neena Vikram Verma.* In this case, in general elections to the State Legislative Assembly the appellant was declared elected by defeating the respondent by a margin of only one vote. The respondent challenged the appellant's election by filing an election petition in the High Court of the State on the grounds of improper reception, refusal and rejection of votes under the relevant provisions of the Representation of the People Act, 1951. The appellant, in turn, filed a recrimination petition under section 97 of the Act of 1951 principally on two grounds: one, that the respondent had not disclosed the criminal cases pending against him and, therefore, his nomination was void, and he cannot be declared elected; two, the respondent indulged in various corrupt practices.

For ousting the recrimination petition, the respondent filed an application under Order VII, Rule 11 of CPC on the ground that it did not disclose any cause of action and, therefore, the same should be rejected.[73] The high court allowed the respondent's application, consequently leading to the dismissal of the recrimination petition of the appellant.

The appellant challenged this dismissal order by filing a petition in the Supreme Court by special leave. Interestingly, by a consent order passed by the Supreme Court,[74] the dismissal order of the high court was set aside, and the recrimination petition of the appellant was restored with the inclusion of certain conditions, which, *inter alia*, prescribed: one, that the high court is requested to hear and conclude the trial of the respondent's original election petition against

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71 See, Virendra Kumar, "Recrimination proceedings under Section 97 … of RP Act, 1951: Whether affected by Order VIII, Rule 6A, CPC," in XLVI *ASIL*, 346-354/ (2010).

72 See *supra* note 7.

73 This was done apart from filing the reply on merits to the recrimination petition, see *Neena Vikram Verma*, at 1634 (para 6).

74 See, consent order passed by the Supreme Court, Feb. 2nd, 2012 (paras 3 and 4), cited in *Neena Vikram Verma*, at 1634-35 (para 12).

the appellant, the returned candidate, as early as possible and in no case later than May 31st 2012; in case the high court declares the election of the returned candidate to be void, the high court shall then proceed with the consideration of the recrimination petition and conclude the inquiry in respect thereof expeditiously and positively by August 31st 2012.[75] With these clear stipulations, the apex court also expected that the parties "shall fully co-operate with the High Court in expeditious conclusion of the trial and shall not seek unnecessary adjournments."[76]

The high court by its judgment and order of 19.10.12 allowed the election petition and set aside the election of the appellant.[77] In terms of the stipulations of the consent order passed by the Supreme Court on 02.02.12, the high court directed the recrimination petition to be heard. Against the high court's judgment and order of 19.10.12, the appellant filed a statutory appeal under section 116 of the Act of 1951, which was admitted by the Supreme Court on 08.11.12, with the passing of an interim order that permitted the appellant "to attend the Assembly, but without any right to cast vote and to receive any emoluments."[78]

Thereafter, the respondent filed another application on 01.11.12 under Order VI, Rule 16 of CPC for striking off the pleadings in certain paragraphs of the recrimination petition, which was allowed by the high court by its order on 05.12.12 despite its being vehemently opposed by the appellant.[79] This led the appellant to file SLP. Three, the appellant filed an application under order VI, rule 17 of CPC, seeking permission of the high court to incorporate some material facts in her recrimination petition, which was rejected by it by its order of 23.11.12, and that rejection order also led the appellant to file a separate SLP against that order.[80]

Out of these multiple orders of the high court – setting aside the election of the appellant on 19.11.12; allowing respondent's application of 11.11.12 for striking off certain critical paragraphs of the recrimination petition on 05.12.12; and rejecting appellant's application for incorporation of certain material facts in the pending recrimination petition on 23.11.12 – the most critical is the order of the high court passed on 05.12.12, because it tends to reduce the appellant's recrimination petition, which was restored by the Supreme Court by passing the consent order, almost to a nullity. It is this order of the high court that has become the subject of serious consideration in the appeal to the Supreme Court by special leave in *Neena Vikram Verma.*[81]

It is in this backdrop, the most crucial issue that has come to the fore is whether the election judge of the high court could entertain an application under order VI, rule 16 of CPC for striking off certain paragraphs of the recrimination

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75 *Id*. At 1635 (para 12)

76 *Ibid.*

77 See, *id*. at 1634 (para 8).

78 *Id.* at 1634 (para 9).

79 *Id*. at 1634 (para 10).

80 *Id.* at 1634 (para 11).

81 *Id*. at 1633 (para 2).

petition that was restored by the Supreme Court under its order passed with the consent of the parties and to be taken for due consideration by the high court in case the election of the appellant was set aside by it in the pending election petition. Response of the Supreme Court on this count may be crystalized as follows:[82]

(a) Once it is accepted by a party "by consent' that recrimination petition is to be heard by the Court, it is clearly understood that the consenting party has given up the objection under Order VII, Rule 11 of CPC and, therefore, the same very party "cannot be subsequently permitted to seek the striking off the pleadings containing the cause of action under the garb that the pleadings containing the cause of action are unnecessary, vexatious or scandalous."

(b) One of the basic principles of litigation, which in the instant case the election Judge has failed to observe, is: "No Court is expected to permit any matter to be raised which might and ought to have been made ground of defence or attack, once the same is relinquished by the party concerned."[83]

(c) The application under Order VII, Rule 11 of CPC, requiring rejection of the recrimination petition on the ground that it does not disclose a cause of action, "is required to be decided on the face of the plaint or the petition,"[84] which the election Judge failed in doing so by drawing "an adverse inference" when the respondent chose not to reply to the notice served on him by the appellant "to admit facts."[85]

(d) The absence of proper verification in the form of sworn affidavit as prescribed in Form No. 25 when there is allegation of corrupt practice is not a ground of dismissal of recrimination petition under Section 83 of the Act of 1951 inasmuch as it has been consistently held that "a defect in the verification in the matter

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82 *Id*. at 1641-42 (para 28).

83 *Ibid.* citing *K.K. Modi v. K.N. Modi* , [1998 (3) SCC 573]: AIR 1998 SC 1297.

84 Neena Vikram Verma. at 1641 (para 28).

85 *Id*. at 1642 (para 29). On perusal of the record along with recrimination petition, the Supreme Court has found that the appellant has adduced "sufficient material facts" in support of his allegation of criminality. Ibid. Moreover, subsequently, a notice to admit facts was also served on the respondent giving "particulars of specific cases," "wherein the charge-sheets were filed for the charges which would result into imprisonment of 2 years or more, as required by section 33A of the R.P. Act, 1951," and the respondent chose not to reply to this notice.

> of Election Petition can be removed in accordance with the principles of CPC and that it is not fatal to the Election Petition."[86]

In view of the above, Supreme Court allowed the appeal and set aside the decision of the Election Judge by holding:[87] (i) In allowing the application of the respondent under Order VI, Rule 16 of CPC was clearly untenable and bad in law. (ii) The Election Judge could not have entertained the application under Order VI, Rule 16 of CPC when the Supreme Court had restored the recrimination petition to the file of that Court by consent in order to decide it expeditiously. (iii) The Election Judge has erred in holding that the pleadings in the named paragraphs were vague, vexatious, non-specific and without any material facts.

V AFFIDAVIT IN TERMS OF ORDER VI, RULE 15(4) OF THE CODE OF CIVIL PROCEDURE *IN ADDITION* TO AFFIDAVIT AS REQUIRED BY THE PROVISO TO SECTION 83(1) OF THE REPRESENTATION OF PEOPLE ACT, 1951: WHETHER MANDATORY

As a matter of course, all statutory appeals are taken up for consideration under section 116A of the Act of 1951 by a bench of two judges of the Supreme Court.[88] However, the issue, whether filing an affidavit in terms of order VI, rule 15(4) of the CPC in addition to the one required under the proviso to section 81(1) of the Act of 1951 is mandatory, for its resolution has been specifically placed for determination before a larger bench of three Judges of the Supreme Court in *G.M. Siddheshwar* v. *Prasanna Kumar*.[89]

Initially, this issue came up for consideration before a bench of two Judges. Subsequently, during the course of initial proceedings, it so transpired that on behalf of the appellant it was argued that the respondent-petitioner had not filed an 'additional' affidavit as required by order VI, rule 15(4) of CPC in support of the election petition, the high court, in view of the most recent two-judge bench decision of the Supreme Court in *P.A. Mohammed Riyas*[90] ought to have dismissed

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86 *Id*. at 1642 (par 30), citing *Murarka Radhey Shyam Ram Kumar* v. *Roop Singh Rathore* ,AIR 1964 SC 1545 followed in *H.D. Revanna* v. *G. Puttaswamy Gowda*, AIR 1999 SC 768; *Ponnala Lakshmaiah* v. *Kommuri Pratap Reddy*, AIR 2012 SC 2638. See also: *T. Phungzathang* v. *Hangkhanlian* AIR 2001 SC 3924; *Manohar Joshi* v. *Nitin Bhaurao Patil*,AIR 1996 SC 796.

87 *Neena Vikram Verma* at 1643 (para 31).

88 See s. 116A of the Act of 1951, the Supreme Court as the first court of appeal hears appeals both on law and fact; it is entitled to reassess and re-appreciate the entire pleading and evidence on its own and come to an independent conclusion. See Virendra Kumar, "Role of the Supreme Court as the first appellate court: Its ambit under Section 116A of the Representation of the People Act, 1951," in XLVII *ASIL* 417-424 (2011).

89 AIR 2013 SC 1549. (Hereinafter simply, *G.M. Siddheshwar).*

90 (2012) 5 SCC 511: In this respect, support was also sought from *R.P. Moidunju Moutty* v. *P.T. Kunju Mohammad*, AIR 2000 SC 388.

it at the threshold.[91] On the other hand, the respondent's counsel argued that *Mohammed Riyas* was neither in consonance with the decision of the larger bench of three judges of the Supreme Court in *F.A. Sapa* v. *Singora* ,[92] nor it had referred to or considered the decision of the three-judge bench in *G. Mallikarjunappa* v. *Shamanur Shivashankarappa*,[93] which lays down that an election petition under such circumstances is not liable to be dismissed at the threshold under the relevant provisions of the Act of 1951. In this predicament, it was felt that the issue raised in *G.M. Siddheshwar* "ought to be heard by a larger bench of at least three judges."[94] Accordingly, by an order passed on 19.07.12, the issues raised were referred to a larger bench of three judges, and this is how the SLP[95] against the judgment of the high court were placed before the three-judge bench for consideration.[96]

In *G.M. Siddheshwar*, the three-judge bench has examined the issue afresh whether non-compliance with the requisite of filing two affidavits as envisaged under the provisions of section 83 of the Act of 1951 warrants the dismissal or rejection of the election petition under section 86 of the said Act.

On perusal of the provisions of section 83 of the Act, it is revealed that under the proviso to section 83 (1) an election petitioner is required to file an affidavit in "the prescribed form" in support of his allegations of corrupt practice and the particulars thereof, and to meet this requirement the format of the prescribed form is given in Form 25 under Rule 94-A of the Conduct of Election Rules, 1961. Besides, in clause (c) of section 83(1) of the Act of 1951, it is also specifically stated that an election petition "shall be signed by the Petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of the pleadings." The requisites of verification of pleadings are spelled out in rule 15 of order VI of CPC, (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

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91 On this subject, see Virendra Kumar, "Election petition lacking in proper verification: Whether liable to be dismissed *in limine*," in XLVIII *ASIL* at 404-408 (2012); Virendra Kumar, "Defect in verification of affidavit," in XXXVII *ASIL* at 261-263 (2001); Virendra Kumar, "Non-compliance of rules requiring verification while filing disqualification petition: its consequences," in XLVI *ASIL* at 338-345 (2010); Virendra Kumar, "Dismissal of election petition *in limine*," in XXXV*ASIL* at 282-284 (1999).

92 (1991) 3 SCC 375: AIR 1991 SC 1557.

93 (2001) 4 SCC 428: AIR 2001 SC 1829.

94 *G.M. Siddheshwar*, at 1553 (paras 18 and 19).

95 Civil Appeal Nos. 2250-2251 of 2013 (Arising out of SLP (C) Nos. 14172, 14173 of 2010) and Civil Appeal Nos. 2252-2255 of 2013 (Arising out of SLP (C) Nos. 24886-24889 of 2010)

96 *G.M. Siddheshwar* at, 1553 (para 20).(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.(4) The person verifying the pleading shall also furnish an affidavit in support of the pleadings.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. which, *inter alia*, "suggests" that in addition to the verification, the person verifying the plaint is "also" required to file an affidavit in support of the pleadings. In the light of this premise, the Supreme Court specifically asked: Does this mean that an election petitioner in the instant case is "obliged to file two affidavits – one in support of the allegations of corrupt practices and the other in support of the pleadings."

Response of the three-judge bench to this question in *G.M. Siddheshwar* is that two different affidavits, one in support of the pleadings and another in support of allegations of corrupt practices by the returned candidate, are not required. The rationale for this decision may be abstracted as follows:[97]

> One, a plain reading of Section 83(1)(c) of the Act of 1951 it clear that what is required of an election petitioner is only that verification should be carried out in the manner prescribed in the Code of Civil Procedure.
>
> Two, the requirement under Order VI Rule 15(4) of CPC that an affidavit "also" to be filed is only in the nature of a "stand-alone document", that is, if affidavit is not filed, that would not mean that the verification of a plaint is incomplete.

Three, "a plain and simple reading of section 83(1) (c) of the Act clearly indicates that the requirement of an 'additional' affidavit is not to be found therein." This provision does require a verification of the pleadings, but that does not imply that affidavit in support of the pleadings in an election petition is "a part" of the verification of the pleadings. To decipher such an additional requirement only means "to read a requirement that does not exist in Section 83(1)(c) of the Act."[98]

Four, under section 83(1) (c) of the Act of 1951, for the election petitioner there is no stipulation of filing an affidavit in support of the averments made in the election petition "except when allegations of corrupt practices have been made."[99]

Five, filing a 'composite affidavit', that is a single affidavit both in support of the averments made in the election petition and with regard to the allegations of corrupt practices by the returned candidate, may very well serve the need of two separate affidavits (though not required), as has been done in the instant case.[100] The adoption of this procedure, which is "not contrary to law and cannot be faulted,"

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97 *Id*. at 1553-54 (para 24).

98 *Id*. at 1555 (para 30).

99 *Id*. at 1556 (para 33).

100 *Id*. at 1556 (para 34). "The filing of two affidavits is not warranted by the Act nor is necessary, especially when a composite affidavit can achieve the desired result."

"would not only be in substantial compliance with the requirements of the Act, but would actually be in full compliance thereof."[101]

Six, while the necessity of an affidavit in support of facts stated in a plaint, as recommended by the Law Commission of India in their 163rd Report of the Code of Civil Procedure (Amendment) Bill, 1997,[102] "may be beneficial and may have salutary results," nevertheless the Courts have to be remained guided by the enacted law as contained in Section 83(1)(c) of the Act of 1951, and "not to the law as it ought to be."[103]

Seven, the requisite emanating from plain reading of Section 83 of the Act of 1951, which requires only a verification and not an affidavit in support of averments in an election petition except when allegations of corrupt practices are made by the election petitioner, cannot be altered by invoking the 'doctrine of legislation by reference'[104] unless the meaning of 'verification' under Section 83(1)(c) of the Act of 1951 is amended to include an affidavit.[105]

In our view, the court is amply supported for their restrictive stand by the observations of the Constitution bench in *Girner Traders*, who, on a review of judicial precedents, are not inclined to consider the doctrine of legislation by reference as an absolute rule, for (as they stated on this count):

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101 *Ibid.*

102 The Law Commission of India proposed the insertion of sub.s (2) in s. 26 of the CPC, making it obligatory upon the plaintiff to file an affidavit in support of facts stated in the plaint. A similar provision was proposed in order VI of the CPC by inserting sub-rule (4) in rule 15 thereof. See, *id*. at 1555-56 (para 32).

103 *Id*. at 1556 (para 33).

104 On behalf of the appellant, it was argued that since an amendment was made to Rule 15(4) of Order VI of CPC, that amendment had been legislated by reference to the relevant provisions of the Act of 1951, and, therefore, the election petitioner would be bound by the terms thereof. This is what is termed as 'legislation by reference'. Accordingly, in the instant case it was pleaded that the election petitioner would not only need to sign and verify the contents of an election petition, but also file an affidavit in support thereof. *Id.* at 1556-57 (para 36). However, the intended support derived for this stand from the Constitution Bench of the Supreme Court in *Girner Traders (3)* v. *State of Maharashtra*, (2011) 3 SCC 1 renders only a qualified support for the application of the doctrine of legislation by reference. See infra. (Hereinafter simply, *Girner Traders*)." … we are of the considered that this rule [of legislation by reference] is bound to have exceptions and it cannot be stated as an absolute proposition of law that wherever legislation by reference exists, subsequent amendments to the earlier law shall stand implanted into the later law without analysing the impact of such incorporation on the object and effectuality of the later law. The later law being the principal law, its object, legislative intent and effective implementation shall always be of paramount consideration while determining the compatibility of the amended prior with the later law as on relevant date.

105 *G.M. Siddheshwar*, at 1557 (para 37).

Eight, affidavit in the prescribed form, which is required to be filed by the election petitioner support of the allegation of corrupt practice and the particulars thereof under the proviso to Section 83(1) of the Act of 1951, need not be in 'absolute compliance' with the of Form 25 under Rule 94-A of the Conduct of Elections Rules, 1961.[106] Since the format of the affidavit is not a matter of substance, what is needed is 'substantial compliance' with the prescribed format.[107] Moreover, mere absence of an affidavit or an affidavit in a form other than the one stipulated by the rules does not by itself cause any prejudice to the successful candidate so long as the deficiency is cured by the election Petitioner by filing a proper affidavit when directed to do so.[108]

Nine, non-compliance with the proviso to section 83(1) of the Act of 1951 is not fatal to the election petition, inasmuch as section 86 of the said Act that specifically deals with the trial of election petition sanctions summary dismissal of the same only for non-compliance with sections 81, 82 and 117 (and not of section 83).[109]

Ten, a defective affidavit owing to non-compliance with the provisions to section 83(1) of the Act of is not fatal to the maintainability of an election petition within the meaning of section 81 of the said Act,[110] because such a defect (unless it is a case of total non-compliance as distinguished from substantial compliance)[111] is "curable" and can be allowed to be cured or remedied later.[112]

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106 See, *id*. at 1558 (paras 40-41).

107 *Ibid*, citing *Ponnala Lakshmaiah* v. *Kommuri Pratap Reddy*, (2012) 7 SCC 788.(Hereinafter simply, *Ponnala Lakshmaiah*).

108 *Ibid*.

109 G.M. Siddheshwar at 1559-60 (paras 42-47), citing *Azhar Hussain v. Rajiv Gandhi*, 1986 (Supp) SCC 315, *G.Mallikarjunapp* v. *Shamanur Shivashankarappa* (2001) 4 SCC 428, *Ponnala Lakshmaiah supra* note 111, and *Sardar Harcharan Singh Brar* v. *Sukh Darshan Singh*, (2004) 11 SCC 196. *Hardwari Lal* v. *Kanwal Singh*, (1972) 1 SCC 214 in which a three-judge bench of the Supreme Court held that since an election petition is required to be tried as nearly as possible in accordance with the procedure applicable under the CPC to the trial of suits, an election petition could nevertheless be dismissed if it did not disclose a cause of action. This view, seemingly contrary to the view expressed in majority of judicial decisions, was not preferred by observing that the same was given "in the context of dismissal of the election petition under the provisions of the Code of Civil Procedure [and not under the relevant provisions of the Act of 1951]," *id*. at 1559 (para 42), and that the issue "having been considered several times by this Court must now be allowed to rest at that,"*Id*.at 1560 (para 47).

110 S. 81 of the Act of 1951 requires that an election petition shall be presented "in accordance with the provisions of this part," which includes the provisions of s. 83 of the said Act.

111 If there is a total and complete non-compliance with the provisions of s. 83 of the Act of 1951, the election petition cannot be described as an election petition and may be dismissed at the threshold. See, *G.M. Siddheshwar*, at 1561 (para 55).

112 *Id.* at 1560 (paras 49-51), citing the Constitution Bench decisions in *Murarka Radhe Shyam Ram Kumar* v. *Roop Singh Rathore*, (1963) 3 SCC 573; and *Ch.*

Eleven, though detection of defects does not merit dismissal of the election petition at the threshold merely on technical grounds, nevertheless "in fairness" "the Court should give an opportunity to cure the defects" and in case of failure to remove/cure the defects, it could result into dismissal, technically or strictly not under Section 86 of the Act of 1951 but, on account of an election petition not being properly constituted as required under the relevant provisions of the Code of Civil Procedure.[113]

Twelve, an affidavit required to be filed under the proviso to section 83(1) of the Act of 1951 is in substantial compliance with the requirement of the law in the instant case,[114] and appended to the election petition only 'by way of evidence',[115] and as such causing no prejudice to the returned candidate even if it was defective – a defect which was curable, cannot be considered as an integral part of an election petition and, therefore, not warranting dismissal at the threshold.[116]

> In the light of the principles as enunciated above, the bench has found that it is "quite clear that the affidavit [filed by the respondent-petitioner] was in substantial compliance with the requirements of the law," and that "the High Court was quite right in coming to the conclusion that the affidavit not being in the prescribed format of Form No. 25 with a defective verification were curable defects and that an opportunity ought to be granted to Prasanna Kumar [the respondent-petitioner] to cure the defects." Thus finding no merits, the Supreme Court Bench has dismissed the appeals.

Subba Rao v. *Member, Election Tribunal, Hyderabad*, (1964) 6 SCR 213. See also *V. Narayanswamy* v. *C.P. Thirunavukkarasu*, (2000) 2 SCC 294, holding that a defect in verification of an affidavit is not fatal to the election petition and it could be cured, *id.* at 1560 (para 53).

113 *Id*. at 1562 (para 64), citing *Umesh Challiyill* v. *K.P. Rajendran*, (2008) 11 SCC 740, in which the Supreme Court in the light of the facts of the case, inter alia, states: "…. [I]n the present case we regret to record that the defects which have been pointed out in the election petition were purely cosmetic and do not go to the root of the matter and secondly even if the Court found them of serious nature then at least the Court should have given an opportunity to rectify such defects."*R.P. Moidutty* v. *P.T. Kunju Mohammad* (2000) 1 SCC 481, in which a defect in verification of the election petition was pointed out by raising a plea in that regard in the written statement, but despite this notice the petitioner did not cure the defect. This led the court to hold that until the defect in verification was rectified or cured, the petition could not have been tried. See, *id.* at 1562 (para 63).

114 *Id*. at 1563 (para 65).

115 *Id.* at 1561 (para 59).

116 Id. at 1563 (para 65).

> The bench has also overruled the most recent two-judge bench decision of the Supreme Court in *P.A. Mohammed Riyas*,[117] which laid down the requirement of filing two affidavits – one affidavit in support of allegations of corrupt practices, and another in compliance with the requirements of order VI, rule 15(4) of CPC.[118] The overruling of this judicial propounding is not just implied; it is expressed by pointing out how, where and in what respect the two-Judge Bench had gone astray in their decision-making process. For this purpose, the three-Judge Bench specifically took note of the two undernoted paragraphs of the two-Judge Bench decision that dealt with their conclusions in *P.A. Mohammed Riyas*.[119]

On bare reading of the two conclusion-paragraphs of the two-judge bench decision in *P.A. Mohammed Riyas*, the three-judge bench in *G.M. Siddheshwar* has noted with dismay: "Unfortunately, the submissions made by the election

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117 See *supra* note 11

118 See analysis of *P.A. Mohammed Riyas*, in XLVIII *ASIL* 404-408 (2012).

119 The para 45 and 46 of the Report, dealing with the conclusions in *P.A. Mohammed Riyas* , as abstracted by the bench in *G.M. Siddheshwar*, at 1554-55 (para 26), are reproduced *in extenso*: "45. Of course, it has been submitted and accepted that the defect was curable and such a proposition has been upheld in the various cases cited by Mr. Venugopal, beginning with the decision in *Murarka Radhey Shyam Ram Kumar* case (supra) and subsequently an affidavit followed in *F.A. Sapa* case (supra), *Sardar Harcharan Singh Brar* case (supra) and *K.K. Ramachandran Master* case (supra), referred to hereinbefore. In this context, *we are unable to accept Mr. Venugopal's submission that despite the fact that the proviso to Section 83(1) of the 1951 Act provides that where corrupt practices are alleged, the election petition shall also be accompanied by an affidavit in the prescribed form, it could not have been the intention of the legislature that two affidavits would be required, one under Order 6 Rule 15(4) Code of Civil Procedure and the other in Form 25. We are also unable to accept Mr. Venugopal's submission that even in a case where the proviso to Section 83(1) of the 1951 Act was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions."Emphasis added*." 46. Mr. Venugopal's submission that, in any event, since the election petition was based entirely on allegations of corrupt practices, filing to two in respect of the selfsame matter, would rendered one of them redundant, *is also not acceptable*. As far as the decision in *F.A. Sapa* case is concerned, it has been clearly indicated that the petition, which did not strictly comply with the requirements of Section 83 of the 1951 Act, could not be said to be an election petition as contemplated in Section 81 and would attract dismissal under Section 86(1) of the 1951 Act. On the other hand, the failure to comply with the proviso to Section 83(1) of the Act rendered the election petition ineffective, as was laid down in *Hardwari Lal* case (supra) and the various other cases cited by Mr. P.P. Rao."*Emphasis added.*

petitioner were not discussed but were simply rejected."[120] In their considered opinion, "No reasons have, unfortunately, been given by this Court [in *P.A. Mohammed Riyas*] for arriving at the conclusions that it did and rejecting the contentions of learned Counsel for the election Petitioner."[121]

The cryptic, and yet reasoned, response to the requirement of 'additional' affidavit is found summed up in the three-sentence paragraph as follows:[122]

(i) "It seems to us that a plain and simple reading of Section 83(1)(c) of the Act clearly indicates that the requirement of an 'additional' affidavit is not to be found therein."

(ii) "While the requirement of 'also' filing an affidavit in support of pleadings filed under the Code of Civil Procedure, the affidavit is not a part of the verification of the pleadings – both are quite different."

(iii) "While the Act does require verification of the pleadings, the plan language of Section 83(1)(c) of the Act does not require an affidavit in support of the pleadings in an election petition."

The rest of the 67-paragraph judgment of the three-judge bench of the Supreme Court provides the elaborate reasoning of their stand they adopted in counteracting the decision in *P.A. Mohammed Riyas*.[123]

VI CONCLUSION

Although every part dealing with a specific legal issue more or less is intended to be complete in itself and does not require a separate conclusion, nevertheless, in order to bring the special emphasis on certain counts, the following few conclusion-statements, even if they bear some repetition, in our view need pondering.

a. 'How to enforce the norms of judicial propriety?' is the matter has come to the fore in a precipitant form in *Markio Tado*, in which an election Judge, while trying an election petition, ventured to unsettle the established course of electoral process in respect of inspection of 'record of register of voters,' which is kept in the format of Form 17-A.[124] The Supreme Court strongly, nay sternly, has disapproved this approach by observing that such an act "amounts to nothing but judicial indiscipline and disregard of the mandate of Article 141 of the Constitution

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120 *G.M. Siddheshwar*, at 1555 (para 29),

121 *Ibid.*

122 *Id.* at 1555 (para 30). See also *supra* notes 91-93, and the accompanying text.

123 See *supra* note 11.

124 See Part II, *Supra.*

of India". "This is shocking, to say the least, and most unbecoming of a judge holding a high position such as that of a High Court Judge."[125]

A somewhat similar situation has arisen in *Neena Vikram Verma*, while examining the ambit of court's power under order VI, rule 16 of CPC.[126]

The said CPC provision empowers the court at any stage of the proceedings to pass order to strike out or amend any matter in any pleading, which may be unnecessary, scandalous, frivolous or vexatious, or which may tend to prejudice, embarrass or delay the fair trial of the suit, or which is otherwise an abuse of the process of the court. In the instant case, this wide power has been exercised by the high court *indiscriminately* while dealing with an election petition, especially in the context of restoration of recrimination petition by consent in the realm of election law.[127] In the course of deciding the issue, the election judge, wittingly perhaps (rather than unwittingly), ignored the observance of such basic principles of litigation as, that a court is not expected to permit any matter which might and ought to have been made ground of defence or attack once the same is relinquished by the party concerned; and that the court should draw 'an adverse inference' when the respondent chose not to reply to the notice served on him by the appellant 'to admit facts'.[128] Also the high court judge should not have ignored the judicially well-entrenched principle that a defect in the verification in the matter of election petition, which is curable and can be removed in accordance with the principles of CPC, is not fatal to the election petition.[129]

'How to prevent the recurrence of such situations?' is the question that needs pondering. One way is the adoption of an academic-cum-judicial approach, that is to analyse the counts to show where the election Judge had gone astray either in ignoring or construing a well-settled course of judicial principle and practice, and to make that election Judge conscious how the Supreme Court had corrected that course in the exercise of their appellate jurisdiction.[130] Another way is the adoption of, what we may term as, an academic-cum-administrative approach, wherein the

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125 *Ibid.*

126 See Part IV, *Supra.*

127 *Ibid.*

128 *Ibid.*

129 *Ibid.*

130 For avoiding the incident of 'judicial impropriety' in future, we have abstracted a few seminal statements from the judgment in *Markio Tado*, which include:

(a) Subordinate courts, including the high courts, shall not ignore "the settled decisions and then pass a judicial order which is clearly contrary to the settled legal position."Such "judicial adventurism" cannot be permitted "in passing whimsical orders which necessarily has the effect of passing wrongful and unwarranted relief to one of the parties."

(b) "If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to the judgment." "He cannot in the same proceedings or in collateral proceedings between the same parties, re-write the overr uled judgment…"

election Judges are called upon to attend some sort of refresher-cum-orientation courses organized under the aegis of such institutes of research and training as the Indian Law Institute, New Delhi, National Judicial Academy at Bhopal, or state judicial academies, where special interactive sessions could be devoted to discuss deviant cases threadbare with the active involving-presence of the academic jurists and the judges to modulate such interactive sessions.

b. The question of constitutionality of section 8(4) of the Act of 1951, which provides deferment of disqualification on conviction in case of sitting members of the legislature by using a non-obstante clause,[131] has been considered by the Supreme Court in *Lily Thomas*.[132] In this respect, the court, by recognizing articles 102 and 192 of the Constitution as the singular source of legislative power to lay down disqualification of membership of Parliament, legislative assembly and legislative council of a state, correctly construed them as the provisions by which, 'affirmatively, the legislative powers are created, and by which, negatively, they are restricted.'[133] On this touchstone, clause (4) of section 8 of the Act has been found ultra vires the Constitution. The underlying emerging principle is that Parliament's power to legislate is not absolute; it is strictly circumscribed by the provisions of the written constitution that are the ultimate source of that power.[134] Having thus propounded the applicable principle of constitutionality, the Supreme Court has also decided two appeals by way of special leave under article 136 of the Constitution by affirming the order of the high court.[135]

In our respectful submission, the blanket affirmation of the reasoning of the High Court by makes the decision of the Supreme Court somewhat suspect: the eventual decision is right, but for wrong reason, inasmuch the elaborative reason of the High Court seems to run contrary to the very propounding principle of the Supreme Court in the instant case.[140] The statement that "The right to vote is a statutory right, the Law gives it, the Law takes it away…." conveys that it is the prerogative of the Parliament to determine the complexion of disqualifications to be imposed irrespective of what is provided by the provisions of articles 102 and 194 of the Constitution. The Parliament may give shape to them, but only within the limits of 'what is permitted and what is prohibited under those provisions.'

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131 S. 8(4) of the Act of 1951 reads: "Notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3), a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of conviction or the sentence, until that appeal or application is disposed of by the court."

132 See Part III, *Supra.*

133 *Ibid.*

134 *Ibid*.

135 *Ibid.*

136 *Ibid.*

For avoiding conceptual confusion, therefore, instead of affirming the order of the high court as a whole,[137] the same should be approved only selectively/differentially by the Supreme Court so as to be in consonance with the principle as propounded by it earlier in the main writ petitions.

c. The issue whether the requisite of filing two affidavits one in support of fulfilling the requirement of verification under clause (c) of section 83(1) of the Act of 1951 and another to substantiate the allegations of corrupt practices as envisaged under the proviso appended to the same section, namely section 83(1) came up before the three-judge bench of the Supreme Court in *G.M. Siddheshwar*.[138] By overruling the earlier two-Judge bench decision in *P.A. Mohammed Riyas*,[139] the three-judge bench has held that besides the fact that an affidavit in support of the pleadings under section 83(1)(c) of the Act is not 'a part' of the verification of the pleadings, filing of one 'composite affidavit', that is a single affidavit both in support of the averments made in the election petition and with regard to the allegations of corrupt practices by the returned candidate, may serve the need of two separate affidavits under section 83(1) of the Act.[140]

In their overruling, however, the intriguingly instructive lesson that needs to be fully explored is where the three-judge bench has expressly pointed out how, where and in what respect they (the two-bench) had gone astray in their decision-making process. In this respect, a full length juristic critique[141] including particularly of the two overruling statements of the three-judge bench; namely, one, that "Unfortunately, the submissions made by the election petitioner [in *P.A. Mohammed Riyas*] were not discussed but were simply rejected (by the two-judge bench of the Supreme Court),"[142] two, that in the considered opinion of the three-judge bench, "No reasons have, unfortunately, been given by this Court [in *P.A. Mohammed Riyas*] for arriving at the conclusions that it did and rejecting the contentions of learned Counsel for the election Petitioner,"[143] would indeed be highly instructive both for the bench and the bar. The critical discourse is likely to become still more

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137 On appeal, the Supreme Court, not finding any infirmity in the order of the high court as quoted above, upheld the said order in totality. See, *ibid.*

138 See Part V, *Supra*.

139 Altamas Kabir, J (for himself and J Chalameswar J) held that filing of the second affidavit in the prescribed form – Form 25 [at 2791(para 8)], in addition to the one under order VI, rule 15(4) of CPC is a must. In this respect, the court categorically disapproved the contention advanced on behalf of the appellant that since the election petition was based entirely on allegations of corrupt practices, filing of two affidavits in respect of the same matter would render one of them redundant.

140 See Part V, *Supra*.

141 Full length critical analysis is outside the scope of the annual survey of Election Law.

142 *G.M. Siddheshwar*, at 1555 (para 29),

143 *Ibid*.

exciting when it is noticed that one of the judges in both the benches is common.[144] After all, a reasoned judgment, which includes rejection or acceptance of an argument presented before the court with due reason, is the hall mark of judicial development in the common law system.

144 In *G.M. Siddheshwar*, the Bench consisted of R.M. Lodha, Madan B. Lokur and J Chelmeshwar, JJ., whereas judgement in *P.A. Mohammed Riyas*was delivered by the Bench of Altamas Kabir, and J Chalameswar, JJ.