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How India Votes

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APPENDICES

Parliament and state legislatures, and the state election commissions appointed in each state for elections to the *panchayati raj* institutions as institutions of local self-government.

All matters relating to various aspects of elections to the offices of the President and the Vice-President of India, and of elections to Parliament and state legislatures have been dealt with at length in the following chapters. In order not to confuse or tax the readers with too many details relating to elections to *panchayati raj* institutions, which are governed by separate state laws of each state concerned, the present book is mainly confined to the discussions relating to elections to the offices of the President and the Vice-President of India and elections to Parliament and state legislatures only. However, salient features of the *panchayati raj* institutions and elections to those bodies have been briefly discussed in the concluding chapter of this book. Basically, elections to these institutions of local self-government are also held in the same manner as elections to the House of the People and state legislative assemblies, albeit under different sets of local laws.

CHAPTER 2

Parliament of India

SYNOPSIS

COMPOSITION OF PARLIAMENT

The Parliament of India is composed of:

(i) The President of India; and
(ii) Two Houses, respectively known as the Council of States or Rajya Sabha and the House of the People or Lok Sabha (art 79).

Indian parliament is thus a bicameral legislature. The Council of States or Rajya Sabha is the upper House, like the House of Lords of the Parliament in the United Kingdom (UK) and the Senate of the Congress in the United States of America (USA). The House of the People or the Lok Sabha is the lower House of the Indian parliament, like the House of Commons in UK and the House of Representatives in

USA. Though the members of both the Houses of Parliament in India enjoy the same privileges, perquisites, salaries and allowances, it is the lower House or the Lok Sabha to which the council of ministers of the union is collectively responsible [art 75(3)].

Interim Parliament

The Constitution of India, as originally enacted, contained a transitory provision to the effect that, until such time as the regular Parliament was duly constituted on the basis of elections as provided for under the Constitution, the Constituent Assembly which was entrusted with the sacred task of framing the Constitution would be the interim Parliament of India (art 379). This transitory provision was given effect from 26 November 1949 itself, i.e., the day on which the Constitution was adopted by the Constituent Assembly (art 394). But, the Constituent Assembly converted itself into the interim Parliament of India from 26 January 1950, when India became a Sovereign Democratic Republic. The interim Parliament so constituted functioned till early 1952 and had its last sitting on 5 March 1952. Thereafter, the regular Parliament came into existence in April 1952, when the House of the People and the Council of States were duly constituted on the 2nd and 3rd of April 1952 respectively, on the results of the first general elections held under the Constitution in 1951–52.

COUNCIL OF STATES

Council of States, a Permanent House

The Council of States or the Rajya Sabha is a permanent House of Parliament. It is not subject to dissolution at any time by any authority. This ensures that the Indian parliament is never dissolved, as the Council of States is always in existence. However, as nearly as possible, one-third members of the Council shall retire on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law [art 83(1)].

Membership Strength of the Council

Maximum permissible strength—The maximum membership strength of the Council of States can be 250. Of this, 12 members shall be nominated by the President [art 80(1)(a)] and not more than 238 shall be the representatives of the states and of the union territories [art 80(1)(b)]. Whereas the number of members to be nominated by the President is permanently fixed at 12, the number of representatives which each state and union territory is entitled to send to the Council of States, is fixed by the Fourth Schedule to the Constitution [art 80(2)].

This Schedule has been amended from time to time, whenever there has been any reorganisation of states or union territories.

Present strength—At present, the Council of States consists of 245 members—12 nominated and 233 representatives of states and union territories (Appendix I). Whereas each of the existing 28 states[1] of the Indian union has one or more representatives in that Council, only two of the seven existing union territories, namely, the National Capital Territory of Delhi and Pondicherry, have been provided representation in that Council, as per the Fourth Schedule to the Constitution.

Election of representatives of states and union territories—At present, all these representatives of the states and union territories are elected by the elected members of the legislative assemblies of the states and union territories concerned.

Nomination of members by President—The President nominates 12 members from among the persons who have special knowledge or practical experience in literature, science, art and social service [art 80(3)]. Such nominations are made by him not in his sole discretion, but on the aid and advice of his council of ministers. Thus, in reality, the nominated members are the nominees of the council of ministers headed by the Prime Minister of India.

Changes in the Composition of the Council of States from Time to Time

Initial constitution of the Council—The Council of States was initially constituted on 3 April 1952, soon after the completion of the first ever general elections in independent India in 1951–52. At that time, it consisted of 216 members—of whom 12 members were nominated by the President and the remaining 204 were the representatives of the states chosen in accordance with the provisions of the Constitution. The Union of India was then divided into three categories of states, namely, Part A, Part B and Part C states. There were, at that time, nine Part A states, namely, (i) Assam, (ii) Bihar, (iii) Bombay, (iv) Madhya Pradesh, (v) Madras, (vi) Orissa, (vii) Punjab, (viii) Uttar Pradesh and (ix) West Bengal; eight Part B states, namely, (i) Hyderabad, (ii) Jammu & Kashmir, (iii) Madhya Bharat, (iv) Mysore, (v) Patiala and East Punjab States Union, (vi) Rajasthan, (vii) Saurashtra and (viii) Travancore-Cochin; and 10 Part C states, namely, (i) Ajmer, (ii) Bhopal, (iii) Bilaspur, (iv) Coorg, (v) Delhi, (vi) Himachal Pradesh, (vii) Kutch, (viii) Manipur, (ix) Tripura and (x) Vindhya Pradesh. In addition, the territories of India also included the Andaman & Nicobar Islands; but these were neither treated as a

1 From November 2000, the number of states in India went up from 25 to 28, with the formation of three new states of Chhattisgarh, Jharkhand and Uttaranchal, under the Madhya Pradesh Reorganisation Act 2000, Bihar Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000. These three new states were also given representation in the Council of States (see Appendix I).

state nor included in any of the states, and were directly administered by the Central Government. Whereas each of the Part A and Part B states was given separate representation in the Council of States, some of the Part C states were grouped together to have a common representation in that Council. For example, Ajmer and Coorg, Bilaspur and Himachal Pradesh, and Manipur and Tripura were clubbed together and each of these three combinations of Part C states was allocated one seat each in the Council of States and the representatives of these states were to be chosen by rotation. At the initial constitution of the Council, the Ajmer–Coorg group was represented by Ajmer, the Manipur–Tripura group by Tripura and the Bilaspur–Himachal Pradesh group by Himachal Pradesh. Tripura had then no legislative assembly and its representative in the Council of States was elected by an electoral college, specially constituted for the purpose on the basis of an election on adult franchise in the state.[2]

Formula for initial allocation of seats to states—For fixing the number of representatives of each state in the Council of States, initially the formula[3] adopted by the Constitution makers was: one seat per million of population of the state for the first five million and one seat for every additional two millions or part thereof exceeding one million. Census figures for 1941 were taken as the basis for determination of seats to be so allotted to each state in that Council. But it was not written down, either in the Constitution or in any law of Parliament, that the above formula based on the population of the state would be adopted for any future readjustments in the scale of representation of states in that Council. It has been left to the collective wisdom of Parliament to make such readjustments by amending the Fourth Schedule to the Constitution as and when required.

Changes from time to time in allocation of seats—Initially, the State of Madras (Part A state) was allotted 27 seats in the Council of States. In 1953, the composite State of Madras was reorganised, mainly on a linguistic basis, and a new State of Andhra was carved out of Madras on 1 October 1953. On such reorganisation, Madras was left with 18 seats and Andhra was given 12 seats in the Council of States under the provisions of the Andhra State Act 1953, thereby increasing the number of elective seats in that Council from 204 to 207.

At about the same time, there was a demand for complete reorganisation of the constituent states of the Indian union on a more rational basis, keeping in view the financial, economic and administrative considerations and also the importance of the regional languages. Therefore, the Government of India appointed a States Reorganisation Commission in December 1953 to consider the entire matter. On

2 See Appendix I for the allocation of seats to the Part A, Part B and Part C states, at the time of the initial constitution of the Council of States on 3 April 1952.

3 See Statement of Objects and Reasons appended to the Constitution (Seventh Amendment) Act 1956.

the basis of the report of that Commission, submitted in September 1955, the Parliament enacted, first, the States Reorganisation Act 1956 and, then shortly afterwards, the Constitution (Seventh Amendment) Act 1956. As per this Seventh Amendment to the Constitution, the territories of India were reorganised into 14 states and six centrally administered areas called the union territories. These 14 states were: (i) Andhra Pradesh, (ii) Assam, (iii) Bihar, (iv) Bombay, (v) Jammu and Kashmir, (vi) Kerala, (vii) Madhya Pradesh, (viii) Madras,[4] (ix) Mysore,[5] (x) Orissa, (xi) Punjab, (xii) Rajasthan, (xiii) Uttar Pradesh and (xiv) West Bengal. The six union territories were: (i) Andaman and Nicobar Islands, (ii) Delhi,[6] (iii) Himachal Pradesh, (iv) Laccadive, Minicoy and Amindivi Islands,[7] (v) Manipur and (vi) Tripura. The distinction between the Part A, Part B and Part C states, which existed prior to that reorganisation, was abolished. Such reorganisation of the states involved large scale transfers of areas from one state to another and, consequently, necessitated corresponding changes in the allocation of seats to the newly formed states and union territories in the Council of States. Accordingly, the representation of states in the Council of States under the Fourth Schedule to the Constitution underwent extensive changes by the Constitution (Seventh Amendment) Act. For fixing such revised representation, the formula based on population of states, which was earlier adopted at the time of initial allocation of seats in the Council, was again adopted, but this time with reference to the 1951-census figures, which had by then become available. Under this dispensation, the total number of seats for representatives of states in the Council of States made a quantum jump from 207 to 220.[8]

Subsequently in 1959, when certain territories of the State of Andhra Pradesh were transferred back to the State of Madras under the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, the State of Madras got an additional seat, raising the total number of elective seats in the Council of States to 221.

Shortly afterwards, the composite State of Bombay was split into the states of Maharashtra and Gujarat under the Bombay Reorganisation Act, 1960. On such bifurcation, the State of Maharashtra was given 19 seats and Gujarat 11 seats, as against 27 seats allotted earlier to the composite State of Bombay, further raising the strength of elective seats in the Council of States from 221 to 224.

In 1962, a new State of Nagaland was carved out of Assam, and it was allocated one seat in the Council of States under the State of Nagaland Act 1962. In the same year, Pondicherry, a former French establishment, became part of the Indian union

4 Madras was renamed Tamil Nadu under the Madras State (Alteration of Name) Act 1968.

5 Mysore was renamed Karnataka under the Mysore State (Alteration of Name) Act 1973.

6 The union territory of Delhi has been renamed the National Capital Territory of Delhi under the Government of National Capital Territory of Delhi Act 1991.

7 Laccadive, Minicoy and Amindivi Islands were renamed Lakshadweep under the Laccadive, Minicoy and Amindivi Islands (Alteration of Name) Act 1973.

8 See Appendix I.

and was given the status of a union territory under the Constitution (Fourteenth Amendment) Act 1962. This new union territory was also provided representation in the Council of States and was allotted one seat. This further raised the strength of elective seats in the Council to 226.

A few years later, in 1966, there was reorganisation of the State of Punjab, resulting in the creation a new State of Haryana under the Punjab (Reorganisation) Act, 1966. The truncated State of Punjab was left with seven seats, as against the quota of 11 seats for the undivided state, and the new State of Haryana got five seats. Under this reorganisation, the adjoining Union Territory of Himachal Pradesh was also benefited, as it got some additional areas from Punjab and its representation in the Council of States was increased from two to three. This raised the total number of elective seats in the Council of States from 226 to 228.

In early 1970s, there was further reorganisation of the north-eastern region under the North-Eastern Areas (Reorganisation) Act, 1971, resulting in the creation of a new State of Meghalaya and two new Union Territories of Arunachal Pradesh and Mizoram, each of which was given separate representation in the Council of States. As a result of such organisational changes, the representation of the states and union territories in the Council of States rose from 228 to 231. Around the same time, there was conversion of the Union Territories of Himachal Pradesh, Manipur and Tripura into full-fledged states; but that did not affect their representation in the Council of States, as they continued to have the same number of seats as they were holding earlier as union territories.

In 1975, when Sikkim, a neighbouring kingdom, became a state within the Indian union under the Constitution (Thirty-sixth Amendment) Act 1975, it was also allotted one seat in the Council of States.

Lastly, in 1987, when the composite Union Territory of Goa, Daman and Diu was reorganised under the Goa, Daman and Diu Reorganisation Act 1987, and Goa became a state and Daman and Diu a separate union territory, the new State of Goa also got representation in the Council of States, raising the total strength of elective seats in the Council to the present number of 233.[9]

From November 2000, three new States Chhattisgarh, Jharkhand and Uttaranchal have been formed by the reorganisation of the States of Madhya Pradesh, Bihar and Uttar Pradesh respectively, under the Madhya Pradesh Reorganisation Act 2000, Bihar Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000. Earlier, the States of Madhya Pradesh, Bihar and Uttar Pradesh had been allocated 16, 22 and 34 seats respectively in the Council of States. Under the provisions of these Acts, the number of seats allocated to Madhya Pradesh, Bihar and Uttar Pradesh was reduced to 11, 16 and 31 respectively. The new states of Chhattisgarh, Jharkhand and Uttaranchal have 5, 6 and 3 representatives respectively in the Council of States. These readjustments did not, however, affect the total number of elected members of the Council, which remained 233, as earlier. Nor did these readjustments adversely affect the term of office of any of the sitting members of the Council representing earlier the States of Madhya Pradesh, Bihar and Uttar Pradesh, as the above Acts made provisions for reallocation of all those sitting members to the reorganised states according to their revised quota of seats. In certain cases, some of these members had been assigned by name to the new states, and, in the remaining cases, the Chairman of the Council had been authorised to make such assignment by draw of lots.[10]

9 See Appendix I.

Electorates and Electoral Colleges for Elections to Council of States

Electorates for election of representatives of states —The representatives of the states in the Council of States are elected by the elected members of the legislative assemblies of the states concerned [art 80(4)]. In such elections, the nominated members, if any, of the state legislative assemblies have no right to participate.

The Constitution of India makes some special provisions in relation to the State of Jammu and Kashmir under art 370. In view of such special provisions, the Constitution of India applies to that state, subject to such exceptions and modifications, as the President may by order specify, in consultation with the government of that state. Accordingly, the Constitution of India was initially applied to the State of Jammu and Kashmir, with such modifications as were specified in the Constitution (Application to Jammu and Kashmir) Order 1950 (CO 10). According to such modified provisions of art 80(4), the four representatives of the State of Jammu and Kashmir in the Council of States, as first constituted, were chosen by the President on the recommendation of the state government. The state government had, in turn, acted upon a unanimous resolution of the constituent assembly of the state in recommending the names of the persons to be chosen by the President. This modification in art 80(4) of the Constitution of India was, however, done away with by the Constitution (Application to Jammu and Kashmir) Order 1954 (CO 48) which superseded the 1950 Order (CO 10). Thus, from 1954 onwards, the representatives of the State of Jammu and Kashmir in the Council of States are also elected by the elected members of the state legislative assembly, as in the case of other states.

Electoral colleges for election of representatives of Part C states —Originally, as mentioned above, the Indian union consisted of three categories of states, namely, Part A states, Part B states and Part C states. Whereas, each of the Part A states and Part B states had its separate state legislative assembly, some of the Part C states had no such assemblies. Therefore, it was provided in art 80(5) that the representatives of the Part C states in the Council of States shall be chosen in such manner as

10 The Madhya Pradesh Reorganisation Act 2000, Bihar Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000, ss 7 and 8.

Parliament may by law prescribe. Accordingly, Parliament made specific provisions in Part IVA of the Representation of the People Act 1950 for choosing the representatives of Part C states in the Council of States. These provided for the constitution of special electoral colleges for these states for the purpose. In those Part C states which had legislative assemblies, the elected members of those assemblies constituted such electoral college. In the other Part C states, which had no legislative assemblies, such electoral college was to be specially constituted by election on the basis of adult franchise from territorial constituencies in the state, to be specifically created for the purpose. At the time of the initial constitution of the Council of States in 1952, Tripura was to elect one representative to that Council, but it had no legislative assembly then and, therefore, an electoral college was specially constituted for the purpose on the aforesaid basis.

Electoral colleges for election of representatives of union territories—The above provisions in respect of Part C states were, however, short-lived, as with the reorganisation of the Indian states in 1956 by the Constitution (Seventh Amendment) Act 1956, the distinction between Part A and Part B states was abolished and Part C states either ceased to exist, or were converted into union territories.

Whereas earlier all the Part C states were represented in the Council of States, all the union territories so created were, however, not given such representation. Out of the six union territories then created, only four union territories, namely, Delhi, Himachal Pradesh, Manipur and Tripura, were given representation in the Council of States. Article 80(5) was amended by the Constitution (Seventh Amendment) Act 1956 to provide that, like the representatives of Part C states, the representatives of the above union territories in the Council of States shall also be chosen in such manner as Parliament may by law prescribe. Pursuant thereto, Parliament first provided, by amending s 27A of the 1950 Act in 1956, that the representatives of Himachal Pradesh, Manipur and Tripura shall be elected by special electoral colleges consisting of elected members of the territorial councils to be constituted for those union territories under the Territorial Councils Act 1956. Subsequently, when the legislative assemblies were created for these union territories under the provisions of the Government of Union Territories Act 1963, those legislative assemblies were specified as the electoral colleges for these territories to elect their representatives to the Council of States. Likewise, when new Union Territories of Pondicherry, Arunachal Pradesh and Mizoram were created and given representation in the Council of States, their legislative assemblies became the electoral college for electing their representatives to the Council.

In so far as the Union Territory of Delhi is concerned, it was first provided, by amending s 27A(3) of the 1950 Act by the Delhi Municipal Corporation Act 1957, that its representatives in the Council of States would be elected by an electoral college consisting of (i) the councillors of the Delhi Municipal Corporation, and

(ii) 10 other persons to represent the areas within the New Delhi Municipal Committee and the Delhi Cantonment Board, to be chosen by direct election on the basis of adult suffrage in accordance with rules made by the Central Government in this behalf. Subsequently, when a metropolitan council was provided for Delhi under the Delhi Administration Act 1966, the elected members of that Council substituted the earlier electoral college. Finally, Delhi also got a legislative assembly under the Government of National Capital Territory of Delhi Act 1991, and the elected members of the assembly now constitute the electoral college for electing its representatives to the Council of States [s 27A(3) of the 1950 Act].

As mentioned above, at present, out of the existing seven union territories, only two union territories, namely, the National Capital Territory of Delhi and the Union Territory of Pondicherry, have been provided representation in the Council of States under the Fourth Schedule to the Constitution. Their representatives are elected by electoral colleges consisting of elected members of their legislative assemblies.

Thus, in the ultimate analysis, Parliament has prescribed that the representatives, if any, of the union territories in the Council of States shall also be elected by an electoral college consisting of the elected members of the legislative assembly of the union territory concerned.

Right of electors to vote before assumption of seat in the legislative assembly—An elected member of the legislative assembly of a state or a member of the electoral college of a union territory is entitled to participate as an elector at an election to the Council of States, even before he has assumed his seat in the legislative assembly and has yet to make and subscribe the requisite oath or affirmation as a member of the assembly under the Constitution, before taking such seat. A question arose in *Pashupati Nath Sukul v Nem Chandra Jain*,[11] whether the members of the newly constituted Legislative Assembly of Uttar Pradesh could participate in the biennial election to the Council of States in 1980, before they had taken their seats in the new assembly after taking the requisite oath under art 188 of the Constitution. In that case, the President, on the recommendation of the Election Commission, had issued the notification under s 12 of the 1951 Act commencing the process for the biennial election to the Council of States from the State of Uttar Pradesh on a date which was before the date fixed for the first meeting of the newly constituted legislative assembly of the state. After the election, one of the defeated candidates challenged the validity of the entire electoral process by an election petition before the Allahabad High Court, on the ground that the members of the state legislative assembly could not participate in the impugned election before they had taken their seats in the state assembly by taking the requisite oath under art 188 of the Constitution. The Allahabad High Court accepted the contention of the petitioner

11 AIR 1984 SC 399.

and declared the whole election as void. However, the Supreme Court reversed the decision of the High Court, holding that the members of the newly elected legislative assembly became members of that assembly as soon as the assembly was constituted by the Election Commission by its notification under s 73 of the 1951 Act, and such members could participate in all non-legislative activities, including the election to the Council of States, even before taking their seats in the assembly. This view was reaffirmed by the Supreme Court by its order of 6 January 1997,[12] when this question was again raised before the apex court relating to the biennial election to the Council of States from the State of Uttar Pradesh in that year, which was also called before the state assembly was summoned for its first meeting.

Application of Tenth Schedule to the Constitution to voting at elections to Council of States—In other words, the Supreme Court held that the elections to the Council of States by the elected members of the state legislative assemblies are non-legislative activities. If so viewed, the provisions of the Tenth Schedule to the Constitution relating to disqualification on the ground of defection cannot be said to apply to voting at such elections.

If there be any doubt on this aspect, it now stands removed by the Supreme Court in its judgment dated 22 August 2006 in the matter of *Kuldip Nayar v Union of India and Ors*,[13] wherein the apex court observed that 'The contention that the right of expression of the voter at an election for the Council of States is affected by open ballot is not tenable, as an elected MLA would not face any disqualification from the Membership of the House for voting in a particular manner. He may at the most attract action from the political party to which he belongs.'

Right to vote when legislative assembly is suspended—The right of members of a state legislative assembly to elect the representatives of the state to the Council of States does not get affected, if the assembly is kept under suspended animation during President's rule imposed in the state. On 11 May 1987, the State of Punjab was put under President's rule, but the state legislative assembly was not dissolved and was kept under suspended animation. The presidential election fell due in July-August 1987. The members of the Punjab legislative assembly, then under suspension, duly participated at that presidential election as members of the electoral college, which consists of elected members of all state legislative assemblies and elected members of both the Houses of Parliament. On that analogy, the members of a suspended legislative assembly have a right to participate in an election to the Council of States too, which is also held by the elected members of the legislative assembly. In fact, the members of the Uttar Pradesh legislative assembly did participate in the biennial election to the Council of States held in 1996, though the legislative assembly of that state stood suspended at the relevant time.

12 *Madhukar Jetly v Union of India and Ors* (1997) 11 SCC 111.

13 [2006] 8 SCALE 257.

Right to vote of a member who has been suspended from the House—The right of members of a state legislative assembly to participate in elections to the Council of States (or a state legislative council) does not get affected during the period of his suspension and he still has the right to vote at the above elections, as these elections have been held by the Supreme Court to be non-legislative activities. Going by this view, the Election Commission recently allowed certain suspended members of the Andhra Pradesh legislative assembly to participate in elections held in March 2013 to the state legislative council by members of the state legislative assembly as well as in the elections to that Council from the local authorities' constituencies where they were *ex officio* members of the constituent local authorities by virtue of being members of the state legislative assembly.

Right to vote of a member, whose election has been declared void, during pendency of his election appeal—An elected member of a state legislative assembly, whose election has been set aside by the state High Court on an election petition, but in whose favour a conditional stay has been granted by the Supreme Court during the pendency of his appeal, permitting the member concerned to sign the assembly's attendance register but not permitting him to take part in the proceedings of the House, is not permitted to vote at election to the Council of States. The question whether such member should be permitted to vote at an election to the Council of States first arose in 1968 in the case of Shri Satyanarayana Mitra, a member of the West Bengal Legislative Assembly, whose election from the Bankura assembly constituency was declared void by the Calcutta High Court in Election Petition No 1 of 1967 and the high court's order was stayed by the Supreme Court, subject to the above said conditions. As the law on this issue was silent, the Election Commission considered it advisable to refer the matter to the Supreme Court for directions. The Supreme Court, clarifying their stay order of 27 October 1967[14] directed (vide their letter No D 5299/67-SC III, dated 7 February 1968 to the Election Commission), that the member concerned should not be allowed to participate in the election to the Council of States. Thereafter, as a rule, no such member of any state legislative assembly has been permitted to either propose the name of any candidate or to vote at any election to the Council of States.

But the situation will be different if the Supreme Court grants an absolute stay of the High Court's order declaring the election void. In such a case, the order of the High Court shall be deemed never to have taken effect under s 107 of 1951 Act, and the member concerned shall continue to enjoy all rights and privileges of a member of the legislative assembly without any fetters, including his right to participate in election to the Council of States. The Election Commission allows such members to participate in elections.

14 *Satyanarayana Mitra v Bireswar Ghose* Civil Appeal No 1408 (NCE) of 1967.

Manner of Elections

System of elections—The election to the Council of States, whether by the elected members of the legislative assembly of a state or by the electoral college for any union territory, is held in accordance with the proportional representation system,[15] by means of the single transferable vote [art 80(4) and art 80(5) read with s 27H of the 1950 Act]. As observed by the Supreme Court in *Ananga Uday Singh Deo v Ranga Nath Mishra and Ors*,[16] this provision has been adopted from the Constitution of Eire. The object of introducing proportional representation in these elections is to give each minority group an effective share as per its strength. Each elector has only one vote in the sense that it will be capable of electing one candidate only, but that vote will not get wasted in case the candidate whom he wishes to elect has got more than the required number of votes, called the quota. As the elector is required to indicate his multiple preferences his vote which is surplus in the hand of the elected gets transferred to the next candidate.

Open voting—Initially, it was provided in s 59 of the 1951 Act that the votes at elections to the Council of States shall be given by ballot in the manner to be prescribed by rules. Voting by ballot is normally presumed to be secret. The procedure prescribed for voting at these elections thus provided for maintenance of secrecy at the time of casting the votes by electors and the ballot paper issued to an elector could be cancelled if he violated the secrecy of vote at the time of exercising his franchise.[17] However, Parliament observed[18] that in many cases electors at these elections, who are elected members of the state legislative assemblies and are mostly

15 The proportional representation system basically aims to distribute the seats, so far as practicable, in proportion to the strength of various political parties or groups in the state legislative assembly. It is essentially a preferential voting system, where the vote is exercised by recording relative preferences for the candidates on a single ballot paper. The manner of recording votes and counting of votes under the system has been explained in greater detail in ch 13 and ch 14 on Poll and Counting of Votes.

16 AIR 2001 SC 2992.

17 Rule 39A read with r 70 of the 1961 Rules.

18 Statement of objects and reasons appended to the Bill introduced on 20 November 2001 which was ultimately enacted as the Representation of the People (Amendment) Act 2003 stated:
'...The Ethics Committee of Parliament in paragraph 19 of its first report presented to Parliament on 8 December 1998 recommended that the issue relating to open ballot system for elections to the Rajya Sabha be examined. The issue has again given rise to concerns in the wake of allegations of money power made in the media in respect to biennial elections to the Council of States held in March-April 2000. In the light of the above, the aforesaid issues were examined in depth by the Government and it has been decided to...introduce open ballot system for elections to the Council of States. Accordingly, suitable amendments are proposed to be made in certain sections of the Representation of the People Act 1951 relating to disqualification for membership of the Council of States, the manner of voting of elections, secrecy of voting and maintenance of secrecy of voting by officers, clerks, agents or other persons performing the election duty.'

chosen on the party tickets, were being bribed or lured to cast their votes against the official candidates of the parties concerned. The Parliament, therefore, considered it wise to make voting at these elections open in order to check these malpractices of bribery or allurements. In 2003, s 59 of the 1951 Act was amended by the Representation of the People (Amendment) Act 2003 (wef 28 August 2003), by inserting a proviso to the effect that 'the votes at every election to fill a seat or seats in the Council of States shall be given by open ballot'. Consequentially, ss 94 and 128 of the 1951 Act have also been amended to provide that it shall not be necessary for a witness or any person to maintain secrecy of voting in the trial of an election petition relating to any election to the Council of States, nor shall it be obligatory for any officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at any such election to maintain secrecy of voting.

To implement the above amended provisions of the 1951 Act, the abovementioned r 39A of the 1961 Rules and other relevant rules laying down the procedure[19] for recording and counting of votes at elections to the Council of States have also been amended by the Conduct of Elections (Amendment) Rules 2004 on 27 February 2004.

The above amendment to the law providing for open ballot system at elections to the Council of States was called in question before the Supreme Court[20] by Shri Kuldip Nayar, a former member of the Council of States, on the ground that it was violative of principles of secrecy and free and fair elections and thus unconstitutional. Some other writ petitions—one, by Shri Indrajit, a former member of the House of the People and a noted journalist—on similar grounds were also filed before the Supreme Court. By an interim order dated 9 April 2004, the Supreme Court made all elections to the Council of States held subsequent to the filing of the abovementioned writ petitions subject to the outcome of the writ petitions. A Constitution Bench of the Supreme Court, however, dismissed these writ petitions on 22 August 2006. The Supreme Court observed:

> ...Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimization. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected members of the legislative assemblies who in turn have party affiliations. The electoral systems world over contemplate variations. No one yardstick can be applied to an electoral system.

19 For detailed procedure for voting and counting of votes at elections to the Council of States, see ch 13 and ch 14 on Poll and Counting of Votes.

20 *Kuldip Nayar v Union of India and Ors* [2006] 8 SCALE 257; AIR 2006 SC 3127.

The question whether election is direct or indirect and for which house members are to be chosen is a relevant aspect. All over the world in democracies, members of the House of Representatives are chosen directly by popular vote. Secrecy there is a must and insisted upon; in representative democracy, particularly to upper chamber, indirect means of election adopted on party lines is well accepted practice.

The Supreme Court further observed that the secrecy of ballot and purity of elections should normally co-exist; but in the case of Council of States, the Parliament, in its wisdom, has deemed it proper that secrecy of ballot should be done away with in such an indirect election to ensure purity of election. The apex court held:

> ...The procedure by which an election has to be held should further the object of a free and fair election. It has been noted by the Parliament that in elections to the Council of States, members elected on behalf of the political parties misuse the secret ballot and cross vote. It was reported that some members indulge in cross voting for consideration. It is the duty of the Parliament to take cognizance of such misbehaviour and misconduct and legislate remedial measures for the same. Breach of Discipline of political parties for collateral and corrupt considerations removes the faith of the people in a multi party democracy. The Parliament, therefore, necessarily legislated to provide for an open ballot. A multi party democracy is a necessary part of the basic structure of the Constitution. An amendment to law intended to restore popular faith in parliamentary democracy and in the multi party system cannot be faulted. The principle of secrecy is not an absolute principle.

Another significant observation made by the Supreme Court is:

> ...The contention that the right of expression of the voter at an election for the Council of States is affected by open ballot is not tenable, as an elected MLA would not face any disqualification from the Membership of the House for voting in a particular manner. He may at the most attract action from the political party to which he belongs. Being a Member of the political party on whose ticket he was elected as an MLA, in the first place, he is generally expected to follow the directions of the party, which is one of the basic political units in our democracy.

Term of Office of Members

Term of office of elected members—As has been mentioned above, the Council of States is a permanent house of Parliament and is not subject to dissolution at any time. But the Constitution provides that, as nearly as possible, one-third of the members of the Council shall retire, as soon as may be, on the expiration of every second year, so that there is a continuous out-flow and in-flow of members in the Council every second year [art 83(1)].

Keeping in view the above constitutional scheme, the term of office of an elected member of the Council, other than a member chosen to fill a casual vacancy on the death, resignation, etc, of a sitting member, has been fixed by law as six years [s 154(1) of 1951 Act]. He shall automatically stand retired on the expiration of his term of office, even if his successor for any reason is not elected in time.

A member chosen to fill a casual vacancy serves for the remainder of his predecessor's term of office.

Term of office of nominated members—The term of office of a nominated member is also likewise fixed for six years. However, a member nominated to fill the casual vacancy of a nominated member, serves for the remainder of his predecessor's term of office [s 154(1) ibid].

Effect of delayed election on term of office—If, for any reason, an election to fill the regular vacancy of a member retiring on the expiration of his term of office, cannot be held in such time as may enable his successor to assume office on the day following the day of expiration of his term of office, the successor gets the full term of six years after his election, whenever held. But, as stated above, a member chosen to fill a casual vacancy only gets a curtailed term, coterminous with the term of office of his predecessor.

Commencement of Term of Office of Members

Date of commencement of term of member chosen to fill regular vacancy—The term of office of a member chosen (whether by election or by nomination) to fill the seat of a member retiring on the expiration of his term of office does not automatically commence on the date following the date on which the predecessor retired. It commences from the date on which the Central Government notifies in the Gazette of India, under s 71 of 1951 Act, the name of the member so elected or nominated [s 155(1) of the 1951 Act]. This notification is issued by the Central Government in the Ministry of Law and Justice, which takes care to ensure that it is issued on the day following the day of expiration of the term of office of the outgoing member, so that there is no interval between the expiration of the term of office of an outgoing member and the commencement of the term of office of the incoming member.

Date of commencement of term of member chosen to fill casual vacancy—However, in the case of a member chosen to fill a casual vacancy, no such separate notification under s 71 of 1951 Act is necessary. His term of office commences from the date on which the declaration about his election under s 67 of the said Act is published by the Central Government in the Gazette of India under s 67A of that

Act, or, as the case may, the notification announcing his nomination under art 80(1)(a) is issued [s 155(2) ibid].

Cycle of Biennial Retirements and Biennial Elections

Curtailment of term of office of members initially chosen to set the cycle in motion—As mentioned above, the Council of States was initially constituted on 3 April 1952, with 216 members—12 nominated by the President and 204 being the representatives of the states. In order to give effect to the constitutional mandate that as nearly as possible, one-third of the members of the Council shall retire every second year, the term of office of one-third of the 216 members initially chosen, by election or nomination, had to be curtailed to two years and of another one-third such members to four years, so that there was a cycle of biennial retirements and biennial elections as envisaged under the Constitution. Therefore, while fixing the normal term of office of members of the Council as six years, an enabling provision was made in s 154(2) of 1951 Act, empowering the President to make, by order, after consultation with the Election Commission, such provision as he thought fit for curtailing the term of office of the members chosen for the first constitution of the Council. The President made such order, known as the Council of States (Term of Office of Members) Order 1952, on 26 September 1952. The order provided that the 204 members representing the states would be grouped state-wise and the members of each group divided into three categories. That order further provided that a member so placed in the first category would get the full term of six years and retire on 2 April 1958, a member placed in the second category would have a four years term and retire on 2 April 1956 and, if placed in the third category, he would get only a two years term and retire on 2 April 1954. The names of the members to be placed in each of the three categories were to be determined by the Election Commission by drawing lots in public. Accordingly, the Election Commission drew such lots in public, after public notice, on 29 November 1952 and fixed the term of office of all the members initially chosen.

By this process, the constitutional mandate that, as nearly as possible, one-third of the members of the Council of States shall retire on the expiration of every second year, i.e., on the 2nd day of April of every alternate year, was sought to be adhered to and a cycle of biennial retirements was thus set in motion. The seats of members so retiring every second year were envisaged to be filled biennially by election of an equal number of members to replace the outgoing members and this cycle was envisaged to be repeated every second year by holding a 'biennial election'.

Like the elected members, the term of office of the 12 nominated members initially nominated was also curtailed in the same manner, so as to see that one-third of the nominated members also retired every second year.

Curtailment of term of certain members subsequently chosen—Subsequently, as and when any reorganisation of states took place, resulting in changes in the composition of the Council of States, eg., the reorganisation of states under the Constitution (Seventh Amendment) Act, 1956, similar provisions were made by law,[21] either for curtailing the term of office of some of the newly chosen members, without however affecting adversely the term of office of the then sitting members, or specifying the term of the newly chosen members.

Curtailment of term of present members not permissible—It is, however, noteworthy that the existing law does not permit any curtailment of the term of office of any members now chosen. Presently, every member elected at a biennial election to fill a regular vacancy serves for the full term of six years, even where his predecessor has retired earlier and the biennial election could not be held in due time for some reason. His six years term commences on the date on which the notification containing the names of members elected at a biennial election in any state or union territory is published in the Gazette of India by the Central Government under s 71 of 1951 Act.

Disturbance of Cycle of Biennial Retirements

The above explains how the cycle of biennial retirements or as nearly as possible, one-third of the members of the Council of States on the 2nd day of April of every second year and of the biennial elections of an equal number of members to succeed them was set in motion. This cycle of biennial retirements and biennial elections operated normally, up to the year 1962. But the cycle got disturbed thereafter, mainly for the reason that the electorate or the electoral college in some of the states and union territories for these elections was not in place when the elections became due as per the above cycle. In 1962, in the case of Union Territory of Delhi, the electoral college for election to the Council of States consisted of the Councillors of the Delhi Municipal Corporation (as there was no legislative assembly for this union territory at that time). A general election was held to the Delhi Municipal Corporation in March 1962 and the new corporation was constituted on 22 March 1962, hardly leaving sufficient time for holding an election to the Council of States before the expiry of the term on 2 April 1962 of the member elected from Delhi. Around the same time, a general election to the legislative assembly of Jammu and Kashmir was also held. The earlier assembly was dissolved after the general election on 31 March 1962 and the new assembly was constituted on 2 April 1962. The elections of the representatives of Delhi and Jammu and Kashmir were consequently delayed and the members so elected assumed office on 16 April 1962 to succeed the representatives who had already retired on 2 April 1962. There was a further disturbance in the above cycle in 1966 in respect of three representatives of the State of Kerala who retired on 2 April 1966. The biennial election from that state could

21 See sub-s (2A) of s 154 of 1951 Act as inserted by the Adaptation of Laws (No 2) Order 1956 issued under the Constitution (Seventh Amendment) Order 1956.

not be held in due time, as the state legislative assembly then stood dissolved and the state was under President's rule. These vacancies were subsequently filled on 22 April 1967, when the new state assembly was constituted after a general election in the state. Subsequently, the above cycle of biennial retirements has been seriously disturbed in the case of several other states, like, Assam, Gujarat, Haryana, Punjab, Tamil Nadu, Uttar Pradesh, and West Bengal, where the biennial elections could not be held on the dates originally due, because of the non-existence of the state legislative assemblies at the relevant time.

As a result, at present, some or the other members of the Council of States are retiring almost every year, instead of one-third members every second year, as envisaged under the Constitution.

Efforts to Restore Cycle of Biennial Elections

By way of judicial intervention—This non-adherence to the scheme of biennial retirements and biennial elections contemplated by the Constitution has been sought to be highlighted by certain individuals and organisations. One of them approached the Allahabad[22] and Delhi[23] High Courts and also the Supreme Court[24] to seek remedy. However, he chose to withdraw the petitions before the Allahabad High Court and the Supreme Court, and the Delhi High Court, by its order dated 23 May 1994, dismissed his writ petition on the ground that he could not be permitted to approach the Court again and again on the same issue, particularly when he withdrew his earlier petitions. However, the Patna High Court took this matter seriously and directed the Union of India and the Election Commission to take remedial steps to restore the disturbed cycle of biennial retirements. However, the said cycle of biennial retirements still remains disturbed.

By way of amendment to law—The Election Commission has also expressed its concern in the matter and has made detailed proposals[25] to the Government of India to amend the law so as to restore the cycle of biennial retirements and biennial elections to be in accord with the original scheme of the Constitution. The Commission has proposed that all members, including nominated members, of the Council of States may be divided into three categories, as was done at the time of the initial constitution of the Council in 1952, and the date of retirement of members falling in each category may be permanently fixed as the 2nd day of April of every second year; and if, for any reason whatsoever, a biennial election is not held in due time to elect successors to replace the outgoing members on the 2nd day of April of

22 *Rama Shankar Sanwal v Union of India and Ors* Writ Petition No 10801 of 1990.
23 *Rama Shankar Sanwal v Election Commission of India and Ors* Civil Writ No 1992 of 1994.
24 *Rama Shankar Sanwal v Union of India and Ors* Writ Petitions (Civil) Nos 73 and 487 of 1992.
25 Proposals of the Election Commission for Electoral Reforms sent to the Government of India in February 1992.

any such year, the members subsequently elected to fill those vacancies should serve for the remainder of the term of their predecessors, and not for the full term of six years as presently provided in s 154 of 1951 Act. In order, however, that the sitting members of the Council do not suffer adversely, the Commission has further proposed that the amendment to the law may have a prospective effect and only the members getting elected after the amendment may have a curtailed term, if any. Though, these proposals of the Election Commission were initially made to the government in the year 1992 and reiterated from time to time, the situation remains the same.

Biennial Elections Not Held in Time—Resultant Vacancies Not to be Combined

Combination not permissible, if vacancies arise on different dates—If a biennial election is not held in due time due to non-existence of the state legislative assembly concerned at the relevant time and the resultant vacancies remain unfilled for a long time during which some other regular vacancies also arise, the vacancies so arising cannot be combined and filled by a common election. The vacancies arising on each separate occasion have to be filled by separate elections, even if a common time table for such elections is adopted on the constitution of the assembly concerned.

The question whether such vacancies could be combined and filled by a common election arose for the first time in 1983 in the case of seats allocated to the Union Territory of Delhi in the Council of States. Delhi has three seats in the Council. One of these seats held by Shri Khurshid Alam Khan fell vacant on 16 April 1980 on the expiration of his term of office. The vacancy could not be filled as the electoralcollege (Metropolitan Council of Delhi) stood dissolved at that time. Another seat held by Shri Charanjit Chanana also fell vacant on 3 April 1982. This vacancy could also not be filled because the Delhi Metropolitan Council was still not yet constituted. When the said Council was constituted after a general election in 1983, the question of filling these two vacancies was taken up by the Election Commission. The two main political parties in the Delhi Metropolitan Council took opposite views—the Bharatiya Janata Party contending that the two vacancies should be combined and filled by a common election as the same were to be filled under the system of proportional representation, and the Indian National Congress contending that the same could not be combined as each vacancy fell under a different category and arose on a different date. After examining the constitutional scheme, the Election Commission agreed with the Indian National Congress and took the view that these two vacancies could not be combined,[26] and accordingly held two separate elections, though following a common time table for both the elections in November 1983. These elections were challenged before the Delhi High Court by two separate election petitions. The High Court dismissed those petitions

26 Re *Elections to the Rajya Sabha by the Electoral College of the Union Territory of Delhi in November* 1983 74 ELR 42.

agreeing with the view of the Election Commission.[27] Appeals[28] to the Supreme Court were filed, but the same were dismissed on 17 December 1990 by that Court as infructuous, leaving the question open for decision in some future case, as the members elected had retired meanwhile.

Combination not permissible, even if vacancies arise on same date but fall under different categories—The above question of combination of vacancies arose again in 1994—this time, in respect of all the three seats allocated to Delhi in the Council of States. The two seats which were filled in November 1983 by holding two separate elections, again fell vacant on 21 November 1989 on the expiration of term of office of the members elected in 1983. Two separate biennial elections to fill those vacancies were notified on 1 November 1989, but the same were cancelled on 6 November 1989 on the representations of political parties who were then busy in connection with the then on-going general election to the House of the People. On 13 January 1990, the Delhi Metropolitan Council was dissolved. No new House of the Delhi Metropolitan Council was constituted, because the government was considering certain radical changes in the administrative set up for the Union Territory of Delhi and the administration of Delhi was meanwhile taken over by the President under the provisions of the Delhi Administration Act 1966. Meanwhile, the third seat allocated to Delhi in the Council of States also fell vacant on 3 April 1990. The contemplated changes in the administrative set up of Delhi were finally made by the Government of National Capital Territory of Delhi Act 1991, which provided for the constitution of a legislative assembly for the National Capital Territory of Delhi and made such assembly as the electoral college for the purpose of filling the above seats of representatives of Delhi in the Council of States. Such electoral college came into existence on 1 December 1993, when the Delhi Legislative Assembly was constituted after the first general election held in pursuance of the above Act. On the coming into existence of the electoral college, the Election Commission decided to fill the above three vacancies by holding three separate elections. This time, the Indian National Congress felt aggrieved by this decision of the Commission and agitated the matter before the Delhi High Court.[29] The Delhi High Court dismissed the writ petition on 14 January 1994, permitting the holding of three separate elections for filling the said three seats. The High Court, agreeing with the view of the Commission, held that once the three seats allocated to Delhi in the Council of States were divided into three categories in 1956, separate elections had to be held to fill each of these seats falling into three different categories, even if they were being filled at the same time. The High Court rejected the contention of the petitioner that a common election should be held because the

27 *Surinder Pal Ratawal v Shamim Ahmed* AIR 1985 Del 22.
28 Supra.
29 *AK Walia v Union of India and Ors* Civil Writ No 132 of 1994.

seats were to be filled in accordance with the system of proportional representation by means of the single transferable vote. The High Court also observed that if discretion was left to the Union of India and Election Commission to hold elections simultaneously for seats falling vacant at different times, such discretion was capable of being abused for favouring one party or the other by keeping the elections in abeyance for some periods.

The above principle of holding separate elections to fill vacancies arising under different categories was again applied by the Election Commission at the time of holding biennial elections in the State of Punjab in 1992. Three seats of representatives of that state fell vacant in the Council of States on 3 April 1988, and two further vacancies of such representatives arose on 10 April 1990. These five vacancies could not be filled in 1988 and 1990, because there was no legislative assembly in that state during that period. Subsequently, when the Punjab legislative assembly was constituted in February 1992, the above five vacancies were filled on 11 April 1992 by holding two separate elections—one for filling the three vacancies which arose in 1988 and the other for the two vacancies which arose in 1990. Subsequently, after six years, when these five seats again fell vacant on 11 April 1998 on the expiration of the term of office of the members chosen in April 1992, the Commission decided to hold two separate elections, though adopting a common schedule for both the elections. This decision of the Commission was also sought to be questioned by one of the political parties before the Punjab and Haryana High Court.[30] But the High Court did not go into the question and dismissed the petition on 17 March 1998, as by that time the electoral process for these elections had already commenced and the Court found that their jurisdiction was barred under art 329(b) of the Constitution. A petition for special leave to appeal[31] was filed before the Supreme Court, but the apex court dismissed the same as infructuous on 3 April 1998, as by that time the impugned elections had already been held. Thereafter, another writ petition[32] was filed before the Punjab and Haryana High Court raising more or less the same issue which was agitated in the earlier writ petition dismissed on 17 March 1998. This second writ petition was also dismissed by the High Court *in limine* on 31 May 1999. However, on the matter being taken to the Supreme Court,[33] the apex court remanded the petition back to the Punjab and Haryana High Court on 4 April 2001 for consideration of the issue raised and disposal on merits. The high court, however, dismissed the matter on 10 August 2004 and dismissed even the review petition filed in the matter on 1 December 2006 as infructuous as

30 *Punjab Congress Committee v Election Commission of India and Ors* Civil Writ Petition No 3681 of 1998.
31 SLP(C) No 5754 of 1998.
32 *Rabinder Singh Sohil v Union of India and Ors* CWP No 7476 of 1999 dismissed *in limine* on 31 May 1999.
33 *Rabinder Singh Sohil v Union of India and Ors* Civil Appeal No 2562 of 2001.

the concerned members of Parliament had meanwhile retired in April 2004. The Election Commission is, therefore, still following the above referred decision of the Delhi High Court by holding separate elections for vacancies falling in different categories. The latest example is the holding of three separate biennial elections to the Council of States from the National Capital Territory of Delhi in January 2012 to fill three vacancies which all fell on the same date, ie, 27 January 2012, but which were considered to have fallen under different categories.

HOUSE OF THE PEOPLE

House of the People Not a Permanent House

The House of the People is the lower House of Indian parliament. It consists of the representatives of the people of India, chosen directly by them. It is to this House that the union council of ministers is collectively responsible. But it is not a permanent House and is subject to dissolution from time to time in accordance with the provisions of the Constitution [art 83(2) and art 85(2)(b)].

There are, however, sufficient safeguards in the Constitution to ensure that the House of the People, whenever dissolved, does not remain out of existence for more than six months at any time. The Constitution provides that six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session [art 85(1)]. Earlier, the Election Commission and the Central Government were of the view that the above provisions of art 85(1) applied even in relation to a dissolved House of the People and it was considered obligatory under the Constitution to conduct a general election and to constitute a new House in such time as may enable the new House to meet for its first sitting within six months of the last sitting of the old dissolved House. The Supreme Court has, however, held that the provisions of art 85(1) apply only in relation to a live House and not to a dissolved House.[34] But the apex court has further held that the general election to constitute the new House in the case of premature dissolution of the earlier House should be held within six months from the date of dissolution.

Duration of the House of the People

Normal duration—The normal duration of the House of the People is five years from the date appointed for its first meeting. Unless sooner dissolved, the expiration of the said period of five years shall operate as automatic dissolution of the House [art 83(2)]. The noteworthy point here is that the five-year term of the House commences not from the date of its constitution following a general election, but from the date appointed for its first meeting after its constitution. The Supreme

34 Re *Special Reference No 1 of 2002* (2002) 4 LRI 169, AIR 2003 SC 87, (2002) 8 SCC 237.

Court has held in *Rameshwar Prasad v Union of India and Ors*[35] (popularly known as Bihar dissolution case) that due constitution of the House and commencement of its duration are distinctly different. For a short period, the normal duration of the House of the People was increased from five years to six years by amending art 83(2) by the Constitution (Forty-second Amendment) Act 1976. However, the said article was again amended by the Constitution (Forty-fourth Amendment) Act 1978 and the original duration of five years of the House of the People was restored.

Extension of duration—The normal duration of five years of the House of the People may, however, be extended by Parliament by law. But this extension can be made only while a proclamation of emergency under art 352 is in operation, in the whole of the country or in any part thereof. Such extension can be made for a period not exceeding one year at a time, and not extending in any case beyond a period of six months after the proclamation of emergency has ceased to operate [proviso to art 83(2)].

Only once so far, has the duration of the House of the People been extended beyond its normal duration. The fifth House of the People was constituted after the general election in March 1971 and its normal term of five years was to expire on 18 March 1976. Its term was, however, extended, from five years to six years, by the House of the People (Extension of Duration) Act 1976, while the proclamation of emergency was in operation in the whole of India. Meanwhile, art 83(2) was also amended by the Constitution (Forty-second Amendment) Act 1976, enlarging the normal duration of the House of the People from five years to six years, and this amendment was made applicable to the then existing House whose term stood extended up to 18 March 1977, as aforesaid. Subsequently, the duration of that House was still further extended by another one year up to 18 March 1978, by the House of the People (Extension of Duration) Amendment Act, 1976. However, that House was dissolved by the President on 18 January 1977, on the recommendation of the council of ministers, before the expiration of its extended term, which was to go up to 18 March 1978.

Premature dissolution—Before the expiry of its normal duration of five years, the House of the People may be dissolved prematurely at any time by the President [art 85(2)(b)].

Under the Constitution, the President has to act on the aid and advice of the council of ministers headed by the Prime Minister.[36] Thus, any premature dissolution of the House of the People shall ordinarily be ordered by the President on the recommendation of the council of ministers. But where the council of ministers has lost confidence of the House of the People to whom it is collectively

35 (2006) 2 SCC 1, AIR 2006 SC 980.

36 See *UNR Rao v Indira Gandhi and Ors* AIR 1971 SC 1002 and *Shamsher Singh v State of Punjab and Ors* AIR 1974 SC 2192.

responsible and has been defeated at the floor of the House, its recommendation to dissolve the House may not bind the President. In such circumstances, he will be duty bound to explore the possibilities of forming an alternative council of ministers, which enjoys the confidence of the House of the People. He may dissolve the House where he fails in his efforts to install an alternative government enjoying the confidence of that House.

Such situation arose in December 1997, and again in April 1999, when the eleventh and twelfth Houses of the People had to be dissolved by the President in the aforesaid circumstances on 4 December 1997 and on 26 April 1999 respectively. The eleventh House of the People was constituted in May 1996 following a general election on the expiration of the normal five-year duration of the earlier House. It was normally to continue up to the middle of the year 2001. But on 28 November 1997, it became apparent that the union council of ministers, then headed by Shri Inder Kumar Gujral as the Prime Minister, had lost confidence of that House, with the withdrawal of support to it by the Indian National Congress. The President explored[37] all possibilities of installing an alternative government, but it became clear to him by the evening of 3 December 1997 that no political combination in the House of the People was in a position to offer or receive the lawfully valid support of the critical number of members of that House required by that combination to secure a majority in the House. In such a situation, the President accepted the recommendation of the council of ministers and dissolved the eleventh House of the People on 4 December 1997. History almost repeated itself in relation to the twelfth House of the People which came to be constituted in February 1998 following the general election on the dissolution of the eleventh House in December 1997. This House was normally to go up to the early part of the year 2003. But on 17 April 1999, the union council of ministers headed by Shri Atal Behari Vajpayee as the Prime Minister, lost the vote on the motion of confidence in the House of the People by the slenderest of margins, ie, by just one vote (269: 270). Again, the President, despite his best efforts[38] for about a week to avoid ordering a mid-term election and to see whether a party, or a combination of parties, could provide a workable, viable alternative government with the prospect of stability for a substantial period of time if not for the remaining term of the twelfth House of the People, ultimately came to the assessment that the said House was not capable of yielding a government with a reasonable prospect of stability. On 26 April 1999, the council of ministers recommended to the President that the House might be dissolved so that a fresh mandate could be obtained from the people. The President also reached the conclusion that the time had arrived for the democratic will of the people to be ascertained again and, accordingly, he dissolved the 12th House of the People on 26 April 1999 paving the way for a fresh general election in the country.

37 Press Communiqué, dated 4 December 1997 of the President's Secretariat.

38 Press Communiqué, dated 26 April 1999, of the President's Secretariat.

In 2004 also, the thirteenth House of the People was prematurely dissolved by the President, on the advice of the Union Council of Ministers, on 6 February 2004, whereas the normal five-year term of that House was to go up to 19 October 2004.

Time limit for holding general election on premature dissolution—In all the cases of premature dissolution of the House of the People so far, general elections to constitute new Houses have been held by the Election Commission within six months of the date of the last sitting of the dissolved House. The Election Commission was all along of the view that, as prescribed in art 85(1) of the Constitution, six months should not intervene between the last sitting in one session of the House of the People and the date appointed for the first sitting of that House in the next session and that this provision applied even in the case of the last sitting of the dissolved House and the first sitting of the new House. However, the Supreme Court has held in Special Reference Case No 1 of 2002[39] that the provisions of art 85(1) do not apply in relation to a dissolved House. The Supreme Court further observed that no specific time limit for holding a general election to constitute a new House of the People on the premature dissolution of the existing House is expressly laid down either in the Constitution or in any other law; nevertheless, the Supreme Court, on consideration of all other relevant provisions in the constitution, held that the general election to constitute a new House of the People in the event of premature dissolution of the House should be held as early as possible and in any case within six months from the date of its premature dissolution (and not from the date of the last sitting of the dissolved House).

Effect of constitution of new House on the duration of existing House—A new House of the People may be constituted on the basis of a general election, either to replace an existing House on the expiration of its duration or to replace a House which has already been prematurely dissolved. When a new House is constituted to replace an existing House on the expiration of its duration, the normal five years duration of the existing House does not get affected thereby and the existing House can run for its full duration of five years [cl (b) of proviso to s 73 the 1951 Act]. The new House will replace the existing House and start functioning only when the existing House stands dissolved on the expiration of its duration or if it is dissolved earlier.

Prior to 1967, lame duck sessions of Parliament used to be held with the old House of the People even after almost all the results of the general elections to constitute new House were available. It was considered an anachronism in several quarters and it was felt that it would be more appropriate to hold a session of Parliament with the new House of the People in place of the lame duck session. The

39 Reference from the President of India under art 143 in the case of premature dissolution of the Gujarat legislative assembly on 19 July 2002 (2002) 4 LRI 169, AIR 2003 SC 87, (2002) 8 SCC 237.

law was, therefore, amended to empower the Election Commission to constitute the new House even if a few results of elections from certain parliamentary constituencies were not available because of the postponement of poll or delay in the completion of elections in those constituencies [s 73 of the 1951 Act, as amended by the Representation of the People (Amendment) Act 1967].

Now, by convention, the existing House is dissolved as soon as the new House is in a position to be constituted on the completion of the general election, barring elections from those constituencies in which the poll could not take place on the date originally fixed or where the date for completion of election has been extended for one reason or the other, so that a new government may be installed on the basis of the verdict given by the electorate at the general election and Parliament convened with the new House of the People.

Membership Strength of the House of the People

Maximum strength permissible—At present, the House of the People shall consist of not more than 550 elected members (art 81). In addition, the President may nominate not more than two members to that House belonging to the Anglo-Indian community, if he is of the opinion that that community is not adequately represented in the House (art 331).

Of the 550 elected members of the House of the People, not more than 530 members shall be chosen by direct election from territorial parliamentary constituencies in the states [art 81(1)(a)], and not more than 20 members shall be the representatives of the union territories chosen in such manner as Parliament may by law provide [art 81(1)(b)]. The Parliament has provided that even the representatives of the union territories in the House of the People shall be chosen by direct election from the territorial parliamentary constituencies in those territories [s 4(2) read with s 2(i), 1950 Act].

Manner of election of members to the House—All elections to the House of the People are held in accordance with the system of 'first past the post'. This system is also known as the plurality system. Under this system, the candidate securing the highest number of valid votes in his favour in comparison to the votes polled by other candidates in a constituency is the winner; that is to say, the winning candidate simply secures more votes than any other candidate in the constituency and it need not be an absolute majority of the votes cast.

Voting not compulsory—Voting at elections to Parliament or to state legislatures is not compulsory in India. Nor is there any requirement that a certain minimum number or percentage of votes must be polled for an election to be valid in a constituency.

Present strength of the House—The present membership strength of the House of the People is 543 (excluding the nominated members, if any, representing the

Anglo-Indian community). Whereas, the full quota of 530 seats earmarked for election from the states has been consumed in the allocation of the aforesaid 543 seats, the union territories have been allocated 13 seats.[40]

Manner of Allocation of Seats to the States

Uniformity in scale of representation—In order to ensure that every state is equitably represented in the House of the People, the seats earmarked for the states in that House shall be allotted in such manner that the ratio between the number of seats allotted to each state and the population of the state is, so far as practicable, the same for all states [art 81(2)]. However, this ratio does not apply in respect of small states having a population of not more than six million [proviso to art 81(2)]. Accordingly, at least one seat has been allotted in the House of the People to every state, even if its population does not qualify for allocation of even one seat on the application of the above population ratio.

The underlying object of the above provision laying stress on uniformity in the scale of representation of the states in the House of the People is mainly to follow the principle of 'one man one vote', so far as is practicable. On examination of the constitutional scheme, the Supreme Court has observed that the concept of 'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle, but not intended to be expressed with arithmetical precision. The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of the territory of India. The differing degrees of political development and maturity of various parts of the country may not justify standards based on mathematical accuracy. Historical considerations have justified different treatment to different states.[41]

Meaning of population—'Population' for the purposes of allocation of seats to the states in the House of the People means the population as ascertained at the last preceding census of which the relevant population figures have been published [art 81(3)]. However, there was a temporary freeze in relation to this provision, after the 1971-census, which was to be operative till the 2001-census, under the Constitution (Forty-second Amendment) Act 1976. This temporary freeze has now been extended, under the provisions of the Constitution (Eighty-fourth Amendment) Act 2001 and the Constitution (Eighty-seventh Amendment) Act 2003, until the publication of the relevant figures for the first census to be taken after the year 2026. Thus, the present dispensation is that, until the relevant figures for the first census taken after the year 2026 (which will normally be taken in the year 2031) have been

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40 See Appendix II.

41 *RC Poudyal v Union of India* AIR 1993 SC 1804.

published, the population for the purposes of allocation of seats to the states in the House of the People shall mean the population as ascertained at the 1971-census [proviso to art 81(3)and art 82].

Readjustment in Allocation of Seats After Each Census

Readjustment in allocation of seats to states—The population of the state being the basis for the allocation of seats to it in the House of the People, the Constitution provides for readjustment in such allocation of seats to the states in that House, upon the completion of each census. Such readjustment shall be made by such authority and in such manner as Parliament may by law determine (art 82).

Readjustment in allocation of seats to union territories—The word 'State' in art 82 means a state, and does not include a union territory. Accordingly, the authority determined by Parliament under art 82 makes readjustment in the seats allocated to the states only, and not to the union territories. The seats for the union territories in the House of the People have been allocated by Parliament itself from time to time.[42]

Freezing of readjustment up to year 2001—During 1975, when the proclamation of emergency was in force in the whole of India, there was an intensification of the drive to control the population of the country by resort to family planning methods. It was felt that the states which controlled the growth of population more effectively by vigorous implementation of the family planning drive might be suffering adversely in the matter of their representation in the House of the People in comparison to the states which were tardy in the implementation of that drive, if the allocation of seats to the states in that House was made on the basis of the latest population figures. In order to protect the interests of former states, it was decided by Parliament that there would be no readjustment in the seats as allocated to the states in the House of the People on the basis of the 1971 census, until the relevant figures for the first census taken after the year 2000 have been published [proviso to art 82 as inserted by the Constitution (Forty-second Amendment) Act 1976]. Such freeze also prohibited any readjustments either in the then existing total number of seats in the legislative assemblies of the states or in the territorial extent of parliamentary and assembly constituencies as demarcated on the basis of 1971 census, until the first census after the year 2000.

By the above embargo on any readjustments up to the year 2001 at least, the interests of the states inter se might have been protected temporarily. But, within the states themselves, this resulted in vast imbalances and huge variations in the

42 See Adaptation of Laws (No 2) Order 1956 passed in pursuance of the Constitution (Seventh Amendment) Act 1956; ss 40, 41(2)(a), 43B, 43C of the Government of Union Territories Act 1963, as amended from time to time; The North-Eastern Areas (Reorganisation) Act 1971, s14; The Goa, Daman and Diu Reorganisation Act 1987, s 12, Government of National Capital Territory of Delhi Act 1991, etc.

electorates of various parliamentary constituencies. For example, the Chandni Chowk parliamentary constituency and the Outer Delhi parliamentary constituency in the National Capital Territory of Delhi had very nearly equal population and equal electorate at the time of delimitation of these constituencies in 1975. During the intervening period between 1975 and 2005, the electorate of the Outer Delhi constituency has swelled up to nearly 35 lakhs because of the vast open spaces in the constituency having been developed into hundreds of housing colonies, whereas, meanwhile, the electorate of the Chandni Chowk constituency has dwindled down to just about 5 lakhs on account of most of its areas having become commercial and business centres. Similarly, many development projects and industries have come up in various parts of the country, which have either attracted people in large numbers for employment and settlement in and around those areas or uprooted and displaced them and made them settle elsewhere, having a material bearing on the electorates of the areas concerned. In 1990, these matters came to be considered by the Goswami Committee on Electoral Reforms set up by the Central Government under the Chairmanship of the then Union Law Minister, (late) Shri Dinesh Goswami. A compromise formula was worked out by that Committee, which envisaged that the number of seats allocated to various states in the House of the People on the basis of 1971-census may remain unchanged until 2001, so that the interests of states inter se are not affected in any manner by any demographic fluctuations meanwhile, but the extent of territorial parliamentary constituencies may be readjusted on the basis of 1981 census in order that imbalances in the electorates of various parliamentary constituencies which had resulted meanwhile as a consequence of the aforesaid embargo could be removed. To give effect to the above proposal of the Goswami Committee, a constitutional amendment Bill, namely, the Constitution (Seventy-first Amendment) Bill 1990 was introduced by the government in the Council of States on 30 May 1990. The Bill also provided for rotation of seats reserved for the scheduled castes, so that the same constituencies did not remain reserved for long periods. That Bill was passed by the Council of States, with the modification that the readjustment of territorial extent of constituencies may be done on the basis of 1991 census which had been completed in the meantime. It was then referred to a Select Committee of Parliament, which opined that an amendment to the Constitution was not necessary for rotation of reserved seats, as such provision could be made by Parliament under its existing powers under art 327 itself. However, the Bill was withdrawn by the government on 18 June 1994. Later, another abortive attempt was made to amend the Constitution to lift the embargo on the delimitation of constituencies by introducing another Bill called the Constitution (Eighty-third Amendment) Bill, 1994 in the House of the People on 25 August 1994. In this Bill, the provision for rotation of reserved seats was dropped. However, this Bill remained unattended, and ultimately lapsed with the dissolution of that House in May 1996. Subsequently, in July 1996, yet another Bill called the Constitution (Eightieth Amendment) Bill 1996 was introduced in the 11th House of the People seeking to

provide for fresh delimitation of parliamentary and assembly constituencies on the basis of the 1991 census, without affecting the existing number of seats allocated to various states on the basis of the 1971 census. But that Bill also could not be passed by Parliament, as it got bogged down in controversy over the issue whether reservation of seats for the scheduled castes and scheduled tribes should be made on the basis of the 1971 census or the 1991 census, and the Bill lapsed with the dissolution of the eleventh House of the People on 4 December 1997. The matter thus stood where it was after the above-mentioned amendment to the Constitution by the Constitution (Forty-second Amendment) Act 1976.

Further Freezing of Allocation of Seats up to the year 2026—The constitutional embargo put in 1976 on the readjustment in the allocation of seats to various states in the House of the People would have ordinarily ceased to be operative after the first census to be taken after the year 2000. However, in 2001, the Parliament considered that the considerations which weighed at the time of placing the above freeze in 1976 still held good, and any fresh allocation of such seats to the states in the House of the People on the basis of 2001 census might adversely affect the interests of those states which had been effective in implementing the population control measures. Therefore, Parliament amended further the provisions of art 82 of the Constitution by the Constitution (Eighty-fourth Amendment) Act 2001 to provide that the allocation of seats to the states as determined on the basis of the 1971 census shall remain unchanged until the first census to be taken after the year 2026. It was, however, provided that the number of seats to be reserved for scheduled castes and scheduled tribes out of the total number of seats allocated to a state shall be determined afresh state-wise on the basis of the 1991 census. It was also provided that the extent of all parliamentary constituencies shall be readjusted on the basis of the 1991 census. Subsequently, in 2003, on representations received by the government and on the recommendation of the Delimitation Commission set up under the Delimitation Act 2002 to implement the above amended provisions of the Constitution, the Constitution was still further amended by the Constitution (Eighty-seventh Amendment) Act 2003 to provide that, though the number of seats allocated to the states on the basis of 1971 census shall remain unchanged until the first census to be taken after 2026, the number of seats to be reserved for the scheduled castes and scheduled tribes shall be re-fixed on the basis of the 2001 census, and that the extent of all parliamentary constituencies in the country shall also be readjusted on the basis of the 2001 census.[43]

As a result, the existing 543 seats in the House of the People have been allocated to the states and union territories on the basis of the 1971 census and there has been no further readjustment on the basis of the subsequent censuses taken in the years 1981 and 1991. All these 543 seats are filled by direct elections from 543 single

43 See ch 6 for detailed discussion on the delimitation of constituencies on the basis of the 2001 census.

member parliamentary constituencies in the existing 28 States[44] and seven union territories.[45]

Changes in the Composition of the House of the People

Composition of the first House in 1952—Article 81 of the Constitution, which makes provisions for composition of the House of the People, originally provided that the House of the People shall consist of not more than 500 members. They were to be elected directly by the voters in the states, except in the case of the members representing the State of Jammu and Kashmir, the Andaman and Nicobar Islands (which were not included in any of the states and were centrally administered areas) and Part B tribal areas of Assam [art 81(2) as originally enacted]. The representatives of Jammu and Kashmir, Andaman and Nicobar Islands and Part B tribal areas were to be chosen in such manner as Parliament may by law provide. It was also provided in art 81(1)(b)[46] that the seats shall be so divided among the states that there shall not be more than one member for every 5 lakhs of the population and not less than one member for every 7.5 lakhs of the population. Keeping these parameters in view, Parliament itself allocated seats to the then existing nine Part A states, eight Part B states and 10 Part C states and the Andaman and Nicobar Islands and Part B tribal areas of Assam, for the purposes of the first general election to the House of the People (s 3 of 1950 Act r/w the First Schedule to that Act). The total number of seats so allocated was 497.[47] In allocating these seats, Parliament took into account the estimated population[48] of various states on 1 March 1950, as worked out by the Census Commissioner for India.

Accordingly, the first House of the People constituted in 1952 on the above basis consisted of 497 members. Of them, 489 members were elected directly from the territorial parliamentary constituencies in the states, and the remaining eight members—six members representing the State of Jammu and Kashmir and one each representing the Andaman and Nicobar Islands and Part B tribal areas of Assam—were nominated by the President. As was done in the case of representatives of the State of Jammu and Kashmir in the Council of States, the representatives of that State in the House of the People also were nominated by the President on the recommendation of the state government based on unanimous resolution of the constituent assembly of that state.

44 From November 2000, the number of states in India increased from 25 to 28; but the number of parliamentary constituencies remained 543, as earlier (see Appendix II).

45 Appendix II.

46 This provision was first amended in 1953 by the Constitution (Second Amendment) Act 1952 and then dropped altogether by the Constitution (Seventh Amendment) Act 1956, as it was considered unworkable in view of the fast growing population and the need to limit the number of seats in the House of the people.

47 Appendix II.

48 See Statement of Objects and Reasons appended to the Representation of the People Bill 1950.

Changes in composition on reorganisation of Madras state—In 1953, the composite State of Madras was reorganised. By the Andhra State Act 1953, a new State of Andhra was carved out of Madras and certain areas of Madras were also transferred to the adjoining State of Mysore. As a result of this reorganisation, the 75 seats earlier allotted to Madras were redistributed between Madras and Andhra as 46 and 28 respectively, and one additional seat was allotted to Mysore. The total number of seats in the House of the People, however, remained unchanged as 497.

Readjustments on the basis of the 1951 census—After the first general election in 1952, a Delimitation Commission was set up in 1953 under the Delimitation Commission Act 1952, in terms of art 82 (and art 170) to readjust the allocation of seats to the states in the House of the People (and to re-fix the total number of seats in the legislative assemblies of the states and to re-delimit the territorial parliamentary and assembly constituencies), on the basis of the 1951 census. That Commission re-worked out the entitlement of seats for the various states (except Jammu and Kashmir) in the House of the People on the basis of their population in the 1951 census and also issued orders to that effect, allocating 493 seats to those states in the House to be constituted next. In so far as the State of Jammu and Kashmir was concerned, six seats were allocated to it, first by the Constitution (Application to Jammu and Kashmir) Order 1950, and then continued by the Constitution (Application to Jammu and Kashmir) Order 1954, which still holds good. In addition, one seat each for the Andaman and Nicobar Islands and Part B tribal areas continued to be reserved for them.

Changes in composition on reorganisation of states in 1956—However, the allocation of seats so made by the Delimitation Commission was not given effect to for the purposes of the second general election that followed in 1957. Parallel to the functioning of the Delimitation Commission, another Commission, namely the States Reorganisation Commission, was engaged in the task of overall re-organisation of the constituent states of the Indian union on a more rational basis. The Government of India had appointed that Commission in December 1953 and on the basis of the report of that Commission, submitted in September 1955, Parliament first enacted the States Reorganisation Act 1956 and then the Constitution (Seventh Amendment) Act 1956. As per the Seventh Amendment to the Constitution which came into force from 1 November 1956, the territories of India were divided into 14 states, namely, (i) Andhra Pradesh, (ii) Assam, (iii) Bihar, (iv) Bombay, (v) Jammu and Kashmir, (vi) Kerala, (vii) Madhya Pradesh, (viii) Madras,[49] (ix) Mysore,[50] (x) Orissa, (xi) Punjab, (xii) Rajasthan, (xiii) Uttar Pradesh and (xiv) West Bengal; and six union territories, namely, (i) Andaman and Nicobar Islands, (ii) Delhi, (iii) Himachal Pradesh, (iv) Laccadive, Minicoy and Amindivi

49 Madras was renamed Tamil Nadu under the Madras State (Alteration of Name) Act 1968.

50 Mysore was renamed Karnataka under the Mysore State (Alteration of Name) Act 1973.

Islands,[51] (v) Manipur and (vi) Tripura. This re-organisation of the states changed the entire political map of India and involved large scale transfers of areas from one state to another and, consequently, necessitated large variations in the allocation of seats to the states and the union territories in the House of the People. This aspect was also taken care of by Parliament while enacting the States Reorganisation Act and the Constitution (Seventh Amendment) Act 1956. By the Constitution (Seventh Amendment) Act, the maximum number of seats which could be allocated to the states remained 500, but an additional quota of 20 seats for the representatives of the union territories was provided. As a sequel to these changes in the Constitution and the political map of the country, the Representation of the People Act 1950 was amended by the Adaptation of Laws (No 2) Order 1956 issued under the Constitution (Seventh Amendment) Act 1956 to allocate 503 seats—487 seats to the 14 states, 15 seats to the six union territories and one seat to the Part B tribal areas of Assam.

The second House of the People as constituted in 1957 thus consisted of 503 members. 494 of these members were chosen by direct election from the territorial constituencies, and the remaining nine members—six members representing the State of Jammu and Kashmir and three members representing the Andaman and Nicobar Islands, Laccadive, Minicoy and Amindivi Islands, and Part B tribal areas respectively—were nominated by the President.

Subsequent reorganisation of states during 1957–1962—Towards the end of 1957, there was some further re-organisation of the Part B tribal areas together with some other areas of Assam, resulting in the creation of the North-East Frontier Tract and the Naga Hills-Tuensang Area of Assam under the Naga Hills-Tuensang Area Act 1957. Both these areas were given separate representation in the House of the People and two seats were allocated to them in place of the one seat earlier earmarked for the representative of the Part B tribal areas, raising the strength of that House from 503 to 504.

In 1960, the State of Bombay was bifurcated into the States of Maharashtra and Gujarat, under the Bombay Reorganisation Act 1960. As a result of this bifurcation, the 66 seats earlier allocated to the composite Bombay state in the House of the People were divided in proportion to the population of the two states, which was very nearly 2: 1. Accordingly, Maharashtra was given 44 seats and Gujarat 22 seats, without however affecting the total membership of the House. There were also certain other readjustments in the boundaries between Madhya Pradesh and Rajasthan and Andhra Pradesh and Madras in 1959. But the exchange of territories in such readjustments was only on a very small scale, and it did not call for any change in the allocation of seats to the concerned states in the House of the People.

51 Laccadive, Minicoy and Amindivi Islands were renamed as Lakshadweep under the Laccadive, Minicoy and Amindivi Islands (Alteration of of Name) Act 1973.

The strength of the House of the People, however, increased in 1961, on accession of the former Portuguese territories of Dadra and Nagar Haveli to the Union of India on 11 August 1961. These territories, on their merger with the Union of India, were given the status of a union territory under the Constitution (Tenth Amendment) Act 1961 and also given representation in the House of the People by allocation of one seat therein, whereby the strength of the House rose to 505. Initially, this seat was filled by nomination by the President.

Thus, at the time of the third general election in 1962, the House of the People consisted of 505 members. Of them, six members representing the State of Jammu and Kashmir and one member each representing the Union Territories of Andaman and Nicobar Islands, Laccadive, Minicoy and Amindivi Islands, Dadra and Nagar Haveli, North-East Frontier Tract and Naga Hills-Tuensang Area of Assam were nominated by the President. The remaining 494 members were elected directly by the territorial parliamentary constituencies.

Further changes in composition during 1962–1967—In 1961, another former Portuguese territory—Goa, Daman and Diu was also liberated on 20 December 1961 and merged with the Indian Union and given the status of a union territory under the Constitution (Twelfth Amendment) Act 1962. This new union territory was allocated two seats in the House of the People under the Government of Union Territories Act 1963, and both the seats were filled by direct election from two parliamentary constituencies in that union territory.

In 1962, Pondicherry, a former French establishment, also became part of the Indian union as a union territory under the Constitution (Fourteenth Amendment) Act 1962 and was given one seat in the House of the People. By this amendment, the quota of seats for the union territories in the House of the People was also increased from 20 to 25. The seat allotted to Pondicherry was filled by direct election from the Pondicherry parliamentary constituency under the Government of Union Territories Act 1963. Meanwhile, on the creation of Nagaland as a separate state in 1962, it was allocated one seat in the House of the People and the seat reserved earlier for the Naga Hills-Tuensang Area was abolished, by the State of Nagaland Act 1962.

Towards the end of 1966, the State of Punjab and the Union Territory of Himachal Pradesh also underwent reorganisation under the Punjab Reorganisation Act 1966. On such reorganisation, Punjab was divided into the States of Punjab and Haryana and a new Union Territory of Chandigarh came to be constituted. Certain areas were also transferred from Punjab to Himachal Pradesh. Consequently, the 22 seats allotted to Punjab in the then existing House of the People were apportioned between Punjab and Haryana as 13 and eight respectively and one additional seat was allotted to Himachal Pradesh, increasing its representation from four to five. It was also provided that in the next House to be constituted in early 1967, one seat shall be allotted to Chandigarh and the number of seats allotted to Haryana and

Himachal Pradesh shall be further increased from eight to nine and from five to six respectively.

In the same year, the Union Territory of Delhi also got additional representation, with its allocation of five seats being raised to seven seats, under the Delhi Administration Act 1966, in view of rapid increase in its population.

Readjustments after 1961 census—After the decennial census of 1961, a fresh Delimitation Commission was set up in January 1963 under the Delimitation Commission Act 1962, to readjust the representation of states in the House of the People on the basis of 1961-census in terms of art 82. As a result of these readjustments, the Delimitation Commission allocated 496 seats to the then existing 17 states. Twenty-four seats stood separately allocated by Parliament to the then existing 10 union territories. In addition, one seat also continued to stand reserved for the North-East Frontier Tract.

The House of the People, as constituted after the fourth general election in 1967, consisted of 521 members. Of them, only one member representing the North-East Frontier Tract was nominated by the President and all the rest 520 members were elected directly from territorial parliamentary constituencies. This was the first time that all the states and union territories had chosen their representatives to the House of the People by direct elections from their territorial constituencies.

Changes in composition during 1967–1971—During the period between 1967 and 1971, there was only one development which affected the composition of the House of the People. The Union Territory of Himachal Pradesh became a state under the State of Himachal Pradesh Act 1970. But this resulted in its representation in the House of the People being decreased from six to four seats.

When the country went to the polls for the fifth general election in 1971, the House of the People consisted of 519 members, all of them elected by direct elections from the territorial parliamentary constituencies, except the lone nominated member to represent the North-East Frontier Tract.

Changes in composition on reorganisation of North-Eastern Areas in 1972—The beginning of the year 1972 saw several further changes in the political map of India, particularly in the north-eastern region. A new state of Meghalaya was carved out of Assam, the Union Territories of Manipur and Tripura were converted into states and two new Union Territories of Arunachal Pradesh and Mizoram came into existence, under the North-Eastern Areas (Reorganisation) Act 1971. The State of Meghalaya was allotted two seats and the new Union Territories of Arunachal Pradesh[52] and Mizoram also got one seat each in the House of the People, but the representation of Assam remained unchanged with 14 seats.

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52 The representation of the Union Territory of Arunachal Pradesh in the House of the People was increased from one to two seats by the Government of Union Territories (Amendment) Act 1975.

Readjustments after 1971 census—After the 1971 census, another readjustment in the allocation of seats to the various states in the House of the People on the basis of the 1971 census figures became due in terms of art 82, as it then stood. The Delimitation Commission set up for the purpose in 1973 under the Delimitation Act 1972 had to allocate the seats to the states in the House of the People within the parameters laid down by the Constitution. At that time, art 81 provided that not more than 500 seats shall be allocated to the states, and not more than 25 seats to the union territories in the House of the People. When the union territory of Himachal Pradesh became a state in 1971, the union territories of Manipur and Tripura also became states in 1972 and the new state of Meghalaya was created in the same year, the representation of states in the House of the People had gone up to 506, exceeding the maximum number of 500 as prescribed under art 81(1)(a). This excess of six seats over the prescribed limit of 500 was considered permissible under art 4, being in the nature of supplemental, incidental and consequential provisions in relation to the establishment of new states. But such excess could not be a permanent feature in breach of art 81 and the situation was required to be remedied before the Delimitation Commission could undertake the readjustment of allocation of seats to the states in the House of the People. Accordingly, art 81 was further amended by the Constitution (Thirty-first Amendment) Act 1971 to increase the quota of seats for the states from 500 to 525 and to reduce the quota of the union territories from 25 to 20 seats. By that amendment, it was also provided that the proportionality between the population of the states and the number of seats allotted to them would not apply to the small states whose population did not exceed 6 millions, as the interests of these small states needed special protection. These states were Jammu and Kashmir, Himachal Pradesh, Manipur, Tripura, Meghalaya and Nagaland. In terms of the new dispensation, the Delimitation Commission distributed 524 seats to the then existing 21 states, keeping one seat in reserve for meeting any future contingency. Such contingency arose immediately thereafter when Sikkim, a neighbouring kingdom, chose to become part of the Indian Union as the twenty-second state under the Constitution (Thirty-sixth Amendment) Act 1975. One seat in the House of the People was allotted to this new entrant to the Indian union.

As regards the seats for representatives of the union territories, Parliament itself fixed the number of such seats. The then existing nine union territories got 17 seats by suitable amendments to the Government of Union Territories Act 1963 in 1971 and 1975. Thus, the membership strength of the House of the People rose to 542 by the aforesaid readjustments by Parliament and the Delimitation Commission.

Freezing of further readjustment in the number of seats up to the year 2001—Thereafter, the Constitution (Forty-second Amendment) Act 1976 ordained that there shall not be any further readjustment in the allocation of seats to the states in the House of the People on the basis of subsequent censuses taken in the years 1981

and 1991 and until the first census after the year 2000. However, on the bifurcation of the Union Territory of Goa, Daman and Diu into the State of Goa and the Union Territory of Daman and Diu under the Goa, Daman and Diu Reorganisation Act 1987, the two seats earlier allocated to the composite union territory went to the State of Goa and an additional seat was allocated to the Union Territory of Daman and Diu in the House of the People. This raised the total membership strength of the House of the People to 543, as is at present. By this Act of 1987, the quota of seats for the states in the House of the People was also raised from 525 to 530, as, meanwhile, the Union Territories of Arunachal Pradesh and Mizoram were also converted into states by the State of Mizoram Act 1986 and State of Arunachal Pradesh Act 1986. Though their conversion into states had not brought about any change in their representation in the House of the People, the total number of seats allocated to states had thereby gone in excess of the then prescribed number of 525 seats.

From November 2000, the States of Bihar, Madhya Pradesh and Uttar Pradesh were reorganised, and three new States of Jharkhand, Chhattisgarh and Uttaranchal were respectively carved out of the former states, under the provisions of the Bihar Reorganisation Act 2000, Madhya Pradesh Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000. On such reorganisation, 54 seats previously allocated to Bihar in the House of the People were divided between Bihar and Jharkhand as 40 and 14 respectively. Similarly, Madhya Pradesh retained 29 out of its earlier quota of 40 seats and the remaining 11 seats went to Chhattisgarh. Likewise, Uttar Pradesh got 80 out of its earlier 85 seats and the other 5 seats fell to the share of Uttaranchal. While allocating the seats to the above states, Parliament also modified, wherever necessary, the territorial extent of some of the parliamentary constituencies having regard to the boundaries of the new states. It was further provided that the sitting members of the House of the People, elected from the affected constituencies, would be deemed to have been elected from those constituencies in the new states.[53]

Further freezing of readjustment in the number of seats upto the Year 2026—As already explained in a foregoing paragraph, the Constitution has been further amended in 2001 and 2003 by the Constitution (Eighty-fourth Amendment) Act 2001 and the Constitution (Eighty-seventh Amendment) Act 2003 to provide that the number of seats allocated to a state on the basis of the 1971 census shall remain further frozen and unchanged until the first census to be taken after the year 2026.

The House of the People now continues to consist of 543 elected members, till date. All these 543 members are now chosen by direct elections from 543 single

53 See ss 9, 10 and 11 and the Second Schedule of the Bihar Reorganisation Act 2000, Madhya Pradesh Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000.

member territorial parliamentary constituencies in the existing 28 states and seven union territories.[54]

Reservation of Seats in the House of the People

Reservation of seats for Scheduled Castes and Scheduled Tribes—In order to protect the interests and ameliorate the social and economic conditions of the Scheduled Castes and the Scheduled Tribes, which are considered traditionally exploited and deprived sections of the Indian society, the Constitution has made several special provisions to achieve that object. One such special provision made in the Constitution is the reservation of seats for them in the House of the People, in order to ensure that the persons belonging to these castes and tribes are adequately represented in that House. Article 330, as originally enacted, provided that seats shall be reserved in the House of the People for (a) the scheduled castes; (b) the scheduled tribes, except scheduled tribes in the tribal areas of Assam; and (c) the scheduled tribes in the autonomous districts of Assam. It was further provided that the number of seats reserved in any state for the scheduled castes or for the scheduled tribes shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that state in the House of the People as the population of the scheduled castes in the state, or of the scheduled tribes in the state or part of the state, as the case may be, in respect of which seats are so reserved, bears to the total population of the state. In other words, the scheduled castes and the scheduled Tribes were entitled to reservation of seats in each state in proportion to their population in the state concerned.

After the Part A, Part B and Part C states were reorganised into states and union territories in 1956, art 330 was amended to provide for similar reservation for the scheduled castes and the scheduled tribes in respect of the parliamentary seats in the union territories also by the Constitution (Seventh Amendment) Act 1956.

Meaning of Scheduled Castes and Scheduled Tribes—For the purposes of above reservation, the scheduled castes and the scheduled tribes mean such of the castes and the tribes as are specified by the President or by Parliament by law under art 341 and art 342 respectively. Under these articles, the President has specified a number of castes, races or tribes or parts of or groups within castes, races or tribes as the scheduled castes, and the tribes or tribal communities or parts of or groups within tribes or tribal communities as the scheduled tribes. The lists of such specified scheduled castes and scheduled tribes are mainly contained in the Constitution (Scheduled Castes) Order 1950 (C O 19) and the Constitution (Scheduled Tribes) Order 1950 (C O 22). In relation to states, these orders have been made by the President in consultation with the governors of the states concerned. The President is, however, not competent to make any variation in these lists once notified. Then,

54 Appendix II.

it is only the Parliament which is competent under arts 341 and 342 to include in, or exclude from, these lists any caste, race, tribe or tribal community, by making law in this behalf. In exercise of this power, Parliament has, from time to time, amended these lists by making specific laws on the subject, like, the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1991.

The Supreme Court has clarified in *Marri Chandra Shekhar Rao v Dean, Seth GS Medical College*,[55] that subject to the law made by Parliament under art 342(2), the tribes or tribal communities or parts or groups within tribes or tribal communities specified by the President by a public notification shall be final for the purposes of the Constitution. They are all the tribes in relation to that state or union territory and that any other tribe or tribal communities or parts of or groups within such tribe or tribal communities, not specified therein in relation to that state, shall not be the scheduled tribes for the purposes of the Constitution.

Meaning of population of scheduled castes and scheduled tribes—According to explanation to art 330, as originally enacted, the population of the scheduled castes and the scheduled tribes for the purposes the above reservation meant the population of these castes and tribes as ascertained at the last preceding census, of which the relevant figures have been published. However, by the Constitution (Forty-second Amendment) Act 1976, the meaning of population for the above purposes underwent a change and the 'population' was defined to mean the population as ascertained in the 1971 census, until the relevant figures for the first census to be taken after the year 2000 had been published. Accordingly, the reservation of the seats for the scheduled castes and the scheduled tribes in all the Houses of the People constituted after the 1971 census, including the House constituted in May 2004, had been made on the basis of the 1971 census.

The Constitution has been further amended in this respect in 2001 and 2003 by the Constitution (Eighty-fourth Amendment) Act 2001 and the Constitution (Eighty-seventh Amendment) Act 2003. By the Constitution (Eighty-fourth Amendment) Act 2001, it was first provided by amending the explanation to art 330 that the reservation of seats for the scheduled castes and scheduled tribes in the House of the People shall be readjusted on the basis of the 1991 census, though the total number of seats in the House shall remain unchanged, until the publication of the relevant figures of population as ascertained at the first census to be taken after the year 2026. Soon thereafter, however, the aforesaid explanation to art 330 underwent a further amendment by the Constitution (Eighty-seventh Amendment) Act 2003 to provide that the reservation of seats for the said castes and tribes in the House of the People shall be readjusted, not on the basis of the 1991 census, but on the basis of the 2001 census. Thus, the state-wise reservation of seats for scheduled castes and scheduled tribes was readjusted by the Delimitation Commission set-up

55 (1990) 3 SCC 130.

under the Delimitation Act 2002 on the basis of the 2001 census and it is expected to hold good until the 2031 census. The House of the People constituted in 2009 was elected on the basis of the seats so readjusted by the Delimitation Commission in 2008.

Readjustment of representation of seats for scheduled castes and scheduled tribes after 2001 census—After the publication of the census figures of scheduled castes and scheduled tribes on the basis of the 2001 census conducted by the Registrar General of India with reference to 1 March 2001, Parliament has enacted eleven Acts between 2002 and 31 May 2012 specifying some additional scheduled castes and scheduled tribes and amending the parent Scheduled Castes and Scheduled Tribes Orders. When the first such amendment was made by Parliament in 2002, certain representations were made to the Delimitation Commission that the additional castes and tribes specified in that Act should also be taken into account by that Commission while determining and reserving the seats for scheduled castes and scheduled tribes in its delimitation exercise. The Delimitation Commission, however, expressed its inability to do so in view of the mandate given to it under the Delimitation Act 2002 to undertake its delimitation exercise on the basis of the population figures as published by Registrar General 2001 census. After the whole delimitation exercise was over in 2008, a writ petition was filed before the Supreme Court in 2010 praying for the reservation of additional seats for scheduled castes and scheduled tribes on the basis of the additional scheduled castes and scheduled tribes specified in the abovementioned amendment Act. The Supreme Court saw justification in the prayer and directed the Election Commission on 30 January 2012 to do the needful in the matter.[56] The Election Commission, however, saw some difficulty in the implementation of that order and approached the Government of India to enact parliamentary legislation authorizing the Registrar General to reassess the scheduled castes and scheduled tribes population in 2001 census and empower the Election Commission to undertake the exercise of locating the additional constituencies to be reserved for scheduled castes and scheduled tribes if any change was warranted on the basis of such revised population figures. The Commission also pointed out that a similar exercise was done in 1976 under the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976 after the then Delimitation Commission had completed its task on the basis of 1971 census under the Delimitation Act 1972. When the government considered this matter in the light of the Supreme Court's order, it felt that the above benefit of additional seats for scheduled castes and scheduled tribes should be given not only on the basis of the amendments made in 2002 but on the basis of all the eleven amendments which had been made upto 2012 so that the scheduled castes and scheduled tribes

56 *Virendra Pratap and Anr. v Union of India (UOI) and Ors.* 2012 (1) SCALE 174, (2012) 11 SCC 764.

get proper representation in Parliament and state legislatures as envisaged in the Constitution. As the Constitution still mandates that seats should be reserved for scheduled castes and scheduled tribes on the basis of the 2001 census, the government has asked the Registrar General to re-ascertain or re-estimate the population of scheduled castes and scheduled tribes as on the 1 March 2001 by taking into account the changes which may have resulted on account of the specification of additional scheduled castes and scheduled tribes in the aforesaid eleven amending enactments. To give effect to such desire, the President promulgated an ordinance on 30 January 2013, by the name of the Readjustment of Representation of Scheduled Castes and Scheduled Tribes in Parliamentary and Assembly Constituencies Ordinance 2013, empowering the Registrar General to re-assess or re-estimate the population of scheduled castes and scheduled tribes and further empowering the Election Commission to readjust the representation of scheduled castes and scheduled tribes in parliamentary and assembly constituencies as delimited by the Delimitation Commission. But the Election Commission was given only a limited power of locating the additional constituencies if the revised population figures of scheduled castes and scheduled tribes warranted any such change in any state, but in such exercise the Commission could not change the territorial extent of any parliamentary or assembly constituency as determined by the Delimitation Commission. The above ordinance was sought to be replaced by an Act of Parliament in the budget session of Parliament of 2013, but the Bill introduced in this behalf could not be passed as it was referred to the Parliamentary Standing Committee for Ministry of Law and Justice, etc., for consideration and consequently the ordinance issued on 30 January 2013 lapsed on 4 April 2013. The President then issued another Ordinance on 5 June 2013 in the same terms as contained in the earlier ordinance of 30 January 2013. This second ordinance also lapsed on 4 September 2013, as the aforesaid Bill could not be enacted into law even in the Monsoon Session 2013. Meanwhile, the Parliamentary Standing Committee has given its report on 5 May 2013 recommending the passage of the above referred Bill. As a result, the Registrar General of India is now engaged in the exercise of estimating and revising the population figures of scheduled castes and scheduled tribes by taking into account the amendments made in the aforesaid Acts of Parliament passed between 2002 and May 2012. The Election Commission is also simultaneously taking necessary follow up action.

Period of reservations—Initially, this reservation of seats for the scheduled castes and the scheduled tribes in the House of the People was meant to last only for 10 years from the date of commencement of the Constitution, ie, from 26 January 1950 to 25 January 1960 (art 334). It was clarified that any reservation so made in the House of the People in existence on the date when the above reservation lapsed after 10 years, would continue until the dissolution of that House. Such reservation, however, continues till date, as the period of reservation of seats for the scheduled

castes and the scheduled tribes in the House of the People has been extended after every 10 years, by amending art 334 from time to time. Last such extension for the said reservation was made by the Constitution (Ninety-Fifth Amendment) Act 2009, whereby this reservation has been continued for 70 years from 26 January 1950, ie, up to 25 January 2020.

Representation of Anglo-Indian community in the House of the People—The interests of the Anglo-Indian community in India have also been adequately taken care of by the Constitution makers. It has been provided that if, in the opinion of the President, the Anglo-Indian community is not adequately represented in any House of the People after a general election, he may nominate not more than two members of that community to such House (art 331).

Initially, this special representation of the Anglo-Indian community was also provided for only 10 years, as in the case of the special reservation of seats for the scheduled castes and the scheduled tribes in the House of the People (art 334). However, the period of such special representation has also been extended from time to time and, at present, it also continues for 70 years up to 25 January 2020.

Representation of Women in the House of the People

In India, women form nearly 50 percent of the total electorate for elections to the House of the People. Still, there is no reservation of any seats for them in the House of the People [or in the Council of States or in the legislature of any state (other than the Legislative Assembly of Jammu and Kashmir)]. The results of the general elections to the House of the People conducted from time to time have shown that women never had adequate representation in that House (or in the Council of States or in any state legislature). There is now a vociferous demand, which is growing day-by-day, that there should be special reservation of seats for women in the House of the People and the legislative assemblies of the states. The demand has received added momentum and strength from the fact that the Constitution has already been amended in 1992 to provide for reservation of not less than one-third of the seats for women in the *panchayats* and municipalities by the seventy-third and seventy-fourth amendments to the Constitution. Therefore, the demand for reservation of seats for women in the House of the People and the state legislative assemblies as well has been accepted in principle by the government. Accordingly, a Bill to amend the Constitution, called the Constitution (Eighty-first Amendment) Bill 1996, was introduced in the House of the People on 12 September 1996, which sought to reserve not less than one-third of the total number of seats in the said Houses for women. The Bill was referred to a joint committee of two Houses of Parliament and the committee presented its Report on 9 December 1996 to the 11th House of the People. The Bill, however, could not be passed and lapsed with the dissolution of that House on 4 December 1997. Subsequently, another Bill called the Constitution (Eighty-fourth Amendment) Bill 1998 was introduced on 14 December 1998 in the

twelfth House of the People. But this Bill also could not be passed because of some major differences amongst the political parties on the question of percentage of seats to be reserved for women and also on the question of further reservation of seats for women belonging to certain backward classes of the population in the seats to be so reserved for women. This Bill too lapsed on the dissolution of the twelfth House of the People on 26 April 1999.

Yet another Bill, called the Constitution (Eighty-fifth Amendment) Bill 1999, was introduced in the House of the People on 23 December 1999. But this Bill, like the earlier Bills, was also embroiled in the same old controversies and could not be passed by Parliament. The last such attempt was made by introducing yet another Bill, the Constitution (One Hundred and Eighth Amendment) Bill 2008 in the Council of States. The Bill provides for reservation of not less than 30 percent of the seats for women in the House of the People and in the state legislative assemblies. The Bill has since been passed by the Council of States on 9 March 2010, but has been referred by the House of the People to the Parliamentary Standing Committee on Ministries of Home Affairs, etc. That Committee has not so far given its report as this Bill is also embroiled in the same old controversies.

Some well-meaning people have made certain alternative proposals to resolve the differences on the issue, but without any consensus of opinion on them so far. A brief mention of these proposals has been made in the concluding chapter of this book.

CHAPTER 3

State Legislatures

SYNOPSIS

INTRODUCTION

India, a union of states—India is a union of states. At present, there are 28[1] states in the Indian union. In addition, the territories of India also consist of seven union territories. Whereas each state has a state legislature, all union territories do not have a legislature of their own. They are administered by the President of India (art 239), and only those of the union territories have a legislature for whom the Constitution has made a specific provision in that behalf. At present, only two of the seven union territories, namely, Delhi (called National Capital Territory of Delhi) and Pondicherry have legislatures, called the legislative assemblies, under the Constitution (art 239AA relating to Delhi and art 239A relating to Pondicherry).

LEGISLATURES FOR STATES

Separate state legislatures for every state—Every state in India has its own separate state legislature. The legislatures of all states, except Jammu and Kashmir, are the creation of the Constitution of India (ch III, Part VI of the Constitution). The State Legislature for Jammu and Kashmir, however, owes its creation to the Constitution of Jammu and Kashmir (Part VI of the State Constitution).

Composition of State[2] Legislatures

The legislature of a state consists of:

(i) The governor of the state; and

(ii) Two Houses in some of the states, and one House, in all the remaining states [art 168(1)]. Where there are two Houses of the legislature of a state, one House is called the legislative council and the other the legislative assembly. Where a state legislature has only one House, it is known as the legislative assembly [art 168(2)]. Thus, each of the states in India has a legislative assembly. But only five[3] states, viz, Andhra Pradesh, Bihar, Karnataka, Maharashtra and Uttar Pradesh, have, at present, legislative councils under the Constitution of India [art 168(1)(a)]. In addition, the State of Jammu and Kashmir also has a state legislative council constituted under its state Constitution.

1 From November 2000, the number of States has gone up from 25 to 28.

2 The State Legislature for Jammu and Kashmir has been constituted under the Constitution of Jammu and Kashmir, which governs all matters relating to its constitution, composition and functioning. These matters have been discussed separately in this chapter.

3 The Tamil Nadu Legislative Council Act 2010 also provided for the constitution of a legislative council for the state of Tamil Nadu. When the action to constitute the council was being taken, the matters relating to the delimitation council constituencies and preparation of electoral rolls for those constituencies were questioned before Supreme Court in *M. Bharathiar v Union of India and Ors.* (SLP No. 345 of 2011) and the Supreme Court stayed the holding of elections to the proposed legislative council. As a result, the legislative council has not yet been constituted. Subsequently, the Tamil Nadu legislative assembly has also passed a resolution on 7 June 2011 in terms of Art 169(1) seeking repeal of the Tamil Nadu Legislative Council Act and abolition of the proposed legislative council.

Like the Council of States of the Union Parliament, the legislative council of a state, having a council, is the upper House of the state legislature. The legislative assembly is the lower House of the state legislature, like, the House of the People in Parliament. It is the state legislative assembly to which the council of ministers of the state is collectively responsible [art 164 (2)].

STATE LEGISLATIVE ASSEMBLIES (EXCEPT JAMMU AND KASHMIR)

Legislative Assembly, Not a Permanent House

The legislative assembly of a state is not a permanent House of the state legislature. Like the House of the People of the Union Parliament, it is also subject to dissolution from time to time.

Duration of Assembly

The normal duration of the legislative assembly of a state is five years from the date appointed for its first meeting. Its duration shall come to an end, unless sooner dissolved, on the expiration of the said period of five years; which shall operate as automatic dissolution of the assembly [art 172(1)].

In 1996, the Uttar Pradesh Legislative Assembly was duly constituted after a general election on 17 October 1996. Immediately after its due constitution, it was placed under suspension and President's rule under art 356 imposed on the same day, ie, 17 October 1996. Subsequently, on its revival, the state legislative assembly met for its first sitting on 27 March 1997. A question arose as to the reckoning of its five years term when the next general election to constitute the new state assembly on the expiration of its term became due. Some persons were of the view that the five year term should be calculated from the date of due constitution of the assembly by the Election Commission, ie, 17 October 1996. The Election Commission, however, took the view that the normal five-year duration of the state assembly, reckoning it from 27 March 1997, would expire on 26 March 2002.[4] The general

4 Several writ petitions on this issue were filed before the Supreme Court and the Allahabad High Court. All these petitions were transferred to the Supreme Court for disposal by its order dated 8 March 2002 in TP(C) No 573/579 of 2000 *(Union of India v Ambrish Kumar and Ors)*. Though these transferred cases are pending before the Supreme Court, the controversy seems to have been resolved by the observation of the Supreme Court in *Rameshwar Prasad and Ors v Union of India and Anor* (2006) 2 SCC 1, AIR 2006 SC 980 that the constitution of the assembly under s 73 of the 1951 Act is distinct from the duration of the assembly under art 172(1).

election was accordingly held to constitute the new assembly in February-March 2002. Any doubt on this issue now stands resolved by the Supreme Court in *Rameshwar Prasad v Union of India and Ors*[5] (popularly known as Bihar dissolution case) that the due constitution of the assembly and commencement of its term or duration are two distinctly different concepts and accordingly the five year terms commence from the date of the first sitting of the House.

The normal duration of the legislative assemblies was increased from five years to six years by the Constitution (Forty-second Amendment) Act 1976. But this was only a short-lived provision, and the original duration of five years was restored by the Constitution (Forty-fourth Amendment) Act 1978.

Extension of duration of assembly—The normal duration of five years of a state legislative assembly may be extended, but it can be extended only by Parliament by law. Further, such extension of duration can be made only while a Proclamation of Emergency under art 352 is in operation, either in the whole of India or in any part thereof, but not necessarily in the state concerned. Furthermore, such extension shall not exceed one year at a time and shall not extend in any case beyond a period of six months after the proclamation of emergency has ceased to operate [proviso to art 172(1)].

The Kerala legislative assembly had the benefit of such extension of its duration in 1975. The assembly, whose normal term was up to 21 October 1975, first got extension for six months by the Kerala Legislative Assembly (Extension of Duration) Act 1975, and then got further extension, twice, for another six months on each occasion, ie, upto 21 April 1977 by the Kerala Legislative Assembly (Extension of Duration) Amendment Acts of 1976.

Premature Dissolution of Assembly, Time Limit for Holding General Election

The legislative assembly of a state may be dissolved prematurely by the governor of the state before the expiration of its normal duration of five years [art 174(2)(b)]. Such dissolution by the governor shall be normally resorted to on the advice of the council of ministers and not unilaterally or in his sole discretion. The President may also prematurely dissolve a state legislative assembly in the case of failure of constitutional machinery in the state, as subsequently explained.

There are, however, sufficient safeguards in the constitution to see that the legislative assembly of a state, whenever dissolved, does not normally remain out of existence for more than six months at any time, unless the state is placed under President's rule for failure of the constitutional machinery.

In 2002, a question arose as to what is the time limit for holding a general election to constitute a new state legislative assembly on the premature dissolution of

5 (2006) 2 SCC 1, AIR 2006 SC 980.

the existing state legislative assembly. The Gujarat Legislative Assembly, whose normal term was up to 18 March 2003, was prematurely dissolved by the Governor of Gujarat on 19 July 2002 on the advice of the council of ministers and the then chief minister of the state was allowed by the Governor to continue to remain in office pending the general election to constitute the new state legislative assembly. The last session of the dissolved state legislative assembly was held on 6 April 2002 and it was contended by some parties, particularly the Bhartiya Janata Party, that the Election Commission was bound to hold the general election to constitute the new legislative assembly of Gujarat in such time as may enable the new assembly to meet by 6 October 2002, so that a period of more than six months may not elapse between the last sitting of the dissolved assembly and the first sitting of the new assembly. For this proposition, these parties relied on the provisions of art 174(1) of the Constitution which states, inter alia, that 'six months shall not intervene between its (legislative assembly's) last sitting in one session and the date appointed for its first sitting in the next session'. The Election Commission was, however, of the view that though the general election should normally be held within six months from the date of the last sitting of the dissolved assembly, the Commission was not bound to so hold the election within those six months if a free and fair election as mandated by art 324 of the Constitution was not possible, because of the situation then prevailing, and that where this constitutional mandate of art 324 came into conflict with the provisions of art 174(1), the provisions of the latter should yield to the provisions of art 324 of the Constitution, as free and fair elections are the very foundation of all democratic institutions. The Commission also took the view that if it was considered that the requirement of art 174(1) could not be met in view of the delay in the holding of elections, the situation could be taken care of by imposition of President's Rule under art 356 of the Constitution.

The Government of India entertained some doubts with regard to the interpretation of arts 174, 324 and 356 of the Constitution, as given by the Election Commission in its order dated 16 August 2002, and, therefore, made a Presidential reference[6] to the Supreme Court for seeking its advisory opinion under art 143 of the Constitution on the following three issues:

(1) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?
(2) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?
(3) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections?

6 Special Reference No 1 of 2002, AIR 2003 SC 87.

The Supreme Court, considering the importance of the questions raised in the said reference by the President, issued notice to all recognised national parties in India, apart from the notices to the Election Commission, the Attorney General for India and the State Government of Gujarat. After hearing the parties at length, the Supreme Court gave its opinion,[7] on 28 October 2002, to the following effect:

(1) Article 174(1) of the Constitution [and art 85(1) which makes a similar provision relating to the House of the People] does not apply after a house has been dissolved. The requirement therein that six months shall not intervene between the last sitting in one session and the first sitting in the next session of the assembly applies to a living assembly and not to an assembly which has been dissolved.

(2) The Election Commission has the exclusive domain under art 324 of the Constitution to fix the election programme for all elections to the House of the People and state legislative assemblies.

(3) The Constitution does not expressly prescribe any time limit for holding a general election after a house/assembly has been dissolved. But having regard to the scheme of the Constitution, the Election Commission should hold the general election to constitute the new house/assembly after a house/assembly has been dissolved as early as possible and, in any case, within six months of the dissolution of the house/assembly. Ordinarily, the law and order should not be a ground for postponement of elections and it would be the duty and responsibility of all concerned to render all assistance, co-operation and aid to the Election Commission for holding free and fair elections.

(4) Article 356 of the Constitution does not come into play where an election cannot be held to meet the requirements of art 174(1), as it does not apply to a house/assembly after dissolution.

It is worthy to note here that the above opinion was tendered by the Supreme Court in the context of a situation where the state legislative assembly was prematurely dissolved and a caretaker chief minister was allowed to hold office pending the general election. The Supreme Court did not answer the question, as it had not arisen in that reference case, whether the Election Commission was bound to hold a general election within six months from the date of premature dissolution of the assembly even where the state was under the President's rule instead of the interim arrangement of a caretaker chief minister. The Election Commission has, however, taken the view that even where a state is under President's rule, the Commission should hold the general election within six months from the date of premature dissolution of the assembly for constituting the new assembly. The state of Bihar was placed under President's rule on 7 March 2005 and the state assembly was placed under suspended animation. Subsequently, the state assembly was dissolved by the

7 Special Reference No 1 of 2002, AIR 2003 SC 87.

President on 23 May 2005. A contention was made that the general election to constitute the new assembly should be held before the expiration of six months period from the date the state was placed under President's rule, as the Parliament had approved the continuance of President's rule in the state for six months from the date of its imposition. Again, the Election Commission took the view that it was not bound to hold the general election within six months from the date of imposition of President's rule and that it had been given the mandate by the Supreme Court to hold the general election within six months from the date of premature dissolution of the assembly. The Commission accordingly proceeded on that assumption and so conducted the general election that the new Bihar Legislative Assembly was constituted on 22 November 2005, ie, within six months from the date of dissolution of the earlier assembly on 23 May 2005.

Dissolution of legislative assembly in case of failure of constitutional machinery— A state legislative assembly may also be dissolved prematurely by the President, if he is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution and he assumes to himself all or any of the functions of the state government under art 356. In common parlance, it is known as imposition of President's rule in the state.

Article 356 of the Constitution does not expressly empower the President to dissolve a state legislative assembly. However, the Supreme Court has held in *SR Bommai and Ors v Union of India and Ors*[8] that the power to dissolve the legislative assembly by the President can be said to be implicit in cl (1) of art 356 which empowers him to assume to himself all or any of the functions of the government of the state and all or any of the powers vested in or exercisable by the governor or any body or authority in the state, other than the legislature of the state, and also to make such incidental and consequential provisions as appear to him to be necessary or desirable for giving effect to the objects of the proclamation under that article. The Supreme Court has further observed, in that case, that as the legislative assembly once dissolved cannot be revived, the President shall exercise this power of dissolving the assembly only after the proclamation issued by him under cl (1) of art 356 has been approved by both Houses of Parliament under cl (3), and not before. Until such approval, the President should only suspend the legislative assembly, by suspending the provisions of the Constitution relating to the legislative assembly under sub-cl (c) of cl (1) of art 356.[9] The dissolution of legislative assembly is not a

8 (1994) 3 SCC 1.

9 President's rule was imposed in the State of Bihar by a proclamation issued by the President under art 356(1) on 12 February 1999, and the Bihar legislative assembly was suspended and kept under suspended animation pending approval of the Proclamation by both Houses of Parliament. As the government saw difficulties in securing parliamentary approval to that proclamation, it was revoked on 8 March 1999 and consequently the Bihar legislative assembly stood revived.

matter of course and it should be resorted to only where it is found necessary for achieving the purpose of the proclamation under that article.

As mentioned in the preceding paragraph, the Bihar Legislative Assembly, which was constituted on 4 March 2005 after a general election, was placed under suspended animation and President's rule was imposed under art 356 of the Constitution on 7 March 2005, as the governor of the state was of the opinion that no party or combination of parties was in a position to form a government. Subsequently, the President dissolved the state legislative assembly on 25 May 2005. The Constitution Bench of the Supreme Court, before which it was agitated that the dissolution of the assembly was malafide and based on extraneous considerations, held,[10] by a majority decision of 3:2 that the dissolution of the assembly was unconstitutional. However, in view of the fact that the Election Commission had already set in motion the process for the general election to constitute the new legislative assembly for the state by the time the Supreme Court pronounced its short order on 7 October 2005 (followed by its detailed reasons on 24 January 2006), the apex court did not consider it desirable to revive the dissolved legislative assembly.

Maximum period for which assembly may remain dissolved under President's rule—In order to ensure that a state legislative assembly dissolved on imposition of President's rule under art 356 does not remain out of existence for an unduly long period and that the normal provisions of the Constitution relating to its functioning are restored as expeditiously as possible, the Constitution has taken care to provide sufficient safeguards. First, the imposition of President's rule must be approved by both the Houses of Parliament within two months of the date of its imposition [art 356(3)]. But if such imposition of President's rule has taken place at a time when the House of the People stands dissolved or the dissolution of that House takes place during the said period of two months before that House could give its approval, the Presidential proclamation must be approved by the House of the People within 30 days of its first meeting on its reconstitution. The Council of States must, however, give its approval within the aforesaid period of two months. The initial spell of President's rule so approved extends, unless sooner revoked, up to six months from the date of its imposition. It may be extended by another six months with the approval of both Houses of Parliament. But if any further extension beyond one year is contemplated, it can be approved by Parliament, only if: (i) a proclamation of emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the state concerned; and (ii) the Election Commission certifies that extension is necessary on account of difficulties in holding general election to the legislative assembly of the state concerned [art 356(5)]. Any such extension will be valid for another six months, unless further extended subject to the aforementioned

10 Rameshwar Prasad and Ors v Union of India and Anor (2006) 2 SCC 1, AIR 2006 SC 980.

conditions. But such extensions cannot go, in any circumstances, beyond a total period of three years from the date of initial imposition of President's rule in the state [art 356(4)].

In other words, the legislative assembly of a state cannot remain dissolved for more than three years at a stretch even during President's rule. For any further extension of President's rule beyond three years even in exceptional circumstances, the only solution will be the amendment to the Constitution itself. This is exactly how the situation in the State of Punjab was tackled when the term of the President's rule imposed on 11 May 1987 had to be extended beyond a period of three years because of the continued disturbed law and order situation in the state owing to unlawful activities of extremist elements. Article 356 was amended, twice, by the Constitution (Sixty-fourth Amendment) Act 1990 and the Constitution (Sixty-eighth Amendment) Act 1991, to provide expressly that President's rule imposed in that state on 11 May 1987 could continue for five years.

Dissolution of assembly, when can be affected—A state assembly may be dissolved soon after its constitution and even before it has met for its first sitting. In 1965, a general election was held in Kerala to constitute the new state legislative assembly, following the imposition of President's rule under art 356 on 10 September 1964 because of the breakdown of the constitutional machinery. The new assembly was constituted by the Election Commission on 17 March 1965 under s 73 of the 1951 Act. The governor of the state, after consultation with the political parties, sent a report to the President that no formation of the government was possible in view of the fragmented results of the general election. The President thereupon revoked his earlier proclamation of 10 September 1964 and issued a fresh proclamation on 24 March 1965 again imposing President's rule in the state. By the latter proclamation, he also dissolved the new state legislative assembly. A question was raised before the Kerala High Court that the new assembly could not be dissolved when it had not even been summoned for its first meeting. The High Court negatived that contention, holding that once the assembly had been constituted, it became capable of being dissolved.[11] The Allahabad High Court took a contrary view in *Udai Narain Sinha v State of Uttar Pradesh and Ors.*[12] But the controversy on the issue has been resolved by the Supreme Court in *Rameshwar Prasad v Union of India and Ors.*[13] (commonly known as the Bihar Legislative Assembly dissolution case). The Supreme Court has held that the legislative assembly, for all intents and purposes, is deemed to be duly constituted on issue of notification under s 73 of the 1951 Act and the duration thereof under art 172(1) is distinct from its due constitution. Once by

11 KK Aboo v Union of India AIR 1965 Ker 229.

12 AIR 1987 All 203.

13 (2006) 2 SCC 1, AIR 2006 SC 980.

operation of s 73 the assembly is deemed to be constituted, there is no bar on its dissolution.

Dissolution of assembly on the results of parliamentary election—At the general election to the House of the People in early 1977, the Indian National Congress, the then ruling party at the Centre, was badly routed and a government was formed by the coalition of certain opposition parties headed by the Janata Party on 24 March 1977. At that time, the Congress was also the ruling party in nine states, viz, Bihar, Haryana, Himachal Pradesh, Madhya Pradesh, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. On 18 April 1977, the new Union Home Minister addressed a letter to the chief ministers of the above nine states 'earnestly commending' for their consideration that they may advise their respective governors to dissolve their state assemblies under art 174(2)(b) for having lost the mandate of the electorates in their states and to seek a fresh mandate. Six of these state governments moved the Supreme Court for a direction to the President not to dissolve their state assemblies under art 356 in the event of the refusal of the chief ministers to go by the wishes of the Union Home Minister. The Supreme Court, however, refused to intervene in the matter holding that these were matters of political expediency and they would not like to enter political thicket, except where the dissolution of an assembly was mala fide.[14]

The Supreme Court also rejected, in the above-mentioned case, the contention on behalf of some of the members of the Punjab legislative assembly that, on their election, they had a right to enjoy salary, etc, for five years and that premature dissolution of the assembly would deprive them of that right. The Court held that they could enjoy such right only so long as the assembly continued to exist and it did not fetter the powers of the governor or the President to dissolve the assembly.

The result was that all the nine state legislative assemblies were dissolved by the President under art 356.

Dissolution of assembly for some event taking place in another state—As an aftermath to the demolition of the Babri Masjid in Ayodhya in the State of Uttar Pradesh on 6 December 1992, not only the State of Uttar Pradesh, but the States of Himachal Pradesh, Madhya Pradesh and Rajasthan were also placed under President's rule and their state legislative assemblies were dissolved by the presidential proclamations under art 356 on 15 December 1992. The above action by the President followed on the reports of the governors of those states that the chief ministers and other ministers of their state governments had provided overt and covert support to the communal organisations which were responsible for the demolition the said mosque. The Supreme Court upheld the validity of the presidential action and dissolution of the assemblies of the above states, notwithstanding that the demolition took place in another state, holding that

14 State of Rajasthan and Ors v Union of India AIR 1977 SC 1361.

secularism is one of the basic features of the Constitution of India and the state governments which pursue un-secular policies render themselves amenable to action under art 356, including dissolution of the state assembly.[15]

Composition of State Legislative Assemblies

Maximum and Minimum Strength Permissible

The total number of members (other than the members nominated by the governor to represent the Anglo-Indian community under art 333) of the legislative assembly of any state cannot exceed 500 and should not normally be less than 60 [art 170(1)]. The Constitution, however, makes special provisions in relation to some small states, where the number of seats in the state legislative assembly may be less than 60. Such states, at present, are Goa (art 371I), Mizoram (art 371G) and Sikkim (art 371F) which have 40, 40 and 32 seats respectively.

Manner of Election

All the above members of a state legislative assembly are chosen by direct election from territorial assembly constituencies in the state [art 170(1)]. These elections are held under the 'first past the post' system, also known as the plurality system. Under this system, the candidate securing the highest number of valid votes in his favour in comparison to the votes polled by other candidates in the constituency is the winner—that is to say, the winning candidate simply secures more votes than any other candidate in the constituency and it need not be an absolute majority of the votes cast.

Voting not compulsory—Voting at elections to Parliament and state legislatures is not compulsory in India. Nor is there any requirement that a certain minimum number or percentage of votes must be polled for an election to be valid in a constituency.

In the recent times, there have been demands in certain quarters that the voting should be made compulsory so that there is full participation of the electorate in choosing their representatives. However, Election Commission is not in favour of the idea of compulsory voting, as it feels that in a democracy free will and compulsion cannot go together. Under the law (s 79, 1951 Act), the right to vote also includes the right 'not to vote', or refrain from voting. The Commission has observed that voting percentage in India compares to the good percentages in the world and can be further enhanced by undertaking systematic voter education. Accordingly, since 2010, the Commission has embarked upon an ambitious programme of systematic voter education for their greater participation and its efforts in this direction have shown positive results in the recent elections to several

15 SR Bommai and Ors v Union of India and Ors (1994) 3 SCC 1.

state legislatures. In some of those states the voting percentage has even crossed 80 percent. Further, there are several administrative obstacles in making the voting compulsory. Compulsory voting would postulate some penalty for those who do not vote and the conditions in India do not warrant any penal action against those who stay away from voting for a variety of reasons, including earning for livelihood. To find out the reasons for not turning up for voting on the day of poll would necessarily require a notice to the person concerned and then a fair consideration of the grounds for abstention. When millions of persons are involved—who do not vote—the administrative effort and time needed for such an exercise can be better imagined than described.

Present Strength of State Assemblies

The membership strength of the state legislative assemblies varies from state to state, depending upon its population, size, geographical features or other historical, ethnic or sociological considerations. At present, the Legislative Assembly of Uttar Pradesh has the maximum strength of 403 members,[16] whereas the Sikkim legislative assembly is the smallest one with just 32 members. Appendix III shows the present strength of each state legislative assembly.

Readjustment in Total Number of Seats of Assemblies

In order to keep pace with the changing demographic conditions, the Constitution provides that, upon completion of each decennial census, the total number of seats in the legislative assembly of each state shall be readjusted by such authority and in such manner as Parliament may by law determine [art 170(3)]. Such authority also readjusts the division of each state into territorial assembly constituencies.

Freezing of Readjustment up to the Year 2001

The above periodic exercise of readjustments in the total number of seats of the state legislative assemblies and the division of states into territorial constituencies was regularly conducted up to 1975, but was then temporarily halted in 1976, when there was an intensification of the drive to control the population of the country by resort to family planning methods during the period of emergency proclaimed in 1975. It was felt that the states which controlled the growth of population more effectively by vigorous implementation of the family planning drive might be suffering adversely in the matter of their representation in the House of the People and in terms of the size of their state legislative assemblies in comparison to the states which showed less keenness in the implementation of that drive, if the latest population figures formed the basis for their share of seats in the House of the

16 From 1 November 2000, the membership strength of Uttar Pradesh legislative assembly was reduced from 425 to 403, on the reorganisation of that state into the States of Uttar Pradesh and Uttaranchal, under the Uttar Pradesh Reorganisation Act 2000.

People or for the fixation of total number of seats in their state assemblies. In order to protect the interests of former states, it was decided by Parliament that there would be no readjustment either in the number of seats allocated to the states in the House of the People or in the total number of seats in the state assemblies as fixed on the basis of the 1971-census, until the relevant figures for the first census taken after the year 2000 have been published [provisos to art 82 and art 170(3) as inserted by the Constitution (Forty-second Amendment) Act 1976].

Some attempts[17] were made in the years 1990, 1994 and 1996 to amend the Constitution to provide for readjustment of territorial extent of assembly constituencies, without however affecting the membership strength of the state assemblies, on the basis of censuses taken in the years 1981 and 1991, but without success.

Resultantly, the number of seats in the state legislative assemblies continued to be as fixed on the basis of 1971-census and there was no further readjustment on the basis of the subsequent censuses taken in the years 1981 and 1991.

Further Freezing of Readjustment up to the Year 2026

The constitutional embargo put in 1976 on the readjustment in the total number of seats in various state legislative assemblies would have ordinarily ceased to be operative after the first census to be taken after the year 2000. However, Parliament considered in 2001 that the considerations which weighed at the time of placing the above freeze in 1976 still held good, and any readjustment in the number of seats of various state legislative assemblies on the basis of 2001 census might upset the balance and adversely affect the interests of those states which had been effective in implementing the population control measures. Therefore, Parliament amended further the provisions of art 170(3) of the Constitution by the Constitution (Eighty-fourth Amendment) Act 2001 to provide that the total number of seats in the legislative assemblies of various states as determined on the basis of 1971 census shall remain unchanged until the first census to be taken after the year 2026. It was, however, provided that the number of seats to be reserved for scheduled castes and scheduled tribes out of the total number of seats in the assemblies shall be determined afresh on the basis of 1991 census. It was also provided that the extent of all assembly constituencies shall be readjusted on the basis of 1991 census. Subsequently, in 2003, on representations received by the government and on the recommendation of the Delimitation Commission set up under the Delimitation Act 2002 to implement the above amended provisions of the Constitution, the Constitution was still further amended by the Constitution (Eighty-seventh Amendment) Act 2003 to provide that, though the total number of seats in the state legislative assemblies determined on the basis of 1971 census shall remain unchanged until the first census to be taken after 2026, the number of seats to be reserved for

17 See ch 2, pp 52–55.

the scheduled castes and scheduled tribes shall be re-fixed on the basis of 2001 census, and that the extent of all assembly constituencies in each state shall also be readjusted on the basis of 2001-census.[18]

Changes in Composition of Assemblies from Time to Time

Under the original scheme of political set up in 1950, when the territories of India were divided into three categories of Part A, Part B and Part C states, the Constitution provided that there shall be a legislative assembly for each of the nine Part A states and eight Part B states, and their members shall be chosen by direct election from territorial constituencies (arts 168 and 238). As regards the 10 Part C states, it was provided that Parliament may by law create or continue a body, whether nominated, elected or partly nominated and partly elected, to function as a legislature for any of those states (art 240). Pursuant thereto, the legislative assemblies were created for six of the 10 Part C states of Ajmer, Bhopal, Coorg, Delhi, Himachal Pradesh and Vindhya Pradesh under the Government of Part C States Act 1951. The membership strength of the assemblies of all Part A, Part B and Part C states was fixed by Parliament itself.[19] In fixing such strength, Parliament took into consideration the estimated population of these states on 1 March 1950, as worked out by the Census Commissioner for India.[20]

Shortly thereafter, a Delimitation Commission was set up under the Delimitation Commission Act 1952 to readjust the total number of seats in various state legislative assemblies on the basis of 1951 census in terms of art 170. It made some readjustments also, but those were not given effect to, as all the states were then in the process of being reorganised on a more rational basis.

After the reorganisation of states in 1956, suitable adjustments and modifications were made in the composition of the legislative assemblies of various states taking into account the areas transferred from one state to the other and the new membership strength of each assembly was fixed under the States Reorganisation Act 1956. However, that too needed some modifications as there were some further structural changes in the political map of the country by the Constitution (Seventh Amendment) Act 1956, whereby the Indian union was divided into 14 states and six union territories. The modified strength of the legislative assembly of each state was then brought on the statute book by amending s 7 of the 1950 Act and the Second Schedule thereto by the Adaptation of Laws (No 2) Order 1956. After the coming

18 See ch 6 for detailed discussion on the delimitation of constituencies on the basis of 2001 census. See also ch 2 for reservation of additional seats for the scheduled castes and scheduled tribes consequent upon the amendments to Scheduled Castes and Scheduled Tribes Orders between 2002 and 2012.

19 Section 7 of 1950 Act read with its Second Schedule, and s 3 of the Government of Part C States Act 1951 read with its Third Schedule.

20 Statement of Objects and Reasons appended to the Representation of the People Bill 1950.

into force of the Constitution (Seventh Amendment) Act 1956 from 1 November 1956, there was a short interregnum before the next general elections were held in 1957. Some ad hoc arrangements were made for this short interregnum without, however, involving any election.

The strength of the legislative assemblies so fixed in 1956 was subsequently re-fixed by the Delimitation Commissions set up in 1962 and 1973 on the basis of the censuses taken in the years 1961 and 1971. After the strength of the various legislative assemblies was fixed by the Delimitation Commission of 1973, there was no further readjustment in the strength of the legislative assemblies on the basis of 1981 and 1991 censuses. However, certain readjustments became necessary on the grant of statehood to certain union territories and on the bifurcation of the composite Union Territory of Goa, Daman and Diu into the State of Goa and the Union Territory of Daman and Diu in 1986–87. These readjustments were taken care of by Parliament itself in the parliamentary enactments by which these reorganisations were made.

From November 2000, there was further reorganisation of the States of Bihar, Madhya Pradesh and Uttar Pradesh, under the provisions of the Bihar Reorganisation Act 2000, Madhya Pradesh Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000. On such reorganisation, three new States of Jharkhand, Chhattisgarh and Uttaranchal were formed, by the bifurcation of Bihar, Madhya Pradesh and Uttar Pradesh respectively. Thereupon, the membership strength of the legislative assembly of Bihar was reduced from 324 to 243, that of Madhya Pradesh legislative assembly from 320 to 230, and that of the Uttar Pradesh legislative assembly from 425 to 403. The three new states of Jharkhand, Chhattisgarh and Uttaranchal also have their own legislative assemblies, consisting of 81, 90 and 70 members respectively.[21] Whereas the legislative assemblies of Jharkhand and Chhattisgarh were straightaway duly constituted with 81 and 90 members, who were elected to the erstwhile legislative assemblies of Bihar and Madhya Pradesh from the respective assembly constituencies which now fell in Jharkhand and Chhattisgarh, there was formed a provisional legislative assembly for the new State of Uttaranchal. This provisional legislative assembly had 31 members, 22 sitting members of the erstwhile Uttar Pradesh legislative assembly, who were elected from the 22 assembly constituencies whose areas formed form the new state of Uttaranchal, and 9 sitting members of the Uttar Pradesh legislative council, elected from the council constituencies whose areas likewise fell in the new state.[22]

As mentioned above, no further readjustment in the total number of seats in the legislative assemblies of any of the states will normally be made, until the publication

21 See ss 12 and 13 and the Second Schedules of the Bihar Reorganisation Act 2000, Madhya Pradesh Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000.

22 See the Uttar Pradesh Reorganisation Act 2000, s 14.

of the population figures of the first census to be taken after the year 2026, unless any further reorganisation of any states takes place meanwhile or the Constitution itself is amended to provide for any readjustment on the basis of any future census before the year 2026.

The above changes in the composition of state legislative assemblies made from time to time may be seen in Appendix III.

Reservation of Seats for the Scheduled Castes and the Scheduled Tribes in Legislative Assemblies

General Provisions

The Constitution provides for the reservation of seats for the scheduled castes and the scheduled tribes not only in the House of the People but also in the legislative assemblies of the states [art 332(1)]. The basic principle for reservation of such seats in the state legislative assemblies is also the same as for such reservation in the House of the People. That is to say, the number of seats reserved for the scheduled castes and the scheduled tribes in the legislative assembly of any state shall bear, as nearly as may be, the same proportion to the total number of seats in the assembly as the population of these castes and tribes in the state bears to the total population of the state [art 332(3)]. While delimiting the assembly constituencies in the state of Uttarakhand under the provisions of the Uttar Pradesh Reorganization Act 2000, the Election Commission had reserved three constituencies for the scheduled tribes in the state though the proportion of the scheduled tribes population came to 2.1. The Supreme Court struck down that reservation of the third additional seat to the scheduled tribes holding that the fraction 2.1 could not be raised to 3.[23]

Special provision for autonomous districts of Assam—In the case of Scheduled Tribes in the autonomous districts of Assam, there is a special dispensation in the Constitution. Instead of seats being reserved for them in the legislative assembly of Assam in proportion to their population in those districts, the Constitution provides for reservation of seats for the autonomous districts themselves in the state assembly [arts 332(1) and (2)]. The number of seats reserved for these districts in the legislative assembly of Assam shall be in direct proportion of the entire population of these districts to the total population of the State of Assam, thus giving the scheduled tribes of those districts an added weightage in the matter of reservation of seats for them [art 332(4)].

It was initially provided in art 332(5) that the constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district. It was further provided in s 5(b) of the 1951 Act that a candidate for election from any constituency in an autonomous district of Assam must be a

23 See the Uttar Pradesh Reorganisation Act 2000, s 14.

member of a scheduled tribe of any autonomous district in the state. Thus, all seats in those autonomous districts were reserved for schedule tribes. In 2003, a new autonomous district by the name of Bodoland Territorial Areas District was created in Assam by the Constitution (Ninetieth Amendment) Act 2003 and it was provided that the representation of the scheduled tribes and non-scheduled tribes in the constituencies included in that new autonomous district shall be maintained as it existed prior to the constitution of that district. In other words, in the new district of Bodoland Territorial Areas District, there will be some seats reserved for the schedule tribes and there may be some general seats as well, unlike in the remaining autonomous districts in that state.

Special provisions for scheduled tribes in Arunachal Pradesh, Meghalaya, Mizoram and Nagaland—In the case of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland also, which are all predominantly inhabited by the scheduled tribes, certain exceptions have been made to further protect and safeguard their interests. In 1987, art 332 was amended by the Constitution (Fifty-seventh Amendment) Act 1987 to provide that if on the date of coming into force of that Act (ie, 21 September 1987), all the seats, including the unreserved general seats, in the then existing legislative assemblies of those states were held by the members of the scheduled tribes, all the seats except one in each assembly shall be reserved for the scheduled tribes, till the next readjustment takes place on the basis of the first census after the year 2000. Where, however, all the seats in those assemblies were not held by the members of the scheduled tribes on the above referred date, the number of seats to be reserved for the scheduled tribes in those assemblies shall not be less than the number of seats held then, including the unreserved general seats, by the members of the scheduled tribes in those assemblies. This too gave an added advantage to the scheduled tribes in the matter of reservation of seats for them in those state assemblies. This special reservation for schedule tribes in the above states has been further extended until the publication of the relevant population figures of the first census to be taken after the year 2026 [art 332(3A) as amended by the Constitution (Eighty-fourth Amendment) Act 2001].

Special provision for scheduled tribes in Tripura—A similar provision was also made for the additional reservation of seats for the Scheduled Tribes in the Legislative Assembly of Tripura in 1992 by the Constitution (Seventy-second Amendment) Act 1992 (w.e.f 5 December 1992). In that assembly also, it was provided that until the next readjustment takes place on the basis of the first census after the year 2000, the number of seats reserved for the Scheduled Tribes shall not be less than the number of seats held by the members of those Tribes in the legislative assembly of that state on 5 December 1992.

The Supreme Court upheld the validity of this constitutional amendment by its judgment dated 7 February 2002 in *Subrata Acharjee and Ors v Union of India and Anor*,[24] observing that:

> The leverage given by constitutional mandate by reason of inclusion of the words 'readjusted by such authority and in such manner as Parliament may by law determine' in articles 82 and 170 depicts the intent of the Parliament as to its true effect. It is an enabling provision for adjustment of seats in accordance with the situation. This authorisation as contained in articles 82 and 170 stands out to an enabling provision for incorporating sub-article 3B under article 332. Proportionality though mainly dependent upon the basis of population but it cannot always be done with arithmetical precision and mathematical nicety. The words 'Parliament may bye law determine' in articles 82 and 170 ought to be attributed its proper meaning and upon consideration of the words used and the meanings to be attributed thereon, it cannot be said that sub-article 3B is violative of constitutional mandate. It is a transient provision. Temporary measures shall have to be taken for social goal and for the benefit of the country as deemed expedient by Parliament. The felt need of the society of a trouble free Tripura State stands out to be effected. It is to bring forth and continue with the object of the Constitution—social, economic and political justice of the people of India.

It is, however, worth mentioning that this special reservation for scheduled tribes in Tripura has also been further extended until the publication of the relevant population figures of the first census to be taken after the year 2026 [art 332(3B) as amended by the Constitution (Eighty-fourth Amendment) Act 2001].

Meaning of Population

Here also, as in the case of the House of the People, the 'population' now means the population as ascertained at the 2001 census till the first census to be taken after the year 2026, ie, the 2031 census.[25] (Explanation to art 330).

Period of Reservations

Unless further extended by amendment to the Constitution, the above reservation for the scheduled castes and the scheduled tribes shall cease to be in force after 70 years from the date of commencement of the Constitution (ie, from 26 January 2020 onwards) (art 334). This will, however, not affect any reservation of seats for the above castes and tribes in the legislative assemblies then in existence and until the dissolution of those assemblies.

24 AIR 2002 SC 843.

25 See ch 6 for detailed discussion on the delimitation of constituencies on the basis of the 2001 census.

Representation of the Anglo-Indian Community in Legislative Assemblies

Special provisions for Anglo-Indian community—As in the House of the People, in the legislative assemblies of the states also, the Anglo-Indian community may be given special representation. If the governor of a state is of the opinion that the Anglo-Indian community is not adequately represented in the legislative assembly of the state and that community needs representation in the assembly, he may nominate one member of that community to the assembly (art 333).

Originally, the governors were empowered to nominate such number of members of the Anglo-Indian community to the state assembly as they considered appropriate. However, by the Constitution (Twenty-third Amendment) Act 1969, such number of nominated members was pegged down to not more than one member in any assembly.

This provision for special representation of the Anglo-Indian community in the state assemblies will also cease to be in force from 26 January 2020 onwards, unless further extended by amendment to the Constitution. But if no such extension is made, that will not affect the then sitting members, if any, belonging to the above community in the state assemblies then in existence, and so long as those assemblies continue.

STATE LEGISLATIVE COUNCILS

State Legislative Councils, Not in All But Only in Specified States

Every state has a legislative assembly, but all states do not have a legislative council.

At present, the Constitution of India, under art 168(1)(a), provides for the legislative councils in only five States, namely, Andhra Pradesh, Bihar, Karnataka, Maharashtra and Uttar Pradesh. There is also a provision for the constitution of a legislative council for the state of Tamil Nadu under the Tamil Nadu Legislative Council Act 2010 . The legislative council has not yet been constituted.[26]

The State of Jammu and Kashmir also has a legislative council. But it is constituted under the provisions of the Jammu and Kashmir Constitution (s 46).[27]

Creation or Abolition of Legislative Councils

The Constitution provides that Parliament may by law provide for the creation of a legislative council in a state having no such council, or for the abolition of the legislative council of a state having such a council [art 169(1)]. But, both for the creation and for the abolition of any state legislative council, a resolution to that

26 23A See footnote 2A.

27 All matters relating to composition, etc, of the Legislative Council of Jammu and Kashmir are regulated by the Jammu and Kashmir Constitution and the Jammu and Kashmir Representation of the People Act 1957. These matters have been discussed separately in this chapter.

effect passed by the legislative assembly of the state concerned, by a majority of the total membership of the assembly and by a majority of not less than two-thirds of the members of the assembly present and voting, is a condition precedent.

Creation of new legislative councils—Originally, when the Indian union was divided into nine Part A states, eight Part B states and 10 Part C states, the Constitution set up legislative councils only in six of those Part A states, namely, Bihar, Bombay, Madras, Punjab, Uttar Pradesh and West Bengal, and only in one Part B state, namely, Mysore [arts 168(1) and 238(7)]. None of the Part C states had legislative councils.

When the State of Andhra was created by the bifurcation of the composite State of Madras in 1953, the legislative council for the State of Madras continued, but no legislative council was then provided for the State of Andhra.

On the reorganisation of the Indian union in 1956, whereby the territories of India were divided into 14 states and six union territories by the Constitution (Seventh Amendment) Act 1956, the legislative councils were continued in all the above-mentioned seven states (apart from Jammu and Kashmir) where they were already in existence. In addition, the State of Andhra Pradesh also got a state legislative council under the Legislative Councils Act 1957, wef 1 July 1958. The Legislative Council for Andhra Pradesh so created, wef 1 July 1958, was subsequently abolished by the Andhra Pradesh Legislative Council (Abolition) Act 1985, w.e.f 1 June 1985. The same has now been re-created under the Andhra Pradesh Legislative Council Act 2005. The legislative council being so revived will have the same number of members as it had in the abolished council. This legislation has been enacted by Parliament pursuant to a resolution passed by Andhra Pradesh legislative assembly, on 8 July 2004, under art 169(1) by a majority of the total membership of the assembly and by a majority of not less than two-thirds of the members present and voting for the creation of the legislative council in that state.

A provision was also made for the constitution of a legislative council in the State of Madhya Pradesh under the Legislative Councils Act 1957. The legislative council for the State of Madhya Pradesh was to be constituted from such date as the President may by order appoint. Though the provision for the constitution of the Madhya Pradesh legislative council still exists on the statute book, such council has not been set up even till date, as the President has not yet appointed any date for the purpose. Thus, there is no legislative council in the State of Madhya Pradesh at present.

In 1960, when the composite State of Bombay was split into the States of Maharashtra and Gujarat, the legislative council which was then functioning for the undivided State of Bombay, became the legislative council for the State of Maharashtra. Gujarat, however, did not get a state legislative council.

Likewise, when the state of Punjab was reorganised in 1966 into the states of Punjab and Haryana under the Punjab Reorganisation Act 1966, the truncated state of Punjab continued to have a state legislative council, as before, but the new state of Haryana was not given a state legislative council.

From November 2000, the States of Bihar and Uttar Pradesh have been bifurcated into the States of Bihar and Jharkhand, and Uttar Pradesh and Uttaranchal respectively, under the Bihar Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000. Whereas, the States of Bihar and Uttar Pradesh have retained their legislative councils, though with somewhat truncated strength, neither of the new states of Jharkhand and Uttaranchal has a legislative council.

Abolition of legislative councils—In the late 1960s, a reverse move started for the abolition of state legislative councils, as some of the state governments felt that the legislative councils were not serving any useful purpose commensurate with the expenditure involved in the functioning of these councils. First, the West Bengal legislative council was abolished by the West Bengal Legislative Council (Abolition) Act 1969 from 1 August 1969. It was followed by the abolition of the Punjab legislative council by the Punjab Legislative Council (Abolition) Act 1969 from 7 January 1970.

The Bihar legislative assembly also passed a resolution in terms of art 169 on 3 April 1970 for the abolition of its state legislative council. But immediately thereafter, the state legislative assembly passed another resolution rescinding its earlier resolution and voted in favour of the continuance of the state legislative council. Therefore, the Bihar legislative council still continues to exist.

This trend of abolition of legislative councils continued even thereafter. In 1985, the Andhra Pradesh legislative council was abolished by the Andhra Pradesh Legislative Council (Abolition) Act 1985 (wef 1 June 1985). The State of Tamil Nadu also opted for the abolition of its legislative council and it was accordingly abolished by the Tamil Nadu Legislative Council (Abolition) Act 1986 from 1 November 1986.

Thus, at present, only five states, namely, Andhra Pradesh, Bihar, Maharashtra, Karnataka[28] and Uttar Pradesh, have state legislative councils in existence (apart from the legislative council for the State of Jammu and Kashmir which is continuing under the provisions of the Jammu and Kashmir Constitution). In addition, as above stated, the legislative council for the state of Tamil Nadu was also sought to be revived in 2010 but has not yet been constituted

28 The name of the Mysore legislative council was changed to the Karnataka legislative council on the renaming of that state by the Mysore State (Alternation of Name) Act 1973.

State Legislative Councils Not Subject to Dissolution

Legislative Councils, Permanent Houses

The state legislative councils may be abolished by Parliament by law as aforesaid. However, these councils, wherever they exist, are not subject to dissolution by any authority at any time and are ever continuing upper Houses of the legislatures of the states having a bicameral legislature. Like the Council of States, as nearly as possible, one-third of the members of a state legislative council also retire, as soon as may be, on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Manner of Elections

All elections to a state legislative council are held under the system of proportional representation by means of the single transferable vote.[29]

Membership Strength of Legislative Councils

Maximum and Minimum Strength Permissible

The Constitution provides that the total number of members in the legislative council of a state having such a council shall not exceed one-third of the total number of members in the legislative assembly of that state. However, such total number of members in the legislative council of any state shall not be less than 40 in any case [art 171(1)].

Originally, the total number of members of a state legislative council was not to exceed one-fourth of the total number of members of the state legislative assembly. However, this overall limit on the membership of a state legislative council was considered to be disproportionately too small in comparison to the strength of the legislative assembly. Accordingly, this upper limit was raised from one-fourth to one-third of the strength of the state legislative assembly by the Constitution (Seventh Amendment) Act 1956. The lower limit, however, continued as 40 as before.

Composition of Legislative Councils

Representation of Different Interests in Legislative Councils

Unlike the Council of States of Parliament, whose elected members are representatives of the states, or the House of the People and the state legislative

29 The proportional representation system basically aims to distribute the seats, so far as practicable, in proportion to the strength of various political parties or groups in the state legislative assembly. It is essentially a preferential voting system, where the vote is exercised by recording relative preferences for the candidates on a single ballot paper. The manner of recording votes and counting of votes under the system has been explained in greater detail in ch 13 and ch 14 on 'Poll' and 'Counting of Votes'.

assemblies, whose elected members represent the common people of the territorial constituencies which have elected them, the members of a state legislative council represent a variety of interests. Special representation has been granted in the state legislative councils to the representatives of:

(i) graduates and other persons possessing equivalent qualifications;
(ii) persons engaged in teaching in educational institutions;
(iii) local authorities functioning in the state; and
(iv) the state legislative assembly. In addition, the governor also nominates certain members to the council.

The aforesaid special representation has been provided for in the following manner:

(a) Of the total number of members of the legislative council of a state, as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, districts boards and such other local authorities in the state as Parliament may by law specify for that state [art 171(3)(a)]. These members are elected from territorial council constituencies known as local authorities' constituencies.
(b) As nearly as may be, one-twelfth of the total number of members of the council shall be elected by electorates consisting of persons residing in the state who have been, for at least three years, graduates of any university in India or have been, for at least three years, in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university [art 171(3)(b)]. These members are elected from territorial council constituencies known as graduates' constituencies.
(c) Again, as nearly as may be, one-twelfth of the total number of members of the council shall be elected by electorates consisting of persons who have been, for at least three years, engaged in teaching in such educational institutions within the state, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament [art 171(3)(c)]. These members are elected from territorial council constituencies known as teachers' constituencies.
(d) Further, as nearly as may be, one-third of the total number of members of the council shall be elected by the members of the state legislative assembly, from amongst persons who are not members of the assembly [art 171(3)(d)]. In such election, both the elected and nominated members, if any, of the state legislative assemblies concerned are eligible to participate and vote.
(e) The remainder of the total number of members of the council shall be nominated by the governor. The persons to be so nominated shall have special knowledge or practical experience in respect of literature, science, art, cooperative movement and social service [art 171(3)(e) and art 171(5)].

Present and Past Strength of Legislative Councils

Appendix IV shows the total number of seats, the number of seats earmarked for elections by the local authorities' constituencies, graduates' constituencies and teachers' constituencies, and by the members of the legislative assemblies of the states concerned, together with the number of seats to be filled by nomination in various state legislative councils, as initially constituted in 1952, as they stood after the reorganisation of states in 1957, in 1969, and as they stand at present after the reorganisation of the States of Bihar and Uttar Pradesh in November 2000 and the enactment of the Andhra Pradesh Legislative Council Act 2005.

These numbers have been fixed from time to time by Parliament, under s 10 of the 1950 Act, read with the Third Schedule thereto, or by amending that Schedule by other Acts, like, the Bihar Reorganisation Act 2000 and the Uttar Pradesh Reorganisation Act 2000 and the Andhra Pradesh Legislative Council Act 2005.

Term of Office of Members

Term of Office of Elected Members

It has been mentioned above that the legislative council of a state, having such a council, is a permanent House of the state legislature and is not subject to dissolution at any time. But the Constitution provides that, as nearly as possible, one-third of the members of the council shall retire, as soon as may be, on the expiration of every second year so that there is a continuous out flow and in-flow of members in the council every second year.

In order that the above constitutional scheme works, the term of office of an elected member of the council, other than a member elected to fill a casual vacancy on the death, resignation, etc, of a sitting member, has been fixed by law as six years [s 156(1), 1951 Act].

A member elected to fill a casual vacancy serves for the remainder of his predecessor's term of office [s 156(2) ibid].

Term of Office of Nominated Members

The term of office of a nominated member is also likewise fixed for six years. However, a member nominated to fill the casual vacancy of a nominated member serves for the remainder of his predecessor's term of office (s 156 ibid).

Effect of Delayed Election on Term of Office

Even if, for any reason, an election to fill the vacancy of a member retiring on the expiration of his term of office cannot be so held that his successor assumes office on the day following the day of expiration of the term of office of his predecessor, the successor gets a full term of six years after his election, whenever held. However, as

stated above, a member chosen to fill a casual vacancy serves only for the remainder of the term of office of his predecessor.

Commencement of Term of Office of Members

Date of Commencement of Term of Member Chosen to Fill Regular Vacancy

The term of office of a member chosen to fill the seat of a member retiring on the expiration of his term of office commences from the date on which the state government concerned notifies the name of the member so elected under s 74 of the 1951 Act [s 157(1) ibid]. This notification is issued on the day following the day of expiration of the term of office of the outgoing member, even if such day is a public holiday, so that there is no interval between the expiration of the term of office of an outgoing member and the commencement of the term of office of the incoming member.

In the case of biennial election held in the year 1972 to the Bihar legislative council, the provisions of s 157 were somehow lost sight of and the state government failed to issue the requisite notification under s 74 after the biennial election. This lapse came to light only after about six years when the question of holding the biennial election to fill the vacancies of members elected at the aforesaid biennial election six years ago was being considered by the Election Commission in 1978. To overcome such a piquant situation, a view was taken by the Election Commission that the term of office of the members in question shall be deemed to have commenced on the date on which the declarations containing the names of those elected members were published in the official gazette of the state under s 67A of the 1951 Act.

Date of Commencement of Term of Member Chosen to Fill Casual Vacancy

In the case of a member chosen to fill a casual vacancy, no such separate notification under s 74 of 1951 Act is necessary. His term of office commences from the date on which the declaration relating to his election under s 67 of the said Act is published by the state government in the official gazette of the state under s 67A of that Act or, as the case may, his nomination is notified under art 171(3)(e) [s 157(2) ibid].

Cycle of Biennial Retirements and Biennial Elections

Curtailment of Term of Office of Members Initially Chosen

The first ever elections and nominations to the legislative councils of the states, having such a council, were completed by the end of May 1952 in all those states and the legislative councils were duly constituted shortly thereafter.

As discussed above in the case of the Council of States, in order to give effect to the constitutional mandate that as nearly as possible, one-third of the members of a

state legislative council shall retire every second year, the term of office of one-third of the members, initially chosen by election or nomination, had to be curtailed to two years and of another one-third such members to four years, so that there was a cycle of biennial retirements as envisaged and mandated by the Constitution. Therefore, while fixing the term of members of the legislative councils as six years normally, an enabling provision was made in s 156(1) of 1951 Act, empowering the governors of the states concerned to make by order, after consultation with the Election Commission, such provisions as they thought fit for curtailing the term of office of the members chosen for the first constitution of the councils.

Accordingly, the governors concerned made appropriate orders in consultation with the Election Commission. Keeping in view the varying needs of the different states, the Commission did not insist on absolute uniformity in the details of the procedure laid down by these orders. Like the Council of States, in the case of most of the state legislative councils also, all the members were divided into three categories by draw of lots in public and the term of office of those members determined according to the category in which they were so placed—members of the first category getting full term of six years, members of the second and third categories getting the curtailed term of four years and two years respectively. In some other cases, however, the members were first divided into separate groups on the basis of territorial or linguistic areas and then the members of each of those groups were further divided into the above referred three categories. In the case of Madras legislative council, a totally different method was adopted. The terms of office of the 24 members elected by the state legislative assembly were determined strictly by the order in which they had been declared elected to the council in the process of counting of votes. The first eight members at that election got the full term of six years, the next eight the term of four years and the last eight got the term of only two years.

The terms of office of the nominated members in these states, except Madras and Uttar Pradesh, were also decided by lots. In Madras and Uttar Pradesh, their terms of office were fixed by the governors themselves by executive orders.

By this process, the constitutional mandate that, as nearly as possible, one-third of the members of a state legislative council shall retire on the expiration of every second year was set in motion and sought to be adhered to. It was envisaged that the seats of the members so retiring every second year would be filled by election of an equal number of members to replace the outgoing members and this cycle would be repeated. This process of holding election every second year to elect new members to replace the outgoing members of a state legislative council is called 'biennial election'.

Subsequently, as and when any reorganisation of states took place resulting in any changes in the composition of a state legislative council, eg, the reorganisation of states under the Constitution (Seventh Amendment) Act 1956, similar provisions were made by law either for curtailing the term of office of some of the members

newly chosen, without however affecting adversely the term of office of the then sitting members, or specifying the term of the newly chosen members.

No Curtailment of Term Now Permissible

It is, however, noteworthy that the existing law does not provide for any curtailment of the term of office of members now chosen. Presently, every member elected at a biennial election to fill a regular vacancy serves for the full term of six years and his term commences on the date on which the notification containing the names of members elected at a biennial election in any state is published in the official gazette by the state government under s 74 of 1951 Act.

Disturbance of the Cycle of Biennial Retirements

The above cycle of biennial retirements and biennial elections was maintained in the 1950s and 1960s, but it got seriously disturbed in 1970s. The main reason for such disturbance was the non-existence of the electorates at the relevant time when the biennial elections fell due. In certain cases, the state legislative assembly concerned stood dissolved and could not elect the share of its representatives to the council on the retirement of its outgoing representatives. In many other cases, the local authorities which constitute the electorates for the local authorities' constituencies stood superseded, and elections to constitute those local bodies were not held for several years. For instance, the elections to local bodies in the State of Uttar Pradesh were not held for very nearly a decade in 1980s. The result was that all the 39 members of the state legislative council, who were elected from the local authorities' constituencies, retired on the expiration of their terms of office during the said period, but no elections could be held to fill the seats of those retiring members. Subsequently, when the electorates for the local authorities' constituencies came to be constituted on the elections to the constituent local bodies being held, elections from all the local authorities' constituencies in the state to fill the said 39 vacancies in the state legislative council were held simultaneously in 1990. All of them were elected for the full term of six years and they all retired together in 1996 on the expiration of their term of office, instead of one-third of them retiring on the expiration of every second year as envisaged under the Constitution. Again, the elections to fill their vacancies were not held in 1996, and the same were subsequently held in 1998. As a result, all these 39 members retired on the same date in 2004 (5 January 2004). For similar reasons, all the 25 members representing the local authorities' constituencies in the Karnataka legislative council also retired on the same date in 2004 (5 January 2004). In the case of the Bihar legislative council, situation was even worse where all the 34 seats earmarked for the local authorities' constituencies were lying vacant for more than 10 years for the reason of non-existence of the constituent local authorities. The elections to fill 24 vacancies from the local authorities' constituencies which fell in Bihar after reorganisation in

November 2000 have recently been held in June-July 2003 after the constitution of the constituent local authorities on the basis of elections held to them earlier in that year.

Steps Initiated for Restoration of Cycle

The Election Commission has been expressing its concern in the matter and it made certain proposals[30] in 1992 to the Government of India to amend the law so as to restore the cycle of biennial retirements and biennial elections to be in accord with the original scheme of the Constitution. Though the Commission has reiterated its proposals from time to time, the situation, however, remains as before.

Elections to State Legislative Councils by Members of State Legislative Assemblies

Election by Assembly Members, Definition

An election to a state legislative council by members of the state legislative assembly under art 171(3)(d) is defined as 'election by assembly members' by r 2(1)(c) of the 1961 Rules.

Composition of Electorate for Election by Assembly Members

The electorate for an election by assembly members consists of all the members of the state legislative assembly. Unlike the election to the Council of States where only the elected members of a state legislative assembly vote, the nominated member, if any, representing the Anglo-Indian community in the state legislative assembly also participates as a voter in the election by assembly members to the state legislative council.

Right of Members to Vote Before Assumption of Seat in Assembly or When Assembly is Under Suspension

As in the case of elections to the Council of States,[31] at the elections to the state legislative councils also, the members of the state legislative assemblies can participate as electors even before assumption of seats by them in the assembly or when the assembly is under suspended animation during President's rule in the state.

Right to vote of a member who has been suspended from the House

The right of members of a state legislative assembly to participate in elections to the Council of States or a State Legislative Council does not get affected during the period of his suspension and he still has the right to vote at the above elections, as

30 See ch 2, pp 41–42.
31 See ch 2, pp 34–35.

these elections have been held by the Supreme Court to be non- legislative activities. Going by this view, the Election Commission recently allowed certain suspended members of the Andhra Pradesh Legislative Assembly to participate in elections held in March 2013 to the State Legislative Council by members of the State Legislative Assembly as well as in the elections to that Council from the local authorities constituencies where they were ex officio members of the constituent local authorities by virtue of being members of the State Legislative Assembly.

Right to Vote of a Member whose Election has Been Declared Void During Pendency of his Election Appeal

The right to vote of a member of a state legislative assembly,[32] whose election has been set aside but who is continuing as such member by virtue of a stay order during the pendency of his appeal, at an election to the state legislative council, shall be governed by the same principles which govern his right to vote at an election to the Council of States; that is to say, he shall not be eligible to vote if the stay is conditional.

Maintenance of List of Electors

For an election by assembly members, it is the duty of the returning officer for the election to maintain in his office a list of the members of the state legislative assembly (s 152, 1951 Act). This list of members, with their addresses corrected and updated, is to be maintained in such form as the Election Commission may direct (r 96, 1961 Rules). According to the form prescribed by the Election Commission, the said list shows the serial number of each elector, according to the serial number and name of the assembly constituency from which he was elected to the assembly, the name of the elector and his full address, and contains an additional column for making such remarks as may be appropriate in relation to an elector, like, his ineligibility to vote at the election in pursuance of any court direction.

Elections to State Legislative Council from Council Constituencies

Territorial Council Constituencies

For the purpose of filling the seats in a state legislative council earmarked for the representatives of local authorities, graduates and teachers under the provisions of cll (a), (b) and (c) of art 171(3), the state concerned is divided into three types of territorial council constituencies, known as local authorities' constituencies, graduates' constituencies and teachers' constituencies respectively.

32 See ch 2, pp 35–36.

Delimitation of Council Constituencies

The basic work relating to division of states into council constituencies is done by the Election Commission and, on its recommendation, the President by order determines: (i) the territorial extent of each council constituency; and (ii) the number of seats allotted to each such constituency (s 11, 1950 Act). From time to time, the President may alter or amend any such order, after consultation with the Election Commission [s 12(1) ibid]. Any such amending order may contain provisions for the allocation of any member representing any council constituency immediately before the making of the order to any constituency delimited anew or altered by the order and for such other incidental and consequential matters as the President may deem necessary [s 12(2) ibid]. Every such order shall be laid before Parliament as soon as may be after it is made, and shall be subject to such modification as Parliament may make on a motion made within 20 days from the date on which the order is so laid (s 13 ibid).

Electorate for Local Authorities' Constituencies

Composition of Constituent Local Authorities

The electorates for local authorities' constituencies under art 171(3)(a) shall consist of members of municipalities, district boards and such other local authorities in the state, as Parliament may by law specify. Parliament has specified such local authorities in the Fourth Schedule to the 1950 Act. That Schedule specifies various local authorities in each state having a legislative council. These local authorities vary from state to state depending upon the setup of the local self-government in the state concerned.[33]

Composition of Electorate in Each Constituency

As each state having a legislative council has been divided into territorial local authorities' constituencies, the electorate of each such constituency shall consist of members of all the specified local authorities exercising jurisdiction in any place or area within the territorial limits of that constituency [s 27(2)(a), 1950 Act]. Every member of such local authority shall be entitled to be registered in the electoral roll for that constituency [s 27(2)(b) ibid].

Thus, the nominated members, and even the ex-officio members of a local authority are entitled to be registered as electors in local authorities' constituencies. However, in some states, certain administrative instructions have been issued by the state governments concerned to their officials, who are ex-officio members of a local authority, not to vote at an election to the state legislative council from a local

33 Appendix V.

authorities' constituency. This is intended to keep government officials clear of politics and political affiliations.

However, in the State of Karnataka, a different view was taken by the Karnataka High Court in relation to the eligibility of nominated and ex-officio members of local authorities to vote in the local authorities' constituencies. At the time of the biennial election to the state legislative council from Chickmagalur local authorities' constituency in 1988, a question was raised whether a person who was not an elected member of the *zilla parishad* in terms of the provisions of sub-s (1) of s 139 of the Karnataka Zilla Parishads, Taluk Panchayat Samitis, Mandal Panchayats and Nyaya Panchayats Act 1983, but who, being a member of the state legislative assembly or state legislative council or a member of Parliament or a president of district central cooperative bank, was given the right to participate in the proceedings or meetings of a *zilla parishad* under sub-ss (2) and (3) of s 139 of that Act, could be regarded as a member of the local authority for the purpose of art 171(3)(a) and entitled to vote in the concerned local authorities' constituency. A question was also raised whether the nominated members of different *mandal panchayats* were eligible to be included in the electoral rolls for the local authorities' constituencies. The Karnataka High Court observed in *L Shivanna v State of Karnataka and Ors*[34] that the effect of sub-ss (2) and (3) of s 139 of the aforesaid Act was that the persons named therein were deemed to be members of the *zilla parishads* for the purposes of the Act and to the extent indicated therein and that the fiction created in their favour could not be extended beyond the purpose for which it was created. Therefore, the high court held that a member of Parliament or of the state legislature or a president of district central cooperative bank could not be regarded as a member of *zilla parishad*, ie, of a local authority, within the meaning of that expression in art 171(3)(a) and s 27(2) of 1950 Act.[35] The High Court, however, held that the nominated members of *mandal panchayats* were covered by the expression 'member' used in the said art 171(3)(a) and s 27(2) of the 1950 Act.

In the recent elections to the Andhra Pradesh Legislative Council in March 2013 from certain local authorities' constituencies, the members of Parliament and state

34 86 ELR 336.

35 The High Court directed in that case that the names of the members of Parliament and state legislatures and presidents of district central cooperative banks shall be deleted from the electoral roll of Chickmagalur local authorities' constituency. However, the court further directed that the aforesaid persons shall be at liberty to cast their votes at the election, if they so chose, but the same shall not be counted and the result of the election shall be declared without reference to those votes. An appeal (Civil Appeal No 276–77of 1993) was filed by the State of Karnataka against this decision of the Karnataka High Court before the Supreme Court. But the Supreme Court dismissed the appeal on 14 October 1999, without expressing any opinion on the correctness or otherwise of the interpretation placed by the High Court on the provisions of the Karnataka Zilla Parishads, Taluk Panchayat Samitis, Mandal Panchayats and Nyaya Panchayats Act 1983, as that Act had been repealed and replaced by the Karnataka Panchayat Raj Act 1993.

legislative assembly were allowed to vote by virtue of their *ex officio* membership of the constituent local authorities having regard to the provisions of the local Municipalities and Panchayat Acts.

When the Electorate Can be Said to be Complete

As mentioned above, the electorate for a local authorities' constituency consists of members of specified local authorities exercising jurisdiction within the territorial limits of the constituency. It had been the general experience that many of these local authorities remained suspended or dismissed for long periods in several states and, as a result, the electorates for local authorities' constituencies could never be said to be complete in all respects. But the elections from these constituencies could not be postponed indefinitely until all the constituent local authority were duly constituted. Therefore, as a *via media*, the Election Commission laid down a guideline that if least 75 percent of the local authorities in a local authorities' constituency were functioning, and again at least 75 percent of the voters in the total electorate of the constituency were available, then the electorate should be asked to elect their representative to the legislative council. The above guideline of the Election Commission met with the approval of the Supreme Court in *Election Commission of India v Shivaji and Ors*,[36] where the election from the Osmanabad-cum-Latur-cum-Beed local authorities' constituency to the Maharashtra legislative council was sought to be called in question on the ground that the *zilla parishads* of Osmanabad and Latur were not in existence at the relevant time. The Supreme Court observed that even in the absence of the *zilla parishads* of Osmanabad and Latur, the existing position of the electorate in the constituency satisfied the guideline of the Election Commission.

Electorate for Graduates' Constituencies

Composition of Electorate

The electorate for a graduates' constituency, referred to in art 171(3)(b), shall consist of persons, ordinarily resident within the territorial limits of the graduates' constituency concerned, who have been either a graduate of a university in the territory of India or in possession of any of the qualifications deemed to be equivalent to that of a graduate of a university in the territory of India [s 27(5)(a), 1950 Act].

Qualifying Period and Qualifying Date

Any person to be entitled to be enrolled as elector in a graduates' constituency should be a graduate or in possession of any equivalent qualification, at least for three years on a qualifying date prescribed by law. Initially, such qualifying date was

36 AIR 1988 SC 61.

prescribed as the first day of April of the year in which the electoral roll of a particular graduates' constituency was prepared [s 27(6), 1950 Act]. Subsequently, this qualifying date was changed to be the first day of January in which the electoral roll was prepared or revised, as in the case of electoral rolls for parliamentary and assembly constituencies [s 27(6) ibid as amended by the Representation of the People (Amendment) Act 1956]. This, however, created hardships in the case of a large number of persons because the results of university examinations are generally announced during the middle of a year. Therefore, there was a further amendment to the definition of qualifying date by the Representation of the People (Amendment) Act 1961, and, at present, such qualifying date for the purpose has been prescribed as the first day of November of the year in which the preparation or revision of electoral roll for the graduates' constituency concerned is commenced.

The Election Commission has clarified that a person shall be deemed to have become a graduate on the date on which the result of the examination for the degree course is announced by the university, though the university may be taking time to hold its convocation for admitting the successful candidates to the university degree.[37]

Uniform List of Equivalent Qualifications

Qualifications deemed to be equivalent to a graduate of a university in India are specified by the government of the state concerned for its legislative council, with the concurrence of the Election Commission [s 27(3)(a), 1950 Act]. The qualifications so specified are required to be notified by the state government concerned in the official gazette of the state.

In order to achieve uniformity in the specification of such equivalent qualifications by all the governments of the states having a legislative council, the Election Commission has prescribed a uniform list of such equivalent qualifications for all the states having a legislative council. The state governments concerned have notified this uniform list in the official gazettes of their states as required under the law. In actual practice, it is the Election Commission which decides, either on a proposal received from any state government or on a representation from any institution or association or body of persons or any individual, whether to treat a qualification as equivalent to that of a graduate or not. For this purpose, the Election Commission has prescribed the following criteria for recognising a qualification as equivalent to that of a graduate:[38]

(i) The course culminating in any diploma or other qualification should cover a minimum period of five years' study, after matriculation or SSLC

37 Election Commission's *Handbook for Electoral Registration Officers*, 2012 edn, ch XIII.

38 Election Commission Circular No 16/56, dated 9 November 1956, as amended by its Circular No 16/91(Genl), dated 13 May 1992.

(Secondary School Leaving Certificate) or any other equivalent qualification;

(ii) A course which does not cover a period of five years' study but for which a period of practical training is prescribed in addition to the period of study, may also be recognised as equivalent to that of a graduate, provided that the total period of such study and practical training is not less than five years;

(iii) Titles and degrees awarded by statutory bodies only may be considered for the purpose and not those awarded by non-statutory bodies.

Prior to May 1975, a person could become a graduate of an Indian university after four years' study after matriculation or SSLC under the 10+2+2 pattern. With effect from 1 May 1975, the education system in India was modified and a person can now become a graduate of an Indian university only after five years' study after matriculation or SSLC with the introduction of 10+2+3 pattern. Therefore, the aforementioned criteria for recognition of equivalent qualifications prescribed only a four years' study after matriculation or SSLC for any diploma, awarded before 1 May 1975, to be treated at par with a university degree. Accordingly, the uniform list prescribed by the Commission contains a large number of diplomas awarded prior to 1 May 1975, which were granted after four years' study after matriculation or SSLC. In other words, under the said uniform list, a person who was awarded a particular diploma after four years' study after matriculation or SSLC, prior to 1 May 1975, is still eligible to be enrolled as an elector in a graduates' constituency, even after the revised criteria came into force from 1975.

In the uniform list, the diplomas, etc, deemed to be equivalent to a university degree have been categorised under five heads, namely, arts and sciences, engineering and technological, medical, professional and agriculture. Many of the degrees and diplomas awarded by some of the universities and educational institutions in certain foreign countries have also been included under each of the above five heads in the uniform list.

Electorates for Teachers' Constituencies

Composition of Electorate

The electorate of a teachers' constituency, provided under art 171(3)(c), shall consist of persons, ordinarily resident within the territorial limits of such constituency, who have been engaged in teaching in any of the educational institutions not lower in standard than that of a secondary school. But such persons must be engaged in teaching for a total period of at least three years, within the last six years, immediately before the prescribed qualifying date [s 27(5)(b), 1950 Act].

Qualifying Date

The qualifying date for the above purpose is also the first day of November of the year in which the preparation or revision of electoral roll for the constituency is commenced [s 27(6), 1950 Act].

Specification of Educational Institutions

The teachers of every educational institution in a state having a legislative council are not entitled to be enrolled as electors in a teachers' constituency. It is only the teachers of those educational institutions which have been specified by the government of the state concerned as being educational institutions not lower in standard than that of a secondary school, who are entitled to be electors in the teachers' constituencies. For this purpose, the state government concerned specifies, by notification in the official gazette, the list of all such educational institutions which are not lower in standard than that of a secondary school. Again, such list is specified by the state government with the concurrence of the Election Commission [s 27(3)(b), 1950 Act]. Accordingly, all the governments of the states having a legislative council have notified separate lists of such educational institutions in their states with the concurrence of the Election Commission.

In such specified educational institutions, no distinction is made between a teacher taking higher classes and a teacher taking primary classes in so far as their eligibility to be enrolled as an elector in a teachers' constituency is concerned. The teachers taking primary or middle classes in these specified educational institutions can also be electors in a teachers' constituency, because their entitlement to be such elector is determined with reference to the institution in which they are engaged in teaching, and not the class or classes in that institution which they are teaching. This is somewhat anomalous and discriminatory in the sense that a teacher taking a primary class in a specified institution can become an elector in a teachers' constituency, but a teacher taking a middle class in a middle school not so specified is not entitled to be elector in a teachers' constituency.

Eligibility for Inclusion with Reference to Place of Ordinary Residence

A teacher engaged in teaching in a specified educational institution can get his name enrolled in the electoral roll of that teachers' constituency in which he is ordinarily resident, and not in the constituency in which his educational institution is situate [s 27(5)(b)]. In other words, he may be working in a school which is outside the territorial limits of the teachers' constituency within which his place of ordinary residence falls. His name will be included in the constituency in which his residence falls and not the constituency in which his school is situate. But his school must be located within the boundary of the state concerned, and not outside it in some neighbouring state.

Simultaneous Registration in Graduates', Teachers' and Local Authorities' Constituencies

There is no bar under the law that a person registered as an elector in a graduates' constituency cannot be registered simultaneously in a teachers' constituency or vice versa, if he happens to be a graduate teacher and otherwise eligible to be enrolled in both the constituencies. Similarly, he can also be simultaneously enrolled in local authorities' constituency, if he is also a member of any specified local authority.

LEGISLATURES FOR UNION TERRITORIES

Creation of Legislative Assemblies for Union Territories

Before the union territories came to be constituted under the Constitution (Seventh Amendment) Act 1956, these territories generally formed Part C states. Only some, not all, of these Part C states had legislative assemblies under the Government of Part C States Act 1951 enacted by Parliament in pursuance of the provisions of the then existing art 240. On the reorganisation of states in 1956 under the Constitution (Seventh Amendment) Act 1956, some of the Part C states were merged with the adjoining states and the rest were converted into union territories to be directly administered by the Central Government. After the enactment of the Constitution (Seventh Amendment) Act 1956, the Parliament first made a provision for setting up of territorial councils for some of the union territories under the Territorial Councils Act 1957. Subsequently, in 1962, a need was felt for some of the union territories also to have their legislatures, though with some truncated powers and the Central Government still retaining its control over them. Accordingly, the Constitution was further amended by the Constitution (Fourteenth Amendment) Act 1962 to provide, inter alia, for the creation by law of a body, whether elected or partly nominated and party elected, to function as a legislature, for some of the union territories (art 239A). Pursuant thereto, the Parliament enacted the Government of Union Territories Act 1963, whereunder legislative assemblies were constituted for five of the then existing nine union territories, namely, Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry. No legislative assembly was provided for the remaining four Union Territories of Andaman and Nicobar Islands, Dadra and Nagar Haveli, Delhi and Laccadive, Minicoy and Amindivi Islands [renamed Lakshadweep in 1973 by the Laccadive, Minicoy and Amindivi Islands (Alteration of Name) Act 1973].

In 1966, when a new Union Territory of Chandigarh was formed under the Punjab Reorganisation Act 1966, it too did not get any legislative assembly.

However, in the same year, the Union Territory of Delhi got a legislative chamber under the Delhi Administration Act 1966. It was named the Delhi Metropolitan Council. Subsequently, in the year 1991, the Union Territory of Delhi was re-

christened as the National Capital Territory of Delhi under art 239AA inserted by the Constitution (Sixty-ninth Amendment) Act 1991, and a legislative assembly was set up in 1993 for the National Capital Territory under the Government of National Capital Territory of Delhi Act 1991.

When the North-Eastern areas were reorganised in 1971, under the North-Eastern Areas (Reorganisation) Act 1971, two new union territories of Arunachal Pradesh and Mizoram were created. Of them, only the Union Territory of Mizoram was then provided with a legislative assembly by amending art 239A by the Constitution (Twenty-seventh Amendment) Act 1971 and the Government of Union Territories Act 1963 by the Government of Union Territories (Amendment) Act 1971. Later, in 1975, the Union Territory of Arunachal Pradesh also got a legislative assembly by further amendment to the said art 239A and 1963 Act by the Constitution (Thirty-seventh Amendment) Act 1975 and the Government of Union Territories (Amendment) Act 1975 respectively.

At present there are seven union territories, namely, (i) Andaman and Nicobar Islands; (ii) Chandigarh; (iii) Dadra and Nagar Haveli; (iv) Daman and Diu; (v) Lakshadweep; (vi) National Capital Territory of Delhi; and (vii) Pondicherry, the rest having become states. Only two of these union territories, namely, Delhi and Pondicherry, have legislative assemblies.

Composition of Legislative Assemblies of Union Territories

Legislative Assembly of Pondicherry

The Government of Union Territories Act 1963 provides that the legislative assembly of a union territory constituted under that Act shall have 30 members [s 3(2)]. All these members shall be chosen by direct election from the territorial assembly constituencies under the 'first past the post' system. Accordingly, the legislative assembly for the Union Territory of Pondicherry has 30 members.

The Central Government has the power to nominate not more than three persons to be members of the legislative assembly. The persons to be so nominated shall not be government servants [s 3(3) ibid].

Legislative Assembly of Delhi

The Union Territory of Delhi was given a special dispensation when it was provided with the Delhi Metropolitan Council under the Delhi Administration Act 1966. This Council had 56 members. Subsequently, when Delhi also got a legislative assembly under the Government of National Capital Territory of Delhi Act 1991, the strength of the legislative assembly was further increased to 70. All these 70 members are chosen by direct election from territorial assembly constituencies under the 'first past the post' system [s 3(1)].

Reservation of seats for scheduled castes in Legislative Assemblies of Delhi and Pondicherry—In both the legislative assemblies, seats shall be reserved for the scheduled castes in direct proportion to their population in the respective union territories [ss 3(4) and 3(5) of Government of Union Territories Act 1963 and s 3(3) of Government of National Capital Territory of Delhi Act 1991]. The population here means the population ascertained at the 2001 census [Explanation to s 3(5) of 1963 Act and s 43D of 1991–Act, as amended by the Government of Union Territories and the Government of National Capital Territory of Delhi (Amendment) Act 2005].

Duration of the Legislative Assemblies of Delhi and Pondicherry

Like the legislative assemblies of states, the Legislative Assemblies of Union Territory of Delhi and Pondicherry also have duration of five years reckoned from the date appointed for their first meeting (s 5 of 1963 Act and of 1991 Act).

Extension of duration—Their term can also be extended, while a proclamation of emergency under art 352 is in operation, for a period not exceeding one year at a time and not exceeding in any case beyond a period of six months after the proclamation has ceased to operate. Such extension can be made by the President himself by an executive order, and no law by Parliament is necessary for such extension, unlike in the case of legislative assemblies of states where such extension can be made only by Parliament by law (proviso to s 5 of the 1963 Act and of the 1991 Act).

Premature Dissolution of Legislative Assemblies of Delhi and Pondicherry

The legislative Assemblies of Delhi and Pondicherry may also be dissolved earlier than their normal duration of five years by the administrators (known as lieutenant governors) [s 6(2)(b) of the 1963 Act and of the 1991 Act].

Dissolution of legislative assemblies in case of failure of constitutional machinery—The above legislative assemblies may also be dissolved by the President, if he is satisfied that a situation has arisen in which the administration of these union territories cannot be carried on in accordance with the provisions of the above referred 1963 Act or, as the case may be, of 1991 Act [s 51 of the 1963 Act and art 239AB r/w s 50 of the 1991 Act].

LEGISLATURE FOR THE STATE OF JAMMU AND KASHMIR

Special Provisions Relating to Jammu and Kashmir

Jammu and Kashmir is one of the constituent states of the Union of India. However, for certain historical reasons, the state enjoys a special status under art 370 of the Constitution of India. The Constitution of India applies in relation to that

state subject to such exceptions and modifications as the President may by order specify, with the concurrence of the government of that state. The first such Order was made by the President in 1950, known as the Constitution (Application to Jammu and Kashmir) Order 1950 (CO 10). It was, however, superseded in 1954 by the Constitution (Application to Jammu and Kashmir) Order 1954 (CO 48). This Order is still in force, though it has been amended in certain respects from time to time.

As part of this special status given to the State of Jammu and Kashmir under the Constitution of India, the state was allowed to set up its own Constituent Assembly for the framing of a separate Constitution for that state. The Constituent Assembly of the state so constituted in September 1951, completed its deliberations in November 1956 and the Constitution of the State of Jammu and Kashmir came into force, wef 26 January 1957.

Composition of State Legislature of Jammu and Kashmir

The Constitution of the State of Jammu and Kashmir has provided for the set up of a bicameral legislature for that state, under s 46. The state legislature consists of: (i) the governor of the state; and (ii) two Houses, known as the legislative assembly and the legislative council.

Laws relating to Elections

All matters relating to the composition of these Houses, delimitation of constituencies, preparation and revision of electoral rolls, qualifications and disqualifications for membership, conduct of elections to those Houses and settlement of disputes relating to those elections are governed by provisions of the Constitution of Jammu and Kashmir and the law made thereunder by the state legislature. Such law is mainly contained in the Jammu and Kashmir Representation of the People Act 1957 and the Jammu and Kashmir Registration of Electors Rules 1966 and the Jammu and Kashmir Conduct of Elections Rules 1965 made under that Act.

However, all matters relating to elections to Parliament from the State of Jammu and Kashmir are governed by the main provisions of the Constitution of India and of the laws made thereunder by Parliament, as in the case of other states.

Legislative Assembly of Jammu and Kashmir

Composition of State Assembly

The Constitution of Jammu and Kashmir initially provided that the legislative assembly of the state shall consist of 100 members and that all these members shall be chosen by direct election from territorial assembly constituencies in the state [s 47(1)].

As some of the areas of the State of Jammu and Kashmir are under the occupation of Pakistan, the state Constitution made a special provision for reservation of seats for those areas in the state legislative assembly. Therefore, it was originally provided that 25 seats, out of the aforesaid 100 seats, in the assembly shall remain vacant until the said areas under the occupation of Pakistan cease to be so occupied and the people residing in those areas elect their representatives to the state legislative assembly (s 48). Accordingly, the said occupied areas are excluded while delimiting the territorial assembly constituencies in the state.

The number of seats reserved for the occupied areas was later reduced from 25 to 24 by the Constitution of Jammu and Kashmir (Twelfth Amendment) Act 1975.

Subsequently, the total number of seats in the state legislative assembly was increased from 100 to 111, by the Constitution of Jammu and Kashmir (Twentieth Amendment) Act 1987. But the number of seats reserved for the Pakistan-occupied areas continued to be 24. Therefore, the state legislative assembly at present consists of 87 members chosen directly from territorial assembly constituencies, which are all single member constituencies. The elections from these assembly constituencies are held under the 'first past the post' system.

Reservation of Seats for Scheduled Castes in the State Assembly

Seats are reserved in the legislative assembly of the State of Jammu and Kashmir for the scheduled castes of that state in direct proportion to their population in the state. The seats reserved for them shall bear, as nearly as may be, the same proportion to the total number of seats in the assembly as their population bears to the total population of the state (s 49).

Meaning of population—Population for the above purpose means the population as ascertained at the last preceding census of which the relevant figures have been published, namely, 2001-census, at present [Explanation (a) to 49].

Meaning of scheduled castes—Scheduled castes, for the purposes of the Constitution of Jammu and Kashmir are also the same castes which have been specified as the scheduled castes for the State of Jammu and Kashmir under art 341 of the Constitution of India for the purposes of that Constitution [Explanation (b) to s 49].

Period of reservation—The reservation of seats for the scheduled castes in the state legislative assembly shall, unless further extended by amendment to the State Constitution, cease to have effect from 26 January 2020. But such cesser shall not affect any representation in the legislative assembly then existing until the dissolution of that assembly.

Reservation of Seats for Women in the State Assembly

There is a vociferous demand for reservation of seats for women in Parliament and in the legislatures of the states (other than Jammu and Kashmir), which has not been conceded so far. But the Constitution of Jammu and Kashmir already makes provision for special representation of women in the state legislative assembly. If the governor of the state is of opinion that women are not adequately represented in the assembly, he may nominate not more than two women to be members of the assembly [proviso to s 47(1)]. They will be in addition to the 87 members chosen by direct election from territorial constituencies.

Duration of the State Assembly

Normal duration—The Constitution of Jammu and Kashmir initially provided that the duration of the legislative assembly of the state, unless sooner dissolved, shall be five years from the date appointed for its first meeting, and the expiration of the said period of five years shall operate as dissolution of the assembly [s 52(1)].

However, in 1977, the normal duration of the state assembly was increased from five years to six years by the Constitution of Jammu and Kashmir (Sixteenth Amendment) Act 1977. Around that time, the term of the legislative assemblies of other states was also increased from five years to six years by amending the Constitution of India by the Constitution (Forty-second Amendment) Act 1976. But, whereas the term of other state legislative assemblies was again brought down from six years to five years by the Forty-fourth Amendment to the Constitution of India in 1978, the amendment to the Constitution of Jammu and Kashmir as made in 1977 was allowed by the state legislature to continue. Thus, whereas the legislative assemblies of other states of the Indian union have a life span of five years, the legislative assembly of Jammu and Kashmir continues for six years, unless dissolved sooner.

Extension of duration of state assembly—The normal duration of six years of the state assembly may be extended by the state legislature by law. Such extension can, however, be made only when a proclamation of emergency issued by the President under art 352 of the Constitution of India is in operation, whether in that state or in any other part of the country [proviso to s 52(1)]. Further, the term of the state assembly can be extended for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation of emergency has ceased to operate. But no such occasion has arisen so far where the state legislature had to invoke this provision for extending the term of its state assembly.

Premature dissolution of the state assembly—The state assembly may be dissolved earlier than its normal term of six years by the governor of the state [s 53(2)(b)].

Normally, such dissolution will be made by the governor on the advice of his council of ministers.

Dissolution of the state assembly in case of failure of constitutional machinery— The governor of the state may also dissolve the state assembly, if he is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the state Constitution, and he assumes to himself all or any of the functions of the government of the state, and imposes, what is popularly known as the governor's rule, under s 92. Such dissolution, though not expressly provided for in s 92, shall be made by the governor in exercise of the powers to make such incidental and consequential provisions as appear to him to be necessary or desirable for giving effect to the objects of his proclamation. This power of the governor of the state is akin to the powers of the President in relation to the other states in the case of failure of constitutional machinery, which is popularly known as President's rule, in the state concerned under art 356 of the Constitution of India.

The proclamation issued by the governor in this behalf shall cease to operate on the expiration of six months from the date of its issue, which would mean that a new legislative assembly should constituted within this period of six months. However, the President has the powers under the aforesaid art 356 of the Constitution of India, as applied to the State of Jammu and Kashmir, to extend the period of such proclamation of the governor by assuming to himself all or any of the functions of the Government of the State of Jammu and Kashmir and imposing President's rule in that state. Such President's rule can continue up to three years in accordance with the provisions of art 356 of the Constitution and subject to the conditions prescribed thereunder.[39]

LEGISLATIVE COUNCIL OF JAMMU AND KASHMIR

Composition of Council

The Legislative Council of the State of Jammu and Kashmir has a unique composition. The State of Jammu and Kashmir consists of two provinces, known as the Kashmir province and the Jammu province. The Constitution of Jammu and Kashmir has provided for parity in the matter of representation of both the provinces in the state legislative council.

The Council shall consist of 36 members [s 50(1)]. Of them, 11 members shall be elected by the members of the state legislative assembly from amongst persons who are residents of the Kashmir province (and who are not members of the legislative assembly) [s 50(2)]. Another 11 members shall be elected by the state

39 See pp 76–77 of this Chapter.

legislative assembly from amongst persons who are residents of the Jammu province (and who are not members of the legislative assembly) [s 50(3)].

Even in these two provinces, care has been taken to further ensure that certain prominent areas of those provinces are assured of a minimum representation in the state legislative council. Therefore, it has been provided that of the 11 members representing the Kashmir province, at least one shall be a resident of *tehsil* Ladakh and at least one shall be a resident of *tehsil* Kargil [proviso to s 50(2)]. Similarly, of the 11 members representing the Jammu province, at least one shall be a resident of Doda district and at least one shall be a resident of Poonch district [proviso to s 50(3)].

Of the remaining 14 members of the state legislative council, six members shall be elected by the following electorates:

(a) One member by the members of municipal councils, town area committees and notified area committees in the Province of Kashmir (the whole of the Kashmir province thereby forming the Kashmir Local Authorities' Constituency) [s 50(4)(a)];
(b) One member by the members of municipal councils, town area committees and notified area committees in the Province of Jammu (the whole of the Jammu province thereby forming the Jammu Local Authorities' Constituency) [s 50(4)(b)];
(c) Two members by the members of *panchayats* and such other local bodies in the Province of Kashmir as the Governor of the State may by order specify (the whole of the Kashmir province thereby forming the Kashmir Panchayats' constituency) [s 50(5)(a)];
(d) Two members by the members of panchayats and such other local bodies in the Province of Jammu as the governor of the state may by order specify (the whole of the Jammu province thereby forming the Jammu Panchayats' Constituency) [s 50(5)(b)].

All the remaining eight members of the state legislative council shall be nominated by the governor. Of them, not more than three shall be persons belonging to any of the socially and economically backward classes in the state. The rest shall be persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service [s 50(6)].

A question arose in 2005 as to what is the definition of 'Poonch district' when a biennial election to the Jammu and Kashmir Legislative Council by members of the state legislative assembly was held in that year. One of the seats to be filled at that election was reserved for Poonch district and the candidate who was elected to represent that seat belonged to Rajouri district. The Returning Officer had accepted the nomination paper of the said candidate on the ground that at the time of the enactment of the Constitution of the Jammu and Kashmir in 1957, Rajouri district was a part of Poonch district and that he had to see the position as at the time of

promulgation of the Constitution in 1957 and not at the time of the holding of election in 2005. The Jammu and Kashmir High Court, however, took a different view. The Supreme Court upheld the view of the Jammu and Kashmir High Court that the word 'district' is to be interpreted in its ordinary and grammatical meaning and the Poonch district means the geographical area of Poonch district as it existed on the date of notification issued for holding election in the year 2005.[40]

Council Not subject to dissolution

Like the Council of States of Parliament and the legislative councils of other states having such a council, the Legislative Council of the State of Jammu and Kashmir is also a permanent House of the state legislature and is not subject to dissolution at any time by any authority. However, as nearly as possible, one-third of the members of the council shall retire, as soon as may be, on the expiration of every second year in accordance with the provisions made in that behalf by the state legislature by law [s 52(2)].

Manner of Election to Council

All elections to the Legislative Council of Jammu and Kashmir by the members of the state legislative assembly are held in accordance with the system of proportional representation by means of the single transferable vote [s 50(7)].

All other elections to that legislative council from council constituencies are held under the system of 'first past the post', as in the case of elections to the state legislative assembly from the territorial assembly constituencies [s 50(1) r/w Parts IV and V of the Jammu and Kashmir Conduct of Elections Rules 1965].

Term of Office of Members

The term of office of a member elected or nominated, other than a member chosen to fill a casual vacancy, shall be six years [s 156(1) of Jammu and Kashmir Representation of the People Act 1957]. A member elected or nominated to fill a casual vacancy shall serve for the remainder of his predecessor's term of office [s 156(2) ibid].

Commencement of term of office of members—The term of office of a member chosen to fill the seat of a member retiring on the expiration of his term of office commences from the date on which the state government notifies the name of the member so elected under s 83 of the 1957 Act [s 157(1)]. This notification is issued on the day following the day of expiration of the term of office of the outgoing member, even if that day is a public holiday, so that there is no interval between the expiration of the term of office of an outgoing member and the commencement of the term of office of the incoming member.

40 *Tassadiq Hussain v Mohd. Rashid Qureshi and Ors.* 2011(1) SCJ 815.

However, in the case of a member chosen to fill a casual vacancy, no such separate notification under s 83 of the 1957 Act is necessary [s 157(2)]. His term of office commences from the date on which the declaration of the returning officer relating to his election under s 76 of the said Act is published by the state government in the official gazette of the state under s 77 of that Act, or, as the case may be, his nomination is announced under s 50(6) of the state Constitution.

Curtailment of term of office of members initially elected—In order to give effect to the constitutional scheme that, as nearly as possible, one-third of the members of the council shall retire every second year, the term of office of one-third of the 36 members initially chosen by election or nomination was curtailed to two years and of another one-third such members to four years, so that there was a cycle of biennial retirements as envisaged and mandated by the state Constitution. Such curtailment was made in accordance with the Order dated 17 March 1958 made by the governor, after consultation with the Election Commission, under s 156(1) of the 1957 Act. Under this Order, the terms of the individual members initially elected were determined by draw of lots in public. Like the elected members, the term of office of the nominated members was also curtailed in the same manner under the said order to see that one-third of the nominated members also retired every second year.

Further curtailment of term of office of members chosen in 1997—The cycle of biennial retirements and biennial elections to the Legislative Council of Jammu and Kashmir was thus set in motion in the manner described above. However, this cycle got seriously disturbed in the 1990s, because of the reasons that the state legislative assembly remained dissolved between 1990 and 1996, and the elections to *panchayats* and other local bodies in the state could also not be held for a number of years because of insurgency in the state. In 1996, a situation arose where the whole of the legislative council was composed of just one nominated member alone. On the constitution of the Jammu and Kashmir legislative assembly on 9 October 1996, it was observed that the seats all the 22 members in the state legislative council who were elected by the members of the state legislative assembly were vacant. Further, if all the 22 seats were filled at one go, all the 22 members so elected would retire on the same day after serving their normal term of office of six years, and this would be opposed to the constitutional scheme of biennial retirements of one-third members of the council. Therefore, in order to restore the disturbed cycle of biennial retirements, the Election Commission recommended an amendment of s 156 of Jammu and Kashmir Representation of the People Act 1957 to the state government, to make another enabling provision for curtailment of term of office of members to be chosen to fill the said 22 seats, on the lines of the provisions made in the said s 156 at the time of initial constitution of the council. The state government accordingly issued an Ordinance, called the Jammu and Kashmir Representation of the People (Amendment) Ordinance 1996, amending the said s 156 to the effect

that eight of the 22 members to be chosen would serve for six years, another eight for four years and the remaining six for two years. The Ordinance was challenged before the state high court, mainly on the ground that if elections were held separately for the above-mentioned three categories of members serving for six years, four years and two years respectively, some political parties will get an unfair advantage by winning more seats than the seats falling to their share in proportion to their strength in the state legislative assembly.[41] The high court left the matter to be decided by the Election Commission whether it should hold separate elections for eight, eight and six seats respectively or a common election for all the 22 seats, but directed that appropriate orders shall be obtained from the high court, if, the Commission proposed to issue more than one notification. Appreciating the grievance of the petitioners, the Commission recommended to the state government the issuance of a fresh Ordinance providing for all the 22 seats to be filled by a common election and for curtailment of the term of office of members so chosen after the election. The state government thereupon repealed the earlier Ordinance and promulgated a fresh Ordinance, called the Jammu and Kashmir Representation of the People (Amendment) Ordinance 1997. The high court then dismissed the writ petition, paving the way for filling all the 22 seats by a common election, but having due regard to the reservations provided under the state Constitution for the two provinces of Kashmir and Jammu among those seats. After the elections were held in March 1997 to fill the above 22 seats, the governor made the Jammu and Kashmir Legislative Council (Terms of Office of Members) Order 1997, on the lines of the earlier Order made in the year 1958. In pursuance of this Order, the terms of the individual members were determined by draw of lots in public at Jammu on 2 January 1998, having due regard to the reservations for the two provinces. Such determination of individual terms of office of members also became a subject matter of dispute before the state high court, raised by one of the members who got only two years term in the draw of lots.[42] The high court, however, saw no merit in the writ petition and dismissed the same on 3 January 1999.

By recourse to the above process, the cycle of biennial retirements of, as nearly as may be, one-third of the members of the council elected by the members of the state legislative assembly on the expiration of every second year has thus been restored. However, no such provision for curtailment of term of members nominated in 1997 was made and they all served for six years from the date of their nomination. The seats required to be filled by the *panchayats'* and local authorities' constituencies, which were lying unfilled for a very long time as the constituent *panchayats* and local authorities in the state had not been constituted for want of elections thereto, have recently been filled by holding elections from those constituencies in October 2005.

41 *Mohd Aslam and Tilak Raj Sharma v State of Jammu and Kashmir and Ors* Writ Petition Nos 1049 and 1066 of 1996.

42 *Dhanraj Bhargotra v State of Jammu and Kashmir an Ors* Writ Petition No 107 of 1998.

CHAPTER 4

The President of India and The Vice-President of India

SYNOPSIS

INTRODUCTION

President of India, Highest Elective Office

On attaining independence, India became a sovereign democratic republic and adopted the parliamentary system of government as in vogue in the United Kingdom, but with the significant change that the Constitution of India created an elective office of the President of India as the head of the state, unlike the monarch of the United Kingdom. He is regarded the first citizen of India.

The President shall be part of the Indian Parliament (art 79), but he shall not be a member of either House of Parliament or of a House of the legislature of any state. If a member of either House of Parliament or of a house of the legislature of a state is elected as President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President [art 59(1)]. The executive power of the Union of India is vested in the President and is exercised by him either directly or through officers subordinate to him in accordance with the Constitution [art 53(1)]. He is also the Supreme Commander of the Defence Forces of India [art 53(2)]. There shall always be a council of ministers, headed by the Prime Minister of India, to aid and advise him in the exercise of his functions, and he acts in accordance with such advice [art 74(1)]. He appoints such person as the Prime Minister, who, in his opinion, enjoys the confidence of the lower House of Parliament, namely, the House of the People. Other ministers in the council of ministers are appointed by him on the advice of the Prime Minister [art 75(1)].

Interim President

The Constitution provides that there shall be a President of India at all times (art 52). Therefore, the Constitution makers in the Constituent Assembly took care to ensure that as soon as the Constitution came into force there was a President of India, as envisaged therein. Accordingly, a transitory provision was made by art 380 that the Constituent Assembly shall elect an interim President, who shall hold office until a regular President was elected in accordance with the provisions of the Constitution and entered upon his office. It was also provided that if any vacancy arose in the office of the interim President so elected, by reason of his death, resignation, removal or otherwise, the Constituent Assembly (which was to function under art 379, as the provisional Parliament until the constitution of the regular Parliament after the commencement of the Constitution), shall elect another person to function as the interim President, and in the interregnum, the Chief Justice of India shall act as interim President. Thereupon, the Constituent Assembly unanimously elected its chairman, Dr Rajendra Prasad, as interim President of India on 24 January 1950. He assumed that office on the historic day of 26 January 1950, when India became a Sovereign Democratic Republic, and continued to hold that office, until he was regularly elected as the first President of India and entered upon his office on 13 May 1952.

Thirteen distinguished personalities have so far adorned the highest office of the President of India.[1] Of them, the first President of India, Dr Rajendra Prasad, had the longest tenure from 1950 to 1962.

Acting President

In the event of occurrence of any vacancy in the office of the President by reason of his death, resignation or removal or otherwise, the Vice-President of India shall act as President, until the date on which a new President elected to fill such vacancy enters upon his office [art 65(1)]. The Vice-President shall also discharge the functions of the President, if the latter is unable to discharge his functions owing to his absence, illness or other cause, until the date on which the President resumes his duty [art 65(2)].

The Constitution visualised that some other contingencies might also arise in future in which a working arrangement may have to be made for the discharge of the functions of the President. It was left to the Parliament to make provisions to deal with such a situation (art 70). Such contingency did arise in 1969, after the sudden passing away of the then President, Dr Zakir Hussain. At that time, Shri VV Giri was the Vice-President, and he assumed office of the acting President on 3 May 1969. The Parliament was quick to realise that some provision needed to be made to meet a situation wherein the office of the Vice-President also fell vacant or where the Vice-President was unable to discharge functions while acting as the President. The Parliament thereupon enacted the President (Discharge of Functions) Act 1969 on 28 May 1969 to provide that in such cases, the Chief Justice of India or, in his absence, the senior most judge of the Supreme Court who is available, shall discharge the functions of the President. And shortly afterwards, a need did arise to invoke the provisions of the above Act. When the election was called to fill the vacancy caused by the demise of Dr Zakir Hussain, Shri Giri decided to field himself as one of the candidates for that election and resigned from the office of the Vice-President on 20 July 1969. In such an unprecedented situation, when both the President and the Vice-President were not in office, the then Chief Justice of India Shri M Hidayatullah J, functioned as the acting President in the interregnum till the completion of the presidential election, at which Shri Giri got elected as the regular President and assumed office on 24 August 1969.

Term of Office of President

Term of Office of President Elected in Normal Course

The office of the President is the highest elective office in India. The President shall hold office for a term of five years from the date on which he enters upon his office

1 Appendix VI.

[art 56(1)]. He shall, however, continue to hold office, notwithstanding that his term has expired, until his successor enters upon his office [art 56(2)(c)].

The Constitution requires that an election to fill the vacancy in the office of the President on the expiration of his term, shall be held before the expiration of the term [art 62(1)]. The Supreme Court has held that the presidential election must be completed before the expiration of the term of the incumbent President, so that his successor enters upon his office on the day the predecessor vacates office on the expiration of his term.[2] The provision in the Constitution that the President shall continue to hold office even after the expiration of his term, until his successor enters upon his office, applies to a case where his successor, though elected, has not entered upon his office, and this provision cannot be so construed as to mean that a presidential election can be postponed beyond the expiry of the term of office of the former.

Term of Office of President Elected to Fill a Vacancy Caused by Death, Resignation, etc

If any vacancy arises in the office of President by reason of his death, resignation or removal or otherwise, the person elected to succeed him as President shall also serve for the full term of five years from the date he enters upon his office [art 62(2)].

Vacation of Office

The President may resign his office before the expiration of his term of office. Such resignation is to be given in writing addressed to the Vice-President of India [proviso (a) to art 56(1)]. Any such resignation shall also be forthwith communicated by him to the Speaker of the House of the People [art 56(2)].

Removal by Impeachment

The President can also be removed from office by impeachment for violation of the Constitution by him, in the manner prescribed in art 61. Briefly, the procedure prescribed is that a charge shall be preferred by either House of Parliament by way of a resolution, moved after at least 14 days' notice in writing, signed by not less than one-fourth of the total number of members of the House concerned, and such resolution shall have to be passed by a majority of not less than two-thirds of the total membership of that House. Then, the other House of Parliament shall investigate the charge or cause the charge to be investigated, where the President shall have the right to appear and to be represented, and that, if the charge is sustained at such investigation, the said House shall pass a resolution to that effect by a majority of not less than two-thirds of the total membership of that House. The

2 Re *Presidential Election, 1974* AIR 1974 SC 1682.

passing of this latter resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

Eligibility for Re-election

The incumbent President or a former President is eligible for re-election to that office for any number of terms (art 57). So far, only the first President of India, Dr Rajendra Prasad was re-elected to that office. All other Presidents enjoyed only one term.

Electoral College for Election of President

The President shall be elected by the members of an electoral college consisting of:

(i) The elected members of both Houses of Parliament; and
(ii) The elected members of the legislative assemblies of the states (art 54).

By an amendment to the Constitution by the Constitution (Seventieth Amendment) Act 1992, brought into force wef 18 June 1995,[3] an explanation has been added to art 54 to the effect that, for the purposes of aforesaid electoral college, the state shall include the National Capital Territory of Delhi and the Union Territory of Pondicherry. In other words, the elected members of the Legislative Assemblies of Delhi and Pondicherry have also been included in the electoral college for the presidential election. Consequent upon this amendment, it was for the first time at the presidential election held in 1997, that the members of the legislative assembly of any union territory participated in a presidential election.

Originally, the Indian union consisted of Part A, Part B and Part C states. But only Part A and Part B states had legislative assemblies which were created by the Constitution. Accordingly, for the first presidential election held in 1952, only the elected members of the legislative assemblies of Part A and Part B states were the members of the electoral college. By an Order, called the Constitution (Application to Jammu and Kashmir) (Amendment) Order 1952, made by the President on 20 March 1952, it was provided that the then nominated representatives of the State of Jammu and Kashmir in either House of Parliament and the members of the Constituent Assembly of Jammu and Kashmir shall be deemed to be elected members of the respective Houses of Parliament and the state legislature, for the purposes of the electoral college for the presidential election. When the Indian union was reorganised in 1956 and the territories of India were reorganised into states and union territories, no provision was made for the members of the legislative assemblies of the union territories, having such an assembly, to participate in the

3 By the Union Ministry of Law, Justice and Company Affairs Notification No GSR 375(E) dated 2 May 1995.

presidential election. At the time of the fifth presidential election in 1969, a question arose whether the members of the legislative assemblies of union territories should have also been included in the electoral college for that election. The Supreme Court held that only the members of the legislative assemblies of the states were the members of the electoral college for the presidential election, and not the members of the legislative assemblies of the union territories.[4] The members of the legislative assemblies of the union territories had thus not participated in any of the presidential elections held during the years 1957, 1962, 1967, 1969, 1974, 1977, 1982, 1987 and 1992. Now, however, the electoral college for the presidential election consists of the elected members of the legislative assemblies of two of the existing seven union territories, namely, the National Capital Territory of Delhi and the Union Territory of Pondicherry, as aforesaid.

It is noteworthy that only the elected members of both Houses of Parliament and of the state legislative assemblies are the electors for a presidential election. No nominated member of the Council of States, House of the People or a state legislative assembly is a member of the electoral college for such election. Further, the members of a state legislative council, even the elected members thereof, are not members of the electoral college for a presidential election.

Eligibility of Members of a Suspended Legislative Assembly to Vote at Presidential Election

If a state legislative assembly stands suspended and is kept under suspended animation, the members of such suspended legislative assembly also have a right to be included in the electoral college for a presidential election. At the time of the 1987 presidential election, the Legislative Assembly of Punjab was under suspended animation, by a proclamation dated 11 May 1987 of the President under art 356 of the Constitution, but the members of such suspended state assembly duly participated in that election.

Eligibility of Disqualified Members of a Legislative Assembly to Vote at Presidential Election

Twenty-two members of the aforesaid suspended Punjab legislative assembly also then stood disqualified, for continuing as members of that assembly, by an order of the Speaker of the assembly under the Tenth Schedule to the Constitution on the ground of defection. Their appeal from the order of the Speaker was then pending before the Supreme Court. The Supreme Court, by an interim order dated 7 May 1987,[5] directed that if any presidential election was held before the hearing of the said appeal, the disqualified members would be entitled to participate in the poll and

4 *Shiv Kripal Singh v VV Giri* AIR 1970 SC 2097.
5 *Sardar Prakash Singh Badal v Union of India* 1987-JT-2-397.

cast their votes as if they had not been disqualified. A doubt arose whether such members could also propose or second the nomination of a candidate for that presidential election. On a clarification sought by the Election Commission, the Supreme Court, by a further interim order dated 26 June 1987, held that participation in the election would include proposing and seconding of nominations of candidates. However, the apex court directed that the votes cast by these members at the time of poll on 13 July 1987 should be marked and kept separately until the final disposal of the case. Subsequently, on 14 July 1987, the court further allowed these votes also to be counted at the time of counting on 16 July 1987, but directed them to be kept separately after counting.

Vacancies in the Electoral College

The election of a person as President shall not be called in question on the ground of existence of any vacancy, for whatever reason, among the members of the electoral college electing him [art 71(4)].

At the time of the second presidential election in 1957, a constitutional doubt arose whether the presidential election could be held when the electoral college was not complete. By that time, elections to the House of the People from the parliamentary constituencies in Himachal Pradesh, the Kangra parliamentary constituency in Punjab and also the election to the Punjab legislative assembly from the Kullu assembly constituency had not been completed, as those constituencies were still snow-bound. The matter was taken to the Supreme Court by one of the intending candidates. But the Supreme Court did not intervene, as it held that all doubts and disputes relating to a presidential election could be raised only by means of an election petition after the election was over.[6] With a view to avoiding any such controversy in future, it was clarified in the Constitution by inserting cl (4) in art 71 by the Constitution (Eleventh Amendment) Act 1961, that any vacancy in the electoral college shall not be a ground for questioning a presidential election.

Vacancies in the Electoral College Due to Dissolution of a State Legislative Assembly

At the time of the sixth presidential election in 1974, the Legislative Assembly of Gujarat, consisting of 182 elected members, stood dissolved. The assembly was dissolved on 15 March 1974, and there was some constitutional impediment in the holding of a general election to that assembly before the presidential election was due to be held in July 1974. A doubt arose whether the presidential election could be held in view of such a large number of vacancies in the electoral college for that election. It was contended by some of the political parties that art 71(4) applied only when there were a few vacancies in the electoral college, and not when a whole

6 *Narayan Bhaskar Khare v Election Commission of India* AIR 1957 SC 694.

legislative assembly was non-existent. They demanded that the presidential election be postponed and held only after holding a general election to the Gujarat legislative assembly. Thereupon, it was considered desirable to obtain the opinion of the Supreme Court in order to set at rest any controversy on this point. Accordingly, the President referred the matter to the Supreme Court under art 143 for its advisory opinion on this question of high public importance. In its opinion[7] dated 5 June 1974, the Supreme Court opined that the presidential election had to be held and completed in such time as may enable the President-elect to enter upon his office on the expiration of term of office of the outgoing President, and, therefore, the presidential election should be held even if the Gujarat legislative assembly was not then in existence. The Supreme Court observed:

> The electoral college as mentioned in art 54 is independent of the Legislatures mentioned in art 54. None of the Legislatures mentioned in art 54 has for the purpose of that Article any separate identity vis-a-vis the electoral college. The electoral college compendiously indicates a number of persons, holding the qualifications specified in the Article to constitute the electorate for the election of the President and to act as independent electors... The words 'an electoral college consisting of' in art 54 mean that the electoral college shall consist of persons mentioned therein. The words 'consisting of' refer to the strength of the electoral college. The Houses of Parliament and the Legislative Assemblies are mentioned in art 54 only for the purpose of showing the qualifications of members of electoral college. The dissolution of the Assembly means that there are no elected members of that dissolved Assembly. The electoral college is always ready to meet the situation at the expiry of the term of office or any vacancy caused by death, resignation or removal or otherwise. The elected members of a dissolved Legislative Assembly of a State are no longer members of the electoral college consisting of the elected members of both Houses of Parliament and elected members of the Legislative Assemblies of the States and are, therefore, not entitled to cast votes at the Presidential election.

The Supreme Court, however, refrained from expressing any opinion on the question, though raised before it by the interveners, as to what would happen if there is a mala fide dissolution of a state legislative assembly or assemblies or if there is, after the dissolution of the assembly or assemblies, a mala fide refusal to hold elections thereto within reasonable time before the presidential election, as the Supreme Court observed that those questions did not arise on that reference from the President. Likewise, the Supreme Court also refrained from expressing any opinion on the effect of the dissolution of a substantial number of state legislative assemblies before the presidential election. Similarly, there is a grey area as to what will happen if the House of the People stands dissolved during the relevant period.

7 Re *Presidential Election, 1974* AIR 1974 SC 1682.

MANNER OF ELECTION OF PRESIDENT

Election by the People of India, but Through their Chosen Representatives

The election to the office of the President is not held directly by the people of the country. But the whole population of the country gets an indirect say in the election, through their chosen representatives in Parliament and state legislative assemblies, because the value of vote of an elected member of a state legislative assembly depends on the population of the state concerned. Though every member included in the electoral college for the presidential election casts only one ballot paper, the value of vote of each ballot paper cast by a member of that electoral college is not the same or equal. It varies from state to state, for it is calculated separately, as explained below, in the case of elected members of each state legislative assembly on the basis of the population of the state concerned, in accordance with the formula laid down for the purpose in the Constitution (art 55).

Manner of Calculation of Value of Votes of Members of Electoral College

Keeping the federal structure of the country in view, the Constitution makers provided for parity between the states as a whole and the union in the matter of votes at a presidential election. It was also provided that there shall be, as for as practicable, uniformity in the scale of representation of different states at the election. In order to secure such parity between the states as a whole and the union, as well as uniformity among the states inter se in the scale of their representation, the Constitution provides that the value of vote which each elected member of Parliament and of the legislative assembly of each state is entitled to cast shall be determined in the following manner:

(i) In the first place, the population of each state shall be divided by the total number of seats of elected members in the legislative assembly of the state and the quotient so obtained shall be further divided by 1,000. In such calculation, if the remainder is 500 or more, then the resultant quotient shall be increased by one; any lesser remainder shall be ignored. The number so arrived at shall be the value of a vote which each elected member of that state legislative assembly casts at the presidential election.

(ii) As a next step, the total value of votes of a state shall be determined by multiplying the value of vote, as worked out at (i) above, of each elected member of the state legislative assembly by the total number of seats of elected members in the assembly.

(iii) Continuing the above process separately in respect of each state, the total value of votes of all the states shall then be ascertained by adding together the total value of votes of each state as worked out at (ii) above.

(iv) The total value of votes of all the states as obtained under (iii) above shall then be divided by the total number of seats of elected members in both Houses of Parliament. The quotient so worked out shall be increased by one if the remainder exceeds one-half, the lesser remainder being disregarded. The resultant quotient so obtained shall represent the value of vote of each elected member of Parliament.

(v) Then, the total value of votes of Parliament shall be determined by multiplying the value of vote, as worked out at (iv) above, of each elected member of Parliament by the total number of seats of elected members in both Houses of Parliament.

(vi) Finally, the total value of votes at a presidential election shall be worked out by adding together the total value of votes of all the states under (iii) above, and the total value of votes of Parliament under (v) above.

Meaning of Population

The population of a state for the purposes of the above calculations means the population as ascertained at the last preceding census of which relevant figures have been published (explanation to art 55).

However, for the purposes of any presidential election to be held after the year 1976 and until the relevant figures for the first census taken after the year 2026 have been published, the population shall mean the population as ascertained at the 1971 census [proviso to explanation to art 55 as inserted by the Constitution (Forty-second Amendment) Act 1976 and further amended by the Constitution (Eighty-fourth Amendment) Act 2001].

Illustration of Calculation of Value of Votes

The following illustration shows how the value of vote of an elected member of a state legislative assembly and of an elected member of Parliament, was worked out in accordance with the above formula at the twelfth, thirteenth and fourteenth Presidential elections held in 2002, 2007 and 2012:

(i) Total population of Andhra Pradesh (1971 census)	: 43,502,708
Total number of elective seats in the state legislative assembly	: 294
Value of vote of each elected member of state assembly	:
(ii) Total value of votes of the state of Andhra Pradesh	: 148 × 294 = 43,152
(iii) Total value of votes of all states (worked out separately for each state as in (i) above)	: 5,49,474

(iv) Value of vote of each member of Parliament : (543 elected members of the House of the People *plus* 233 elected members of the Council of States = 776)

(v) Total value of votes of all elected members of Parliament : 708 × 776 = 5,49,408

(vi) Total value of votes for the presidential election, 2012 : 5,49,474 + 5,49,408 = 10,98,882

Statement Showing the Number of Votes of each Elector at the Presidential Election

For the purposes of every presidential election, the Election Commission shall furnish the returning officer with a statement showing the value of vote of each elector, as worked out in accordance with the above formula. Every ballot paper put in by an elector at that election shall be deemed to represent as many votes as that elector is shown as having in that statement (r 30, 1974 Rules).

The statement so furnished by the Election Commission to the returning officer for the latest presidential election held in 2012 is given in Appendix VII.

System of Election

The presidential election is held in accordance with the system of proportional representation by means of the single transferable vote [art 55(3)]. That is to say, every member of the electoral college for the presidential election casts[8] one vote, but in such vote he has the option to mark his preference for each of the candidates in the electoral arena.

Qualifications for Election as President

The Constitution [art 58(1)] has laid down the following qualifications to be eligible for election as President:

(i) The candidate must be a citizen of India;
(ii) He must have completed the age of 35 years;

8 The manner of recording and counting of votes at presidential election has been explained in greater detail at pp 154–155 and 158–161 in this chapter.

(iii) He must be qualified[9] for election as a member of the House of the People.

Candidate to be Registered Elector for a Parliamentary Constituency

A candidate for presidential election must be registered as an elector in the electoral roll for any parliamentary constituency in India [s 5B(2), 1952 Act].

No Oath Required for Candidates for Election as President

Under the Constitution, one of the essential qualifications for candidates for election to the House of the People is that every such candidate has to make and subscribe an oath or affirmation in the form prescribed in the Third Schedule to the Constitution. But no oath is prescribed under the Constitution for the candidates for election as President.

The election of Dr Zakir Hussain at the fourth presidential election, 1967, was questioned before the Supreme Court on the ground, among others, that he had not taken any oath at the time of filing his nomination for the election. It was also contended that the Election Commission could have prescribed a form for the oath. The Supreme Court rejected the above contentions and held that the candidate for election as President was not required to take any oath for becoming eligible for such election under art 58 of the Constitution.[10] The Supreme Court also held that the Election Commission could not prescribe the form of oath and lay down a new qualification for a candidate for presidential election under art 324 of the Constitution, as the law does not prescribe any oath for such candidate.
The Supreme Court further clarified that:

> Although one of the qualifications for election as President prescribed under art 58 is that candidate must be qualified for election as a member of the House of the People and art 84(a) prescribes an oath or affirmation set out in the Third Schedule as an essential qualification for being chosen to fill a seat in Parliament, the Third Schedule does not prescribe any form of oath or affirmation for a person who desires to contest a presidential election. In the very nature of things, a candidate who wants to contest the election for the office of the President, cannot take oath in any of the forms prescribed by the Third Schedule. Therefore, failure to take oath cannot render the Presidential election unconstitutional.[11]

9 The qualifications and disqualifications for being chosen as, and for being, a member of the House of the People have been discussed separately in ch 8.
10 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904.
11 *Charan Lal Sahu v Giani Zail Singh and Ors* AIR 1984 SC 309.

Ineligibility for Election as President

A person shall not be eligible for election as President, if he holds any office of profit[12] under the Government of India or the government of any state or under any local or other authority subject to the control of any of the said governments [art 58(2)].

But a person shall not be deemed to hold any office of profit by reason only that he is the President of India or Vice-President of India or the governor of any state or a minister either for the union or for any state [explanation to art 58(2)]. As already mentioned above, a sitting President is eligible for re-election, without any limit for such re-elections.

Oath or Affirmation by President Before Entering Upon Office

Though no oath or affirmation is prescribed for candidates for election as President, a person elected as President is nevertheless required to make and subscribe an oath or affirmation in the form prescribed in art 60, before entering upon his office. The said oath or affirmation enjoins upon him to faithfully execute the office of President, to preserve, protect and defend the Constitution and the law to the best of his ability and to devote himself to the service and well-being of the people of India.

Conditions of President's Office

After his election, the President shall not be a member of either House of Parliament or a House of the legislature of any state. If any sitting member[13] of Parliament or of a state legislature is elected as President, he shall be deemed to have automatically vacated his seat in Parliament or, as the case may be, the state legislature on the date on which he enters upon his office as President [art 59(1)].

The President shall also not hold any office of profit, after his election [art 59(2)]. He shall, however, be entitled without payment of rent to the use of his official residence and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges shall be as specified in the Second Schedule to the Constitution [art 59(3)]. The emoluments and allowances of the President may be enhanced, but shall not be diminished during his term of office [art 59(4)].

12 What constitutes an office of profit under the government has been discussed fully in ch 8 dealing with qualifications and disqualifications for elections to Parliament.

13 A member of Parliament or of a state legislature does not hold an office of profit under the government—*Bhagwati Prasad Ghorewala v Rajiv Gandhi* AIR 1986 SC 1535.

Time Limit for Holding Presidential Election

Election to Fill Normal Vacancy

An election to fill a normal vacancy caused by the expiration of the term of office of outgoing President shall be completed before the expiration of his term [art 62(1)].

A question arose at the time of the sixth presidential election in 1974, whether the presidential election could be postponed so that the electoral college was complete with the constitution of the Gujarat legislative assembly, which stood dissolved at the relevant time. The matter was referred by the President to the Supreme Court for its opinion in terms of art 143. It was held by the Supreme Court that the presidential election must be completed before the expiration of the term of the incumbent President, so that his successor enters upon his office on the day the predecessor vacates office on the expiration of his term.[14] The provision in the Constitution [art 56(1)(c)] that the President shall continue to hold office even after the expiration of his term, until his successor enters upon his office, applies to a case where his successor, though elected, has not entered upon his office, and this provision cannot be so construed as to mean that a presidential election can be postponed beyond the expiry of his term of office.

Election to Fill a Vacancy Occurring by Reason of Death, Resignation, etc

An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal or otherwise shall be held as soon as possible after the occurrence of the vacancy. But such election must be held within six months of the date of occurrence of the vacancy [art 62(2)].

Conduct of Presidential Election

Election Commission to Superintend, Direct and Control the Election

The Constitution vests the superintendence, direction and control of the conduct of election to the office of President in the Election Commission of India [art 324(1)].

It is the Election Commission which sets the process of a presidential election in motion by a notification calling upon the electoral college to elect the President. All other arrangements for the conduct of this election, like, the provision of ballot boxes and other election materials, printing of ballot papers, etc, are also made by the Commission itself under its own direct superintendence and control.

14 Re *Presidential Election, 1974* AIR 1974 SC 1682.

Laws relating to Election

The Election Commission conducts the presidential election in accordance with the provisions of the Constitution and the Presidential and Vice-Presidential Elections Act 1952 and the Presidential and Vice-Presidential Elections Rules 1974.

The above Act has been made by Parliament in pursuance of art 71(3) which provides that the Parliament may, by law, regulate any matter relating to or connected with the election of the President, other than those matters for which the Constitution itself has made provisions.

Under this Act, the Central Government is empowered to frame rules, after consultation with the Election Commission, for carrying out the purposes of the Act (s 21). These rules are placed before each House of Parliament for approval for a total period of 30 days, which may be comprised in one session, or in two or more successive sessions. If both Houses agree to annul any of these rules or make modification in these rules, the same shall thereafter, have effect only in such modified form. But any such annulment or modification shall not prejudice the validity of anything previously done under the rule so annulled or modified. After the passing of the aforesaid Act in 1952, a set of rules, known as the Presidential and Vice-Presidential Elections Rules 1952 was framed by the Central Government. In 1974, the parent Act of 1952 underwent certain important changes, which necessitated consequential amendments to the rules of 1952 also. Therefore, a new set of rules, known as the Presidential and Vice-Presidential Elections Rules 1974, replaced the earlier rules and these rules of 1974 are still in force.

Returning Officer and Assistant Returning Officers for the Election

Returning Officer

At the time of each presidential election, the Election Commission, in consultation with the Central Government, appoints a returning officer who conducts the election under the superintendence, direction and control of the Commission. The returning officer so appointed shall have his office in New Delhi [s 3(1), 1952 Act].

The convention adopted by the Election Commission, in consultation with the Central Government, in the matter of appointment of returning officer for Presidential election, right from the time of the first election in 1952, is that the secretaries or secretaries general to the two Houses of Parliament are appointed as such returning officer, in rotation. In keeping with that convention, the secretary to the House of the People was appointed as the returning officer for the first presidential election in 1952 and for the second presidential election in 1957, the responsibility of the office of returning officer was given to the Secretary to the Council of States (at that time, there were no secretaries-general to those Houses). This convention has been followed in all the 14 presidential elections held so far.

Assistant Returning Officer

To assist the returning officer in the performance of his functions at his headquarters in New Delhi, two senior officers are normally appointed as assistant returning officers. They generally belong to the secretariat of the same House of Parliament, of which the secretary-general has been appointed as the returning officer for the particular election [s 3(1) ibid].

In addition, the secretary or, in his absence, the senior most officer in the secretariat of the legislative assembly of each state is also appointed as the assistant returning officer to conduct the poll and other relevant proceedings at each of the state capitals [s 3(1) ibid]. At the time of the last (twelfth) presidential election in 2002, in addition to the secretary to the legislative assembly, the next senior most officer in the secretariat of the assembly was also appointed by the Election Commission as assistant returning officer in each state, to meet any unforeseen situation where the secretary to the assembly might not be in a position to discharge his functions as assistant returning officer.

The only occasion so far when an officer outside the secretariat of a state legislative assembly has been appointed as such assistant returning officer, was in 1992. At the time of the tenth presidential election in 1992, there was some controversy pending before the Supreme Court as to who was the real incumbent to the post of secretary to the Manipur legislative assembly and, in such a situation, the Election Commission appointed[15] the Deputy Commissioner, Imphal as the assistant returning officer in the State of Manipur.

Subject to the provisions of the Presidential and Vice-Presidential Elections Rules 1974, every assistant returning officer is competent to perform all or any of the functions of the returning officer [s 3(2) ibid].

Time Table for Election

Election Notification

As already explained above, the election to the office of President has to be held before the expiration of term of office of the outgoing President. It is, therefore, provided by law that in the case of a vacancy arising in the normal course on the expiration of the term of office of an outgoing President, the Election Commission shall issue a notification, calling upon the electoral college to elect a successor, on, or as soon as conveniently may be after, the sixtieth day before the expiration of the term of office of the outgoing President. In other words, the process for the presidential election has to start within the period of 60 days before the incumbent President is due to retire, so that it is completed well in time [s 4(3) of 1952 Act].

In the case of a vacancy occurring by reason of death, resignation or removal or otherwise of a President, the notification calling the presidential election shall be

15 Election Commission Notification No 479/3/92-III, dated 5 July 1992.

issued as soon as may be after the occurrence of such vacancy [s 4(4) ibid]. But such election must be completed within six months of the occurrence of the vacancy [art 62(2)].

Publication of Election Notification

The notification calling the election is published in the Gazette of India and is also republished in the Official Gazettes of all state governments and union territory administrations [s 4(1) ibid]. Such notification is published in the Gazette of India in English and Hindi and is republished in the State Gazettes in English and in the official language or languages of the state concerned.

Announcement of Election by the Election Commission

It is with the publication of the above notification by the Election Commission that the statutory process of presidential election commences. However, as a convention, the programme for the election is announced by the Election Commission about a fortnight to one month in advance of the date of issue of formal notification, so that all concerned and interested get prior notice of the impending election.

Period for Making Nominations

The nominations for a Presidential election commence on the day on which the notification calling the election is published. These nominations can be made within a further period of 14 days from the date of publication of the election notification. In other words, a period of 15 days, including the day on which the notification is issued, is provided for making nominations. If the last date for the purpose falls on a public holiday,[16] then the nominations can be filed on the next succeeding day, which is not a public holiday [s 4(1)(a) ibid].

Scrutiny of Nominations

The day immediately following the last day for making nominations is the day for the scrutiny of nominations, unless it is a public holiday, in which case the scrutiny of nominations shall be taken up on the next succeeding day which is not a public holiday [s 4(1)(b) ibid].

Period for Withdrawal of Candidature

After the scrutiny of nominations, two days are provided for the withdrawal of candidatures. Again, if the last date for the purpose happens to be a public holiday,

16 'Public holiday' means a day which is a public holiday for the purposes of s 25 of the Negotiable Instruments Act 1881. Any day observed as a holiday for government offices, like, the second Saturday of a month, under any administrative order of the government, is not a public holiday for the purposes of the Presidential and Vice-Presidential Elections Act 1952 [s 2(ff)].

the withdrawals will be permitted on the next succeeding day which is not a public holiday [s 4(1)(c) ibid].

Date of Poll

The poll for a presidential election cannot be taken on a day earlier than the fifteenth day after the last date for the withdrawal of candidatures. Thus, there has to be a minimum interval of 14 clear days between the last date for the withdrawal of candidatures and date of poll [s 4(1)(d) ibid]. The poll can be taken on a public holiday, if the Election Commission so fixes.

Whereas the last date for making nominations, the date for the scrutiny of nominations and the last date for the withdrawal of candidatures are statutorily fixed with reference to the date of issue of the notification calling the election, the date of poll can be fixed by the Election Commission in its discretion. But the date of the notification and the dates for the other stages of election shall be so appointed by the Election Commission that the election will be completed at such time as will enable the President thereby elected, to enter upon his office on the day following the expiration of term of office of the outgoing President [s 4(3) ibid].

Public Notice of Election

As soon as the Election Commission publishes the notification calling the presidential election, the returning officer issues a public notice of the intended election in a prescribed form, inviting nominations of candidates and specifying the place at which the nomination papers are to be delivered (s 5 of 1952 Act and Form 1 appended to 1974 Rules). The public notice is also published in the Gazette of India and republished in the Official Gazettes of all state governments and union territory administrations, in the same manner in which the notification of the Election Commission calling the election is published or, as the case may be, republished in these Gazettes. The public notice contains all relevant information, like, the address of the office of returning officer in New Delhi from where the forms of nomination paper can be obtained and where the nomination papers can be delivered to him, the amount of security deposit which each candidate has to make and the manner in which it has to be made, the date and place where the scrutiny of nominations by him will take place, etc.

Nomination of Candidates

Form of Nomination Paper

Any person who is qualified to be elected to the office of President may be nominated as a candidate for the election (s 5A, 1952 Act). Such nomination has to be made in the form prescribed for the purpose (Form 2 appended to 1974 Rules).

Number of Proposers and Seconders

Every nomination paper completed in the prescribed form and subscribed by the candidate assenting to the nomination has to be subscribed by at least 50 electors in the electoral college as proposers, and by at least another 50 electors as seconders [s 5B(1)(a), 1952 Act].

Initially, the nomination for the presidential election was required to be subscribed only by one proposer and one seconder. It was felt that several persons were standing as candidates for the presidential election in a light-hearted manner. Therefore, the number of proposers and seconders subscribing a nomination paper was first increased to 10 each in 1974 by the Presidential and Vice-Presidential Elections (Amendment) Act 1974. As non-serious candidates still continued to be nominated, there was a further increase in the number of proposers and seconders for nomination of a candidate as at least 50 proposers and 50 seconders on the eve of the eleventh presidential election in 1997, by the Presidential and Vice-Presidential Elections (Amendment) Ordinance 1997.[17]

The Supreme Court has held that the stipulation that a nomination paper of a candidate for presidential election shall be subscribed by certain proposers and seconders is a reasonable requirement relating to regulation of such election, as permissible under art 71(3), and cannot be held to be a curtailment of the right of a qualified candidate to stand as a candidate under art 58, nor is such provision in conflict with art 14.[18]

Proposer or Seconder Subscribing More Than One Nomination Paper

An elector can subscribe, either as proposer or as seconder, the nomination of only one candidate at a presidential election. If he subscribes as proposer or seconder the nomination papers of more than one candidate at the same presidential election, his signature shall be operative only on the nomination paper first delivered to the returning officer, and not on any other nomination paper [s 5B(5), 1952 Act].

It was contended in *Mithilesh Kumar Sinha v Returning Officer for Presidential Election*,[19] that some proposers and seconders had subscribed to the nomination paper of the petitioner first in point of time than the nomination paper of another candidate and that the signatures of such proposers and seconders on his nomination paper should be accepted, though his nomination paper was delivered later to the returning officer. The Supreme Court rejected the contention holding that an elector has the right to sponsor only one candidate and that right is exhausted the

17 The Ordinance was later replaced by the Presidential and Vice-Presidential Elections (Amendment) Act 1997.

18 *Shiv Kripal Singh v VV Giri* AIR 1970 SC 2097 and *Charan Lal Sahu v Fakruddin Ali Ahmed* AIR 1975 SC 1288.

19 AIR 1993 SC 20.

moment a nomination paper subscribed by him is 'delivered' to the returning officer.

Candidate Signing the Nomination Paper Before the Proposers or Seconders Sign it

There can be no legal objection to a nomination paper being signed by a candidate even before the proposers or seconders have signed the same. At the time of the fifth presidential election in 1969, it was observed that the nomination papers of certain candidates had been signed by them on a date which was prior to the date on which the proposers or seconders had signed them in token of their proposal to nominate such candidates. The returning officer accepted these nomination papers, and an issue was raised before the Supreme Court in the election petitions calling in question that election—whether acceptance of the nominations of the above-mentioned candidates was improper. The Supreme Court, after a detailed examination of the judicial pronouncements on the subject and the legislative history of the relevant provisions in the law, held that the nomination papers of the aforesaid candidates were rightly accepted by the returning officer.[20]

Security deposit by candidates—Amount of deposit—Originally, no security deposit was required to be made by a candidate for presidential election. In order to curb the tendency of non-serious candidates jumping into the election arena for the highest elective office, it was considered desirable to prescribe some security deposit for candidates at the election. Accordingly, the law was amended in 1974 to provide that a candidate shall not be deemed to be duly nominated for the election unless he deposits or causes to be deposited a sum of Rs 2,500 as security [s 5C as inserted by the Presidential and [Vice-Presidential Elections (Amendment) Act 1974]. The amount of security deposit for presidential election has been further raised to Rs 15,000 on the eve of the eleventh presidential election in 1997 by amending the said s 5C by the Presidential and Vice-Presidential Elections (Amendment) Ordinance 1997.[21]

The Supreme Court held that the powers under arts 71(3) and art 246(1) r/w entry 72 in List I of the Seventh Schedule to the Constitution, were sufficient to enable Parliament to make the above provision.[22] The Supreme Court also held that the above provision was not in conflict with arts 14 or 58.[23] It was further held that a person who had not made the security deposit under s 5C was not a candidate, either duly nominated or one who could claim to be so nominated.

20 *Shiv Kripal Singh v VV Giri* AIR 1970 SC 2097.

21 The Ordinance was later replaced by the Presidential and Vice-Presidential Elections (Amendment) Act 1997.

22 *Charan Lal Sahu v Fakruddin Ali Ahmed* AIR 1975 SC 1288.

23 Ibid, *Charan Lal Sahu v Neelam Sanjiva Reddy* AIR 1978 SC 499.

Manner of making the deposit—The security deposit has to be deposited or caused to be deposited by the candidate with the returning officer in cash at the time of the presentation of his nomination paper [s 5C(2)]. Alternatively, he can make such deposit in the Reserve Bank of India or in a government treasury. In the latter event, the receipt from the Reserve Bank or the government treasury has to be enclosed with the nomination paper. The enclosing of a cheque with the nomination paper does not amount to compliance with the mandatory requirement of the law.[24]

If a candidate files more than one nomination paper for the same election, he is required to make only one deposit, and not separate deposits in respect of each such nomination paper [proviso to s 5C(1)].

Return or forfeiture of security deposit—The security deposit made by a candidate is returned to him, if: (a) his nomination is rejected; or (b) he withdraws his candidature within the prescribed time and in the prescribed manner; or (c) he is elected at the election; or (d) where he is defeated, the number of valid votes polled by him exceeds one-sixth of the number of votes necessary to secure the return of a candidate at the election (s 20A, 1952 Act).

In all other cases, the security deposit of a candidate is forfeited to the Central Government (s 20A, ibid).

Presentation of Nomination Papers, by Whom and Where Can be Presented

The nomination paper can be presented either by the candidate or by any of his proposers or seconders [s 5B(1)]. It has to be presented by any one of them, in person, to the returning officer. It cannot be sent by post.[25]

Further, a nomination paper shall be delivered to the returning officer only at the place specified in this behalf in the public notice issued by him under s 5, and at no other place.

Time for Filing Nomination Papers

The nomination papers for presidential election have to be presented on any day during the period prescribed for the purpose, between the hours of 11 o'clock in the forenoon (11:00 am) and 3 o'clock in the afternoon (3:00 pm). The returning officer shall not accept any nomination paper either before or after the aforesaid prescribed hours [s 5B(3)].

If any nomination paper is received by the returning officer after 3:00 pm on the last date prescribed for making nominations, the returning officer shall summarily reject such nomination paper and he shall record a brief note relating to such rejection on the nomination paper at the time of its presentation itself [s 5B(4)]. The

24 *Charan Lal Sahu v Fakruddin Ali Ahmed* AIR 1975 SC 1288.
25 *Hari Vishnu Kamath v Gopal Swarup Pathak* 48 ELR 1.

returning officer is not required to make any further scrutiny in respect of such rejected nomination paper on the date fixed for the scrutiny of nominations [s 5E(2)].

Maximum Number of Nomination Papers of a Candidate

Each candidate can file four nomination papers at the most for the same election [s 5B(6)]. More than four nomination papers by or on behalf of any candidate shall neither be presented to, nor shall be accepted by, the returning officer [proviso to s 5B(6)].

Proof of registration of candidate as elector in a parliamentary constituency—Each nomination paper of a candidate shall be accompanied by a certified copy of the entry relating to him in the electoral roll for the parliamentary constituency in which he is registered as an elector [s 5B(2)]. Such entry must be in the electoral roll which is currently in force in the constituency concerned, and not in any previous roll which has ceased to be in force on the publication of the current electoral roll. Further, only a certified copy of the entry in the electoral roll shall be attached to the nomination paper, and not the entire electoral roll. The production of the entire roll is not permissible, unlike in the case of parliamentary and assembly elections where the roll can also be produced. It is not necessary that the entry in the electoral roll be certified by the electoral registration officer of the constituency. Any officer who has the custody of such electoral roll can furnish a certified copy of the entry in that roll.[26]

If certified copy of the entry in the current electoral roll is not attached to a nomination paper, such nomination paper shall be summarily rejected by the returning officer and he shall record a brief note relating to such rejection on the nomination paper at the time of its presentation itself [s 5B(4)]. The returning officer is not required to make any further scrutiny in respect of such rejected nomination paper on the date fixed for the scrutiny of nominations [s 5E(2)].

If the certified copy of the entry in the electoral roll is attached to the nomination paper, but the name of the parliamentary constituency in which the candidate is registered as elector is incorrectly mentioned in the nomination paper, such discrepancy is not a defect of substantial nature for which the nomination paper should be rejected.[27] Discrepancy regarding the father's name of the candidate in the certified copy of the entry in the electoral roll was also held in this case to be a defect of non-substantial nature.

26 *Shiv Kripal Singh v VV Giri* AIR 1970 SC 2097.
27 *Kaka Joginder Singh Dharti Pakad v KR Narayanan* AIR 1993 SCW 2883.

Essential Requirements for a Valid Nomination

Each of the following requirements thus must be fulfilled by a candidate for his valid nomination for a presidential election:

(i) He must be qualified under the Constitution and the law for being chosen as the President.

(ii) He must file his nomination paper in the prescribed form (Form 2 appended to the 1974 Rules). The nomination paper must be presented in person to the returning officer, either by the candidate himself or by any of his proposers or seconders.

(iii) He can file a maximum of four nomination papers for the same election. Each such nomination paper must be subscribed by at least 50 electors as proposers and by at least another 50 electors as seconders and also subscribed by him as assenting to the nomination.

(iv) The nomination paper must be filed only during the hours between 11:00 am and 3:00 pm on any of the days prescribed for the purpose (other than on a day which is a public holiday).

(v) The candidate must deposit or cause to be deposited an amount of Rs 15,000 as security. Such deposit should be made either in cash with the returning officer or in the Reserve Bank of India or a government treasury, in which case the receipt from the bank or the treasury must be enclosed with the nomination paper.

(vi) Each nomination paper must be accompanied by a certified copy of the entry in the current electoral roll of the parliamentary constituency in which the candidate is registered as elector.

It is worthy of mention that a candidate for a presidential election is not required to file any affidavit disclosing his criminal antecedents, if any, assets, liabilities and educational qualifications, though the filing of such an affidavit is an essential requirement for contesting an election to Parliament or state legislatures.

Scrutiny of Nominations

Date, Time and Place for Scrutiny of Nominations

The law specifies that the scrutiny of nomination papers received by the returning officer shall be taken up by him on the day immediately following the last day for making nominations, unless such day is a public holiday, in which case the scrutiny will take place on the next succeeding day which is not a public holiday [s 4(1)(b)].

However, the law does not specify the hour at which the returning officer shall take up such scrutiny. He fixes such hour at his discretion and specifies the same in the public notice which he issues under s 5. Usually, 11 o'clock in the forenoon (11:00 am) is fixed as such hour by the returning officer.

He also fixes the place for the scrutiny of nominations in his discretion and intimates the same through the aforesaid public notice. A suitable venue in the Parliament House at New Delhi is normally fixed for the purpose.

Persons Who Can be Present at the Time of Scrutiny

Every candidate at the election is entitled to be present at the time of scrutiny of nominations. In addition, he can also authorise, in writing, one of his proposers or seconders and one more person to be present along with him at the scrutiny of nominations [s 5E(1)].

No other person is entitled to be present at the scrutiny of nominations. As a logical corollary, even a person whose nomination paper has already been summarily rejected at the time of its presentation under s 5B(4) either for late receipt beyond the last date and time fixed for the receipt of the nomination papers, or for not being accompanied by the requisite copy of the electoral roll in which his name is registered as an elector, does not seem to be entitled to attend the scrutiny proceedings.

All persons present at the scrutiny of nominations are entitled to reasonable facilities for examining the nomination papers of all candidates, other than those nomination papers which have already been summarily rejected by the returning officer as aforesaid [s 5E(1)]. It is not necessary for the returning officer to scrutinise these already rejected nomination papers again [s 5E(2)].

Examination of Nomination Papers by Returning Officer

The returning officer is required to examine each nomination paper [other than those already rejected by him under s 5B(4)] in the presence of the candidates and their authorised representatives. The candidates and their representatives have a right to object to any of these nomination papers. The returning officer can also suo motu raise objection to any nomination paper.

If any objection is raised in relation to any nomination paper either by any candidate or his representative or by the returning officer suo motu, the returning officer has to take a decision on every such objection. For this purpose, he may hold such summary inquiry as he may deem necessary and appropriate. If the candidate in relation to whose nomination the objection has been raised requires time to rebut the objection, the returning officer can grant him time for such rebuttal and adjourn the scrutiny proceedings under the proviso to s 5E(6), but not later than the second day following the date fixed for the scrutiny, which is normally the last date for withdrawal of candidatures. In all other cases, the scrutiny proceedings shall be proceeded with and completed on the date fixed for the scrutiny of nominations, unless any adjournment becomes necessary in view of the proceedings being interrupted or obstructed by riot or open violence, or by any causes beyond the control of the returning officer [s 5B(6)].

At the time of the fourteenth Presidential election in 2012, an objection was raised with regard to the eligibility of Shri Pranab Mukherjee to stand as a candidate on the ground that he was allegedly holding an office of profit under the government by virtue of being the chairman of Council of Indian Statistical Institute. At the request of the authorized representative of Shri Mukherjee, the scrutiny proceedings were adjourned by the returning officer to the following day and completed by him on that day rejecting the objection.

Grounds for Rejection of Nomination

The nomination of any candidate may be objected to and rejected by the returning officer on any of the following grounds:

(i) that, on the date fixed for the scrutiny of nominations, the candidate is not eligible for election as President under the Constitution; or
(ii) that any of the proposers or seconders of the candidate is not qualified to subscribe a nomination paper under s 5B(1); that is to say, such proposer or seconder is not an elector at the election; or
(iii) that the nomination paper is not subscribed by the required number of proposers and/or seconders; or
(iv) that the signature of the candidate or any of the proposers or seconders is not genuine or has been obtained by fraud; or
(v) that there has been a failure to comply with any of the provisions of ss 5B or 5C; that is to say, the nomination paper has not been presented in person by the candidate or any of his proposers or seconders, or the nomination paper has not been delivered to the returning officer within the hours and dates prescribed for the purpose or at the place appointed for the purpose, or the candidate has failed to make the security deposit in the prescribed manner [s 5E(3)].

But the nomination of a candidate shall not be rejected on the ground of any irregularity mentioned at (ii), (iii), (iv), or (v) above, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed [s 5E(4)].

The nomination paper of a candidate shall also not be rejected on the ground of any defect which is not of a substantial character [s 5E(5)].

Certified copy of the entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency [s 5E(8)].

Returning Officer to Record His Decision on Every Nomination Paper

The returning officer shall invariably record his decision, either accepting or rejecting the nomination paper, on each such paper filed by a candidate [s 5E(7)].

Where a candidate has filed more than one nomination paper and the returning officer has already accepted one or more of such nomination papers, he has still to examine each of the remaining nomination papers of that candidate and to endorse separately his decision on all his nomination papers.

If any nomination paper of a candidate is rejected by the returning officer, he must record thereon, in writing, a brief statement of his reasons for such rejection [s 5E(7)].

List of Validly Nominated Candidates

After the completion of scrutiny of nominations, the returning officer shall prepare a list of candidates whose nominations he has accepted as valid (though there is no statutory requirement either under the 1952 Act or 1974 Rules for preparation of such list). He makes this list of validly nominated candidates public by displaying a copy thereof at his notice board.

Nomination Papers Open to Public Inspection

The nomination papers filed by the candidates, the documents attached or annexed thereto and the decisions recorded thereon by the returning officer, are open to public inspection and the copies thereof can be obtained, subject to such conditions and on payment of such fee, as the Election Commission may direct [r 37(2) of the 1974 Rules].

In pursuance of the above rule, the Election Commission had earlier directed that a person seeking inspection or a copy of any document should establish his right for such inspection or for supply of copy and for that purpose he should disclose that he has a direct and tangible interest in such document and also disclose the nature of such interest. However, after the enactment of the Right to Information 2005, this condition is no longer be relevant.

A nominal fee has been prescribed for the purpose, which however is not charged, if the inspection or copy of the document has been asked for by an official agency for official purpose.

Withdrawal of Candidatures

Time Limit for Withdrawal of Candidatures

Any candidate whose nomination has been accepted as valid by the returning officer may withdraw his candidature by giving a notice to that effect to the returning officer. Such notice must be delivered to the returning officer before 3 o'clock in the afternoon (3:00 pm) on the last date fixed for the purpose under s 4(1)(c). Such last date for withdrawal of candidatures is the second day after the date for the scrutiny of nominations, unless such day happens to be a public holiday, in which case the

next succeeding day which is not a public holiday, shall be the last date for withdrawal of candidature [s 6(1)].

Form of Withdrawal Notice

The notice of withdrawal of candidature must be given in the prescribed form (Form 4 appended to the 1974 Rules).

Who May Deliver Withdrawal Notice

The notice of withdrawal in the prescribed form must be delivered in person to the returning officer, either by the candidate himself or by any of his proposers or seconders. The proposer or seconder delivering the notice of withdrawal must have been authorised in this behalf, in writing, by the candidate. In the absence of such authorisation in writing, the returning officer will not accept any notice of withdrawal [s 6(1)].

Effect of Withdrawal Notice

A notice of withdrawal of candidature once delivered to the returning officer is final and it cannot be allowed to be cancelled by the candidate, even if he wishes so to do [s 6(2)].

Display of Withdrawal Notice

On receipt of a notice of withdrawal of candidature, the returning officer shall note thereon the date on which and the hour at which it was delivered to him [r 5(2)]. He has also to satisfy himself about the genuineness of such notice as also about the identity of the person delivering it [s 6(3)].

He shall then cause a copy of the notice together with his note thereon to be affixed in some conspicuous place in his office [s 6(3) and r 5(2)].

Uncontested Election

Procedure in Uncontested Election

If after the expiry of the period within which the candidatures may be withdrawn, there remains only one candidate who has been validly nominated and who has not withdrawn his candidature in the manner and within the time prescribed, the returning officer shall forthwith declare such candidate to be duly elected to the office of President [s 8(a)].

No specific form is prescribed under the rules for declaring the result of an uncontested presidential election. Such declaration may, however, be made by the returning officer in Form 7 appended to the 1974 Rules, which is used for declaration of result of a contested presidential election, by making suitable adaptation in that form.

Election Where There is No Contesting Candidate

Though it is a very remote possibility that there may not be any contesting candidate for a presidential election, the law nevertheless has taken such contingency into account, and prescribed a procedure to be adopted in such a case. If there is no validly nominated candidate at any presidential election or where all the validly nominated candidates withdraw their candidatures and consequently no contesting candidate is left in the field, the returning officer is required to report the fact to the Election Commission. The Commission shall thereupon commence all the proceedings in relation to the election afresh, by cancelling the earlier notification calling the election and issuing another notification calling the election and appointing fresh dates for filing of nominations, scrutiny of nominations, withdrawal of candidatures, taking of poll, etc, for such fresh election, in the same manner in which the earlier notification was issued by the Commission [s 8(c)].

Contested Election

List of Contesting Candidates

Where, after the expiry of the period within which candidatures may be withdrawn, the number of candidates who have been duly nominated and who have not withdrawn their candidatures exceeds one, the poll shall become necessary. In such case, the returning officer shall prepare a list of contesting candidates who have remained in the electoral fray [s 8(b)].

Form for the List of Contesting Candidates

The returning officer shall prepare the list of contesting candidates in Form 5 appended to the 1974 Rules [r 6(a)]. In such form, he has to arrange the names of the candidates in English and Hindi in alphabetical order. According to the directions of the Election Commission, such alphabetical order is determined with reference to alphabets in *Devnagri* script. In the list of contesting candidates, along with the name of the candidate, his complete postal address is also mentioned so as to enable the electors to identify him with ease.

Publication of List of Contesting Candidates

The list of contesting candidates is published by the returning officer in the Gazette of India [r 6(b)]. Under the directions of the Election Commission, it is also republished in the Official Gazettes of all states and union territories. It is also given wide publicity through all media of mass communication, apart from being affixed in some conspicuous place in the office of the returning officer [rr 6(b) and (c)].

Countermanding of Election on the Death of a Candidate

If a candidate who has filed his nomination and whose nomination is found valid on scrutiny, dies after the time fixed for the close of nominations and a report of his death is received by the returning officer before the commencement of poll, the returning officer shall, upon being satisfied of the fact of death of the candidate, countermand the poll and report the fact to the Election Commission (s 7). The Election Commission shall thereupon commence all proceedings with reference to the election anew in all respects, as if for a new election.

However, at such election called afresh by the Election Commission, it shall not be necessary for a candidate whose nomination was found valid earlier at the time of countermanding of the poll to file any further nomination. His earlier nomination shall be treated as nomination for the new election as well (proviso to s 7).

At such new election, a person who had earlier withdrawn his candidature before the countermanding of the poll is eligible for being nominated afresh as a candidate (second proviso to s 7).

The Supreme Court has held that such fresh election is a continuation of the earlier election, which was countermanded on the death of a candidate.[28]

No such occasion has, however, arisen so far where a presidential election had to be countermanded on the death of a candidate.

The Poll for Presidential Election

Date of Poll

The poll for a presidential election shall be taken on a date not earlier than the fifteenth day after the last date for the withdrawal of candidatures [s 4(1)(d)]. Thus, a minimum interval of clear 14 days is available between the last date for the withdrawal of candidatures and the date of poll, in which the candidates carry out their election campaigns and the Election Commission and the election authorities under it make all arrangements for taking the poll.

Manner of Voting

Votes at a presidential election are given by electors in person by secret ballot in the manner prescribed. There is no provision for votes being given by proxy and each individual elector has to give his vote personally at the place assigned to him (s 9).

Place of Polling

The places where the poll for a presidential election shall be taken are fixed by the Election Commission. The Election Commission is required to fix such places in the Parliament House in New Delhi, and also in the premises in each state in which the

28 Re *Presidential Election, 1974* AIR 1974 SC 1682.

legislative assembly of that state meets for the transaction of business [r 7(a)]. The places of poll so fixed by the Election Commission are notified both in the Gazette of India and also in the Official Gazettes of states and union territories.

Only once so far, has the poll for a presidential election been taken outside the premises of a state legislature. At the time of the tenth presidential election in 1992, the Election Commission had to fix[29] the Conference Hall of the Old Secretariat Building in Imphal as the place of poll for the members of the Manipur legislative assembly, as the Speaker of the assembly refused to give permission to the use of the legislative assembly premises for the purpose. He refused such permission because the Election Commission had appointed the Deputy Commissioner, Imphal, instead of the secretary to the legislative assembly, as the assistant returning officer for that election in view of some controversy pending before the Supreme Court as to who was the real incumbent to the post of the said secretary.

Assignment of Group of Electors to Each Place of Poll

The Election Commission has also to specify with reference to each such place of polling, the group of electors who will be entitled to vote at such places [r 7(b)]. In such arrangement, the Election Commission fixes a suitable room in the Parliament House in New Delhi as the place of poll for all members of both Houses of Parliament, and a suitable room in the state legislature building in each state where the members of the legislative assembly of the state concerned are to vote. The Election Commission, however, extends a special facility to members of Parliament to vote at any state capital instead of in the Parliament House in New Delhi. A similar facility is also extended to the members of all state legislative assemblies enabling them to vote at New Delhi or at any state capital. Any member of Parliament or of a state legislative assembly desirous of availing such facility to vote at a state capital, or in New Delhi, has to make a specific request to the Election Commission sufficiently in advance and normally one week before the date of poll. In some cases, the Commission has also allowed certain members of the state legislative assemblies to vote at some other state capitals where they happened to be at the time of the poll in some emergent circumstances. All members of Parliament are individually informed by the Election Commission about the aforesaid facility of voting at state capitals. The members of state legislative assemblies are given such information through the assistant returning officers who are the secretaries to the state legislative assemblies concerned.

Hours of Poll

While fixing the places for taking poll for a presidential election, the Election Commission also fixes the hours during which the poll will be taken at each such place [r 7(b)]. Though the Election Commission has the discretion to fix different

29 Election Commission Notification No 479/7/92, dated 10 July 1992.

hours of poll at each place of poll, it normally fixes the uniform hours of poll from 10:00 am to 5:00 pm at each place of polling.

Presiding Officers and Polling Officers

The returning officer for the presidential election is appointed by the Election Commission as the Presiding Officer for conducting the poll at the place fixed in the Parliament House in New Delhi. In every state capital, the assistant returning officer in that state (secretary to the state legislative assembly) is likewise appointed by the Election Commission as Presiding Officer for taking poll in that state [r 9(1)].

The Presiding Officer at each place of poll may appoint any number of officers as he thinks necessary, as polling officers, to assist him in the taking of the poll. He shall, however, not appoint any person who has been employed by, or on behalf of, or has been working for, a candidate in or about the election.

Design and Form of Ballot Papers

The ballot papers for the presidential election are printed in such form and design as the Election Commission may direct [r 10(1)].

Under the Commission's directions, these ballot papers are printed in two colours—in green colour for members of Parliament and in pink colour for members of state legislative assemblies. In all these ballot papers, the names of contesting candidates are printed in the same order in which their names appear in the list of contesting candidates [r 10(2)].

Each ballot paper has a counterfoil attached thereto, on which provision is made for noting down the serial number of the elector (as in the authentic list of electors) to whom that ballot paper is issued. Each ballot paper and its counterfoil are given an identical serial number printed on them. However, the serial number printed on the main ballot paper is concealed by pasting a strip of black paper thereon, so that the serial number is not visible at the time of counting of votes.

On each ballot paper, the place where it will be used, that is to say, the Parliament or the name of the state, is prominently mentioned, along with the value of vote, which each such ballot paper will represent at the election. The ballot paper is printed in two columns—one containing the names of the candidates and the second for marking the preferences by the elector for each such candidate.

Languages of the ballot paper—On the green ballot papers for use by members of Parliament, the names of contesting candidates are printed in Hindi and English. The names of contesting candidates on pink ballot papers for use by members of state legislative assemblies are printed in English and the official languages of the states concerned.

The particulars on the counterfoil of a ballot paper are printed only in English in all cases.

Supply of ballot papers—It is the responsibility of the Election Commission to supply to each Presiding Officer, sufficient numbers of ballot papers which are relevant for the place of poll under his charge [r 10(3)]. As some members of Parliament may vote at state capitals, a few ballot papers for use by members of Parliament are also supplied to each Presiding Officer in the state capitals. Likewise, a few ballot papers to be used in each state capital are also supplied to the Presiding Officer in the Parliament House in New Delhi. But these extra ballot papers can be used by the respective Presiding Officers only for issue to those electors who have been specifically permitted by the Election Commission to vote at places other than their normal place of polling.

Ballot boxes—The Election Commission has got manufactured special ballot boxes for use at presidential elections. These are of a design totally different from the design of the ballot boxes which are used in the parliamentary and assembly elections. The place of poll where each such box is to be used is prominently painted on it. At the time of every presidential election, the Commission makes special arrangements for the delivery of these ballot boxes to each Presiding Officer.

Admission to the Place of Polling

At each of the places fixed for poll for a presidential election, a candidate can be represented only by one person who is authorised by him in writing. The candidate, however, has a right to be present at any place of poll.

Apart from the candidates, their authorised representatives, the polling staff and the electors, no one else can enter the place of poll, except with the written authority from the Election Commission. The Commission normally permits accredited media persons to enter the place of poll, if they apply to the Commission. They cannot enter that place on the basis of the general authorisation, which they may be having from the secretariats of the Council of States or the House of the People or of the state legislative assemblies to cover the parliamentary or assembly proceedings.

Inspection of Ballot Boxes and Ballot Papers

Before the commencement of poll, the candidates and their authorised representatives have a right to inspect the ballot boxes and the ballot papers to be used for poll (r 12), and they are also permitted by the Election Commission to affix their seals on the ballot boxes, if they so desire.

Procedure for Issue of Ballot Papers

The Election Commission supplies to each Presiding Officer an authentic list of electors entitled to vote at the place of poll under his charge. As and when, the Commission allows any elector the facility to vote at a place other than the one to which he was assigned, the Commission arranges to intimate the Presiding Officer concerned, of such fact, and also sends to him the relevant extract from the list of

electors and also the ballot paper for use of that elector, if not already available with the Presiding Officer.

Before delivery of a ballot paper to an elector, he is required to put his signature or, if he is illiterate, his thumb impression on the authentic list of electors. The serial number of the elector in the list of electors is also entered on the counterfoil of the ballot paper issued to him(r 14).

Assistance to illiterate or disabled electors—If an elector is not able to read the ballot paper or record his vote thereon by reason of illiteracy, or blindness or by not being conversant with the language in which the ballot paper is printed, or by reason of any physical or other disability, he can ask the presiding officer to assist him in the recording of his vote in accordance with his wishes (r 19). Unlike in the case of parliamentary and assembly elections, he cannot take any companion of his choice to record his vote and has to necessarily depend upon the Presiding Officer for any assistance in this behalf. The Presiding Officer shall observe as much secrecy as is feasible and shall keep a brief record of each such instance of assistance rendered by him to any elector. He is prohibited by law to indicate the manner in which any vote has been cast with his assistance [r 19(3)].

Voting by electors under preventive detention—Though every elector at a presidential election is required to vote in person at the place assigned to him, an exception has been made in the case of electors subjected to preventive detention under any law for the time being in force. Such electors are entitled to the facility of voting by postal ballot [r 26(1)]. But such facility of postal ballot is not available to electors detained otherwise than under preventive detention laws. They have to come in person to vote.

It shall be the duty of every government to intimate to the Election Commission the names of electors, if any, who are subjected to preventive detention by or under the authority of that government, together with the necessary particulars as to their places of detention [r 26(3)].

On receipt of such intimation from any government, it is the responsibility of the Election Commission to send a postal ballot paper to the elector concerned through the officer-in-charge of the jail or other place of detention. With the postal ballot paper, a form of declaration of identity and attestation of signature of the elector, a letter of instructions about the manner of marking the ballot paper and necessary envelopes for returning the marked ballot paper to the returning officer are also sent, so as to reach the said officer-in-charge of the jail or place of detention in good time before the date fixed for polling [r 26(2)].

It is only on the day of poll that the postal ballot paper is actually delivered to the elector under preventive detention by the officer-in-charge of jail or place of detention. The elector is then allowed all reasonable facilities and sufficient time, but not exceeding two hours, for recording his vote on the postal ballot paper. Thereafter, it becomes the responsibility of the said officer to arrange to send the

marked postal ballot paper of the elector to the returning officer, either by registered post or through a special messenger, so that it reaches the returning officer before the time fixed for the counting of votes [r 26(3)].

Manner of Recording of Votes

As the presidential election is held in accordance with the system of proportional representation by means of the single transferable vote, every elector has as many preferences as there are candidates contesting the election [r 17(1)]. But it is not compulsory for an elector to mark preferences for all candidates. Only the marking of the first preference is compulsory for a ballot paper to be valid; marking of other preferences is optional.

These preferences for the candidates are to be marked by the elector by placing the figures 1, 2, 3, 4 and so on, against the names of the candidates, in the order of his preference, in the space provided for the purpose on the ballot paper [r 17(2)]. These figures may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language. But these preferences cannot be indicated in words, like, one, two, three, or first preference, second preference, third preference, etc [explanation to r 17(2)]. Any indication of these preferences in words will invalidate the ballot paper [explanation to r 31(2)].

Maintenance of Secrecy of Voting by Electors

Every elector is enjoined upon by law to maintain secrecy of voting within the place of polling and to observe the prescribed voting procedure (r 18). Unlike in the case of parliamentary and assembly elections, the rules are, however, silent in regard to the action which may be taken by the Presiding Officer if an elector deliberately violates the secrecy of voting inside the polling station. In the case of the former elections, the Presiding Officer is empowered under the rules not to allow the elector violating the secrecy of ballot to vote, and is authorised to take back the ballot paper from such elector.

At the fourteenth Presidential election in 2012, Shri Mulayam Singh Yadav showed his marked ballot paper to the presiding officer and some others present in the polling station on the ground that it had been inadvertently spoilt. He tore the ballet paper and the presiding officer issued him another ballot paper; which he marked and inserted into the ballot box. The Election Commission, however, came to the view that the voting procedure and the secrecy of vote had been violated and the vote of Shri Mulayam Singh Yadav was declared invalid and not taken into account at the time of counting of votes.

Return of Unused Ballot Paper by Elector

If an elector obtains a ballot paper to cast his vote but then changes his mind and decides not to use the same, he shall return the ballot paper to the Presiding Officer.

The Presiding Officer shall cancel such ballot paper and keep it in a separate envelope, so that it is not taken up for counting (r 16).

Supply of Fresh Ballot Paper to Elector

If an elector inadvertently deals with the ballot paper issued to him in such a manner that it cannot be conveniently used for recording his vote, the Presiding Officer can issue him a fresh ballot paper if he is satisfied of such inadvertence. He shall take back the earlier ballot paper and cancel it and keep it in a separate envelope (r 15). As mentioned above, the ballot paper which was torn by Shri Mulayam Singh Yadav was held by the Election Commission not to have been spoilt inadvertently and the issue of the second ballot paper to him by the presiding officer was considered invalid.

Close of Poll

Every Presiding Officer shall close the poll at the hour appointed for the purpose and shall not admit any elector into the place of poll after the said hour [r 13(2)]. However, all electors present at the place of poll before it is closed shall be entitled to have their votes recorded, even if the poll has to be continued for some more time after the hour appointed for the close of poll [proviso to r 13(2)].

Account of Ballot Papers

After the close of poll, the presiding officer shall prepare an account of ballot papers supplied to him for use, the ballot papers actually used (including the cancelled ballot papers, if any) and the unused ballot papers being returned by him [r 20(1)]. Such account shall be prepared by him in the form specially prescribed for the purpose (Form 6 appended to the 1974 Rules).

The candidates or their authorised representatives present at the close of the poll are entitled to take a true copy of the account prepared by the Presiding Officer, who shall attest it as a true copy. The Election Commission has issued instructions that the copies of the said account should be supplied by the Presiding Officer to every candidate or his authorised representative, even if he does not ask for it, so that there may not be any controversy later as to the number of ballot papers cast at any place of poll [r 20(2)].

Sealing of Ballot Boxes and Other Election Records

As soon as is practicable after the close of poll, the presiding officer shall close the ballot box and place all the relevant election records, like, the marked copy of the list of electors, the counterfoils of used ballot papers, the cancelled ballot papers and the unused ballot papers, in separate packets. All candidates or their authorised representatives are permitted to affix their own seals on the ballot boxes and other election records, in addition to the seals which the presiding officers may affix thereon (r 21).

Transmission of Ballot Boxes and Election Records to Returning Officer

As soon as may be after the close of poll, all sealed ballot boxes and election records pertaining to the places of poll outside Parliament House in New Delhi shall be caused to be transmitted by the respective presiding officers to the returning officer for safe custody pending the counting of votes. For this purpose, all necessary arrangements are made by the returning officer, in consultation with the Election Commission, for the transmission of the aforesaid boxes and election records by the quickest means of transportation to New Delhi (r 23).

Adjournment of Poll in Emergencies

If the poll proceedings at any place of polling are interrupted or obstructed by riot or open violence, or if it is not possible to take the poll at any such place on account of a natural calamity or other sufficient cause, the poll at such place shall be adjourned by the presiding officer and the circumstances reported to the Election Commission, and also to the returning officer, unless such presiding officer is the returning officer himself [r 24(1)]. Thereupon, the Election Commission shall fix a new date and hours of poll for the completion of such adjourned poll [r 24(2)]. The Commission can also fix a new place for taking such adjourned poll.

At such adjourned poll, only those electors who had not voted earlier before the adjournment of poll will be entitled to vote [r 24(3)].

Fresh Poll in Case of Destruction, etc. of Ballot Boxes

If at any presidential election, any ballot box is unlawfully taken away from the custody of the Presiding Officer or the Returning Officer, whether during or after the poll, or any ballot box is in any way tampered with or destroyed or lost, the poll taken at the place where that ballot box was used shall be deemed to have been vitiated and become void. On receipt of the report of any such incident from the Presiding Officer or the Returning Officer, the Election Commission shall appoint another day for taking a fresh poll at that place [r 25(1)]. Thereupon, a fresh poll shall be taken at such place as if it is the original poll [r 25(2)].

No occasion has arisen so far where the poll for any presidential election had to be adjourned or taken afresh for any of the reasons mentioned above.

Counting of Votes and Declaration of Result

Place and Time of Counting of Votes

The votes for a presidential election shall be counted by, or under the supervision of, the Returning Officer (s 10). Such counting takes place at his office in New Delhi (r 27).

The date and time for counting of votes are fixed by the Election Commission (r 27). Each contesting candidate is given a notice in writing by the Election Commission about the date and time so appointed by it. While fixing such date, the Commission takes into account the time that would be taken by the various Presiding Officers to send the ballot boxes and other election records from their respective places of poll to the office of the Returning Officer in New Delhi.

At the time of the last (fourteenth) presidential election held in 2012, the poll was taken on 19 July 2012 and the votes were counted on 22 July 2012.

Admission to the Place of Counting

Every contesting candidate has a right to be present at the time of counting of votes. In addition, he can also authorise one more person to be present along with him at the place of counting (s 10).

Except for the candidates, their authorised representatives, such counting staff as the Returning Officer may appoint to assist him in the counting and other public servants on duty in connection with the election, like, the observers appointed by the Election Commission, no one else can be present at the place of counting, unless specifically authorised by the Election Commission (r 28).

The Election Commission affords all reasonable facilities to media persons to cover the counting proceedings and issues special permits to them to enter the place of counting. They are also permitted to take photographs of the counting proceedings, but are prohibited from taking any shots of the markings on the ballot papers.

Maintenance of Secrecy of Voting

Every one present in the place of counting is required to maintain secrecy of voting. It is the duty of every officer, clerk or any other person who performs any function in connection with the recording or counting of votes to maintain, and aid in maintaining, the secrecy of the voting and he shall not communicate to any person any information calculated to violate such secrecy, unless he is authorised by or under any law to communicate any such information [s 22 (1)].

If any person acts in contravention of the above prohibition and violates the secrecy of the voting, he commits an offence for which he may be punished with imprisonment for a term extending upto three months, or with fine, or with both [s 22(2)].

Opening of Ballot Boxes

All ballot boxes used at the poll are opened, one by one, in the presence of the candidates and their authorised representatives, who are permitted to examine the seals put thereon and satisfy themselves that the same have not been tampered with in any manner.

Counting of Votes of Members of Parliament

First, the ballot boxes used at the Parliament House in New Delhi are opened, the ballot papers contained therein taken out and their number counted for reconciliation with the number of ballot papers which ought to have been found in such boxes as per the ballot paper account in Part I of Form 6 pertaining to that place of poll. If there is any discrepancy between these two numbers, a note of that fact is kept in Part II of Form 6; but the counting process continues [r 32(a)].

Scrutiny of Ballot Papers

The next step in the counting process is the scrutiny of ballot papers taken out of the ballot boxes and the segregation of those which, in the opinion of the returning officer, are valid from those which in his opinion are invalid [r 32(b)].

Grounds for Rejection of Ballot Papers

The returning officer shall reject a ballot paper as invalid on which:

(i) the figure 1 is not marked; or
(ii) the figure 1 is marked opposite the name of more than one candidate or is so marked as to render it doubtful to which candidate it is intended to apply; or
(iii) the figure 1 and some other figure are marked opposite the name of the same candidate; or
(iv) any mark is made by which the elector may afterwards be identified [r 31(1)].

A ballot paper shall also be invalidated if the preferences thereon are not marked in figures 1, 2, 3, etc, but are indicated in words, like, one, two, three or first preference, second preference, third preference, etc [Explanation to r 31(1)].

In the case of a postal ballot paper, it shall also be rejected if the signature of the elector on the declaration and attestation form received with the ballot paper is not duly attested by the authority specified in such form (who is normally the officer-in-charge of the jail or the place of detention) [r 31(2)].

Arrangement of Valid Ballot Papers Candidate-wise

The valid ballot are papers segregated from the invalid ones, and are then distributed among the contesting candidates with reference to the first preference marked on each of them for those candidates.

Crediting the Value of Votes to Each Candidate

The value of votes which each contesting candidate gets in the above process of counting is ascertained by multiplying the number of ballot papers on which the first preference is marked for him, by the value of vote which each ballot

paper of a member of Parliament represents. For example, if a candidate has secured 10 first preference ballot papers and the value of each such ballot paper for a member of Parliament at a particular election is 708, the total value of votes secured by him from out of the votes cast by members of Parliament will be 7,080(10 × 708 = 7,080).

Counting of Votes of Members of State Legislative Assemblies

After the ballot boxes used at the Parliament House in New Delhi have been opened, ballot papers contained therein counted, scrutinised, distributed candidate-wise and their total value for each candidate ascertained in the foregoing manner, the ballot boxes used at other places of poll are opened state-wise in the alphabetical order of the states, and the ballot papers contained therein are also counted, scrutinised, distributed candidate-wise and their total value for each candidate ascertained in the same manner. For example, if a candidate secures 15 ballot papers cast by members of Uttar Pradesh legislative assembly and each vote of member of that assembly represents the value of 208, then the value of votes of the candidate from amongst the votes of members of that assembly will come to 3,120 (15 × 208 = 3,120).

Totalling of Votes Secured by Each Candidate

The total votes secured by each contesting candidate are then ascertained by adding together the value of votes secured by him from out of the votes of members of Parliament and the value of votes obtained by him from out of the votes of members of each state legislative assembly.

First Round of Counting

This whole process of counting of votes of members of Parliament and of state legislative assemblies, candidate-wise, is called the first round of counting.

Ascertaining the Quota Sufficient to Secure the Return of a Candidate

For ascertaining the quota sufficient to secure the return of a candidate at a presidential election, the value of votes credited to each contesting candidate in the first round of counting is, as the first step, added up so as to determine the total value of valid votes polled at the election. Such total value of valid votes is then divided by two, and one is added to the quotient so obtained, ignoring the remainder, if any. The number so arrived at is the quota which a candidate should receive for being declared elected (para 4 of the Schedule to the 1974 Rules).

Declaration of Result After First Count

If the total value of votes credited to any candidate at the first count is equal to, or greater than, the quota sufficient to secure the return of the candidate, he shall be declared elected by the returning officer, and the election process shall come to an end.

If, however, no candidate reaches the quota in the first count, the counting process will continue in the manner explained below.

Exclusion of Candidate Lowest on the Poll

If at the end of the first count, no candidate can be declared elected, the candidate who, up to that stage has been credited with the lowest number of votes, shall be excluded from the poll. If two or more candidates have been credited with the same value of votes and are lowest on the poll at this stage, the retuning officer shall decide by draw of lots who shall be excluded from the poll (para 6 of the schedule to the 1974 Rules). All his ballot papers will be again scrutinised, one by one, with reference to the second preference marked, if any, on them. These ballot papers will be transferred to the respective remaining (continuing) candidates for whom such second preferences have been marked thereon, and the value of votes of those ballot papers credited to such candidates. These ballot papers shall be transferred to the aforesaid continuing candidates on the same value at which those were received by the excluded candidate. The ballot papers on which the second preference is not marked shall be treated as exhausted ballot papers and shall not be counted further, even if they contain third or any subsequent preference.

If at the end of this count, any candidate reaches the quota, he shall be declared elected.

Further Exclusion of Candidates Lowest on the Poll

If even at the end of the second count no candidate can be declared elected, the counting will proceed still further by exclusion of the candidate who is now lowest on the poll up to this stage. Again, if two are more candidates have the same value of votes and are lowest on the poll, the one who had secured the lowest number of first preference votes shall be excluded, and if that member was also the same, the Returning Officer shall decide by draw of lots which of them shall be excluded (para 6 of the schedule to 1974-Rules). All his ballot papers, including the ballot papers which he might have received during the second count, will again be scrutinised with reference to the 'next available preference' marked on each of them. If on a ballot paper received by him in the first count, the second preference is marked for any of the continuing candidates, it shall be transferred to that candidate. If on any such ballot paper, the second preference is marked for the candidate who has already been excluded in the second round, such ballot paper shall be transferred with reference to the third preference, if any, for a continuing candidate. Similarly, the

ballot papers received by him in the second round by way of transfer will also be scrutinised with reference to the third preference marked on them.

This process of exclusion of candidates lowest on the poll will be repeated till one of the continuing candidates reaches the quota [para 5 of the Schedule to the 1974 Rules].

Meaning of next available preference and exhausted paper—In the above process, the 'next available preference' will mean the second or subsequent preference recorded in consecutive numerical order for a continuing candidate, preferences for already excluded candidates being ignored [para 1(3) of the Schedule to the 1974 Rules]. Further, if no such next available preference is marked on a ballot paper, such ballot paper shall not be counted further and shall be taken out of the count as 'exhausted paper' [para 1(5) ibid]. A ballot paper shall also be treated as exhausted, if two or more candidates, whether continuing or not, are marked with the same figure which are next in order of preference, or where the name of the candidate next in order of preference, whether continuing or not, is marked by a figure which does not follow consecutive order after some other figure on the ballot paper, or where two or more figures have been marked against the name of the same candidate who is next in order of preference [para 1(5) ibid].

Declaring the Only Continuing Candidate as Elected

It may so happen at some election that even after the exclusion of several candidates lowest on the poll, none reaches the quota and in the process of such exclusion, only one candidate ultimately remains as the lone continuing candidate. In such event, this lone continuing candidate shall be declared elected, even if he has not reached the quota sufficient to secure the return of a candidate (para 5 of the Schedule to the 1974 Rules).

Recounting

If the Returning Officer is not satisfied with regard to the accuracy of counting of votes at the end of any count, he may have the votes counted at the previous count recounted. Such recounting may be done by him either on his own initiative, or at the instance of any candidate or of the authorised representative of a candidate in the absence of that candidate (r 34). If the candidate himself is present at the counting, such recount can be asked for by him and not by his authorised representative.

Declaration of Result

Announcement of Result

After the counting of votes is complete in all respects and the result of the voting has been determined in the manner explained above, the Returning Officer shall

forthwith announce the result of election to those present in the place of counting [r 35(1)(a)].

Preparation of Return of Election

The Returning Officer shall also then prepare and certify a return of the election in the form prescribed for the purpose [r 35(1)(b) r/w Form 7 appended to the 1974 Rules].

As soon as may be thereafter, the return so prepared and certified shall be forwarded by him to the Election Commission [r 35(2)].

Report of the Result

The Returning Officer shall also report the result of election to the Central Government and the Election Commission, as soon as may be, after the result of the election has been declared by him. The Central Government shall cause the declaration made by the Returning Officer containing the name of the person elected to the office of the President to be published in the Gazette of India (s 12).

No specific form has been prescribed under the 1974 Rules for declaring the result of presidential election. Such declaration is made by the Returning Officer by suitably adapting the form which is prescribed under the Conduct of Elections Rules 1961 for the declaration of result of election to the House of the People.

Formal Announcement of the Result of Election by the Election Commission

On receipt of report on the result of election from the returning officer, the Election Commission, as a matter of convention, though not required by any rules, makes the formal announcement of the name of the President elect. Such announcement is signed by the Chief Election Commissioner and all other Election Commissioners and is presented to the President elect. By convention, this announcement of the Election Commission is read out by the Home Secretary to the Government of India as the first step at the oath taking ceremony when the President elect enters upon his office.

Disputes Relating to Presidential Election

Authority to Settle Election Disputes

All doubts and disputes arising out of or in connection with the election of President (and Vice-President) shall be enquired into and decided by the Supreme Court of India, whose decision shall be final [art 71(1)]. No civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed under the 1952 Act in connection with a presidential or vice-presidential election (s 23, 1952 Act).

Any petition calling in question an election of President or Vice-President shall be heard and disposed of by a Bench of the Supreme Court of not less than five judges (O 39 r 20, of the Supreme Court Rules 1966).

In 1975, art 71(1) was amended by the Constitution (Thirty-ninth Amendment) Act 1975 to provide that all doubts and disputes relating to a presidential or vice-presidential election shall be enquired into, and decided by such authority or body as Parliament may by law prescribe, and the decision of such authority or body shall not be called in question by any court. In pursuance of this constitutional amendment, the President promulgated an Ordinance on 3 February 1977 to amend the Presidential and Vice-Presidential Elections Act 1952, providing for the setting up of an authority consisting of nine members—three to be nominated by the Speaker of the House of the People (one of whom shall be the Chief Justice or retired Chief Justice of the Supreme Court and another person having knowledge of election law), three to be elected by the House of the People and the remaining three to be elected by the Council of States. But after the general election to the House of the People held in March 1977, the new government which came into office decided not to replace that Ordinance by parliamentary legislation and the Ordinance was allowed to lapse. The Presidential and Vice-Presidential Elections Act 1952 was thereafter amended by the Presidential and Vice-Presidential Elections (Amendment) Act 1977, to again provide that the authority to try any election petition relating to a presidential or vice-presidential election shall be the Supreme Court [s 14(2)]. Further, the aforesaid constitutional amendment of 1975 was also short-lived, and the original position of art 71(1) was restored by again amending that article by the Constitution (Forty-fourth Amendment) Act 1978.

When can Doubts and Disputes be Raised

All doubts and disputes relating to any presidential or vice-presidential election can be raised before the Supreme Court only after the election is over, by means of an election petition, and not in any other manner when the election process is on and not yet complete. At the time of the second presidential election in 1957, two petitions purporting to be under art 71 were filed before the Supreme Court, while that election was still in the offing, seeking to raise certain doubts and disputes relating to delayed supply of form of nomination paper and also the completion of the electoral college for that election. The Supreme Court held that all doubts and disputes relating to the presidential election could be raised only after the election was over in view of art 71(1) of the Constitution, and dismissed both the petitions as premature.[30] The Supreme Court held that the word 'election' occurring in that article must be given the same wide meaning as in art 329(b), so as to comprise the entire election process culminating in a candidate being declared elected. Therefore,

30 *NB Khare (Dr) v Election Commission of India and Ors* AIR 1957 SC 694.

any enquiry into a doubt or dispute relating to a presidential election is to be made only after the completion of the election, ie, after a candidate is declared to be elected as President. The Supreme Court observed that a perusal of the provisions of the Presidential and Vice-Presidential Elections Act 1952 also supported this view.

Election Disputes, How to be Raised

No election to the office of the President shall be called in question except by presenting an election petition to the Supreme Court [s 14(1) of the 1952 Act].

A writ petition under art 226 relating to presidential election, but incidentally questioning the constitutionality of certain statutory provisions, cannot be entertained by the high court. The proper forum for such a challenge is the Supreme Court and not high court.[31]

Any matter which can be considered only by the Supreme Court under art 71(1), is taken out of the jurisdiction of the high courts while exercising power of entertaining writ petitions under art 226.[32]

At the Presidential election held in 2012, the question of acceptance of the nomination paper of Shri Pranab Mukherjee by the returning officer was sought to be raised before the Election Commission by one of the rival candidates alleging that the same was improperly accepted, the Commission, however, refused to intervene in view of Art 71(1).

Election Petition, Who Can File

An election petition calling in question a presidential election can be filed either: (i) by a candidate at the election; or (ii) by 20 or more electors joined together as petitioners [s 14A(1)(a) ibid].

Meaning of candidate—'Candidate' here means a person who has been or claims to have been duly nominated as a candidate at the election [s 13(a) ibid]. 'Elector' would mean a person whose name is included as a member of the electoral college for the presidential election [s 2(d)]. It is not necessary that such elector should have voted at the impugned election.

A person who may be qualified under art 58 for election as President but who has not complied with the requirements of the 1952 Act relating to filing of nomination paper, etc, cannot claim to be a candidate.[33] A person who has not complied with the provisions of s 5B (regarding subscription of nomination by the prescribed minimum number of proposers and seconders) or s 5C (regarding deposit of security for nomination) of the 1952 Act is not a candidate either duly nominated, or one

31 *Peter Samuel Wallace v Union of India and Ors* AIR 1975 Del 112.

32 *Udai Narain Sinha v Union of India and Ors* AIR 1988 All 30; *MS Boraiah v Sudarshan Agarwal and Ors* AIR 1983 Kant 51.

33 *Charan Lal Sahu v Fakruddin Ali Ahmed* AIR 1975 SC 1288.

who could claim to be so nominated within the meaning of s 13(a). Such persons cannot file election petitions relating to presidential election.[34]

No person other than a candidate or an elector has locus standi to file any election petition relating to presidential election.[35]

Time Limit for Filing Election Petition

An election petition relating to a presidential election may be presented to the Supreme Court at any time after the date of publication of the declaration containing the name of the returned candidate by the Central Government in the Gazette of India under s 12, but not later than 30 days from the date of such publication [s 14A(2) ibid].

It is worthy of note that the period of 30 days within which an election petition relating to a presidential election can be filed is to be reckoned from the date of publication of the declaration of result in the Gazette of India, and not from the date of the declaration of the result itself, unlike in the case of election petitions relating to elections to Parliament and state legislatures, where the prescribed time limit for filing such petitions is reckoned from the date of declaration of the result of the impugned election.

Form of Election Petitions and Procedure for Filing and Disposal of Such Petitions

As the election petitions relating to presidential elections are filed before the Supreme Court, Parliament has left it to that court to make regulations relating to the form of election petitions, the manner in which they are to be presented, the persons who are to be made parties thereto, the procedure to be adopted in connection therewith and circumstances in which the petitions are to abate, or may be withdrawn, and in which event new petitioners may be substituted, and the security which may be required to be deposited by the parties to the petition for costs (s 15 ibid).

Pursuant thereto, the Supreme Court has made detailed provisions relating to the above matters in Part VII (O 39) of the Supreme Court Rules 1966[36] framed by it under art 145.

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34 Ibid; *Madan Lal Dhartipakar v Neelam Sanjeeva Reddy* AIR 1978 SC 802; *Mithilesh Kumar Sinha v Returning Officer for Presidential Election* AIR 1993 SC 20.

35 *Charan Lal Sahu*'s case AIR 1978 SC 499; See also *Charan Lal Sahu v APJ Abdul Kalam* AIR 2003 SC 548.

36 Prior to promulgation of Supreme Court Rules 1966, the provisions regarding election petitions relating to presidential and vice-presidential elections were contained in O 37-A of the Supreme Court Rules framed in 1950. Any person intending to file an election petition relating to an election to the office of President or Vice-President of India must check up the latest version of the Supreme Court Rules so that the petition exactly conforms to the requirements of those Rules.

Relief That May be Claimed in the Election Petition

An election petitioner may claim in his election petition a declaration by the Supreme Court that the election of the returned candidate is void. In addition, he may also claim a declaration that he himself or any other candidate at the impugned election has been duly elected (s 16 ibid).

Parties to the Election Petition

Where the election petitioner claims only the declaration that the election of the returned candidate is void, he shall implead only such returned candidate as respondent to the election petition. Where, however, he also claims a further declaration that he or any other candidate has been duly elected, he shall implead all candidates (other than himself) who were duly nominated at the election, as respondents to the petition (O 39, r 8 of the 1966 Rules).

If any candidate or an elector who has not been impleaded as a respondent intends to appear on the hearing of the petition, he can do so by sending a notice to the petitioner or his advocate-on-record of such intention. Such notice must reach the addressee not later than two clear days before the day appointed for the hearing of the petition by the Supreme Court (O 39, r 17 ibid).

Grounds on Which an Election May be Challenged

An election petition may be presented on one or more of the grounds specified in s 18 of the 1952 Act. These grounds are:

(i) That the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the consent of the returned candidate; or

(ii) That the result of the election has been materially affected—
   (a) by the improper reception or refusal of a vote; or
   (b) by any non-compliance with the provisions of the Constitution or of the 1952 Act or of any rules or orders made under that Act; or
   (c) by reason of the fact that the nomination of any candidate (other than the successful candidate), who has not withdrawn his candidature, has been wrongly accepted; or

(iii) That the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate has been wrongly accepted [s 18(1)].

A presidential election cannot be called in question on any grounds other than those mentioned above. The Supreme Court has held that the limited grounds mentioned above for challenging a presidential election are not ultra vires art 71(1), and do not derogate from the jurisdiction of the Supreme Court under art 71(1), whereby it is

provided that all doubts and disputes arising out of or in connection with such election shall be enquired into and decided by the Supreme Court. Article 71(1) merely prescribes the forum in which disputes in connection with the presidential election would be enquired into. It does not prescribe the conditions under which the petition for setting aside any such election could be presented. A petitioner has no right to move for setting aside an election except in accordance with the provisions of the 1952 Act. He has no right as a citizen to approach the Supreme Court under art 71(1) whenever an election is held, on the ground that there has been a breach of the constitutional provisions. He must bring himself within the four corners of the said Act and has no rights apart from it.[37]

Suitability of Candidate, Whether can be Questioned

After the eighth presidential election in 1982, an election petition was filed on the ground, inter alia, that the returned candidate was not a suitable person for holding the high office of the President of India. The Supreme Court, however, refused to go into that question, holding that such question could not be raised under s 18 of the 1952 Act and the Supreme Court could not enquire into such question.[38]

Meaning of Bribery and Undue Influence at Presidential Election

Bribery and undue influence at a presidential election have been made a specific ground on which the election may be called in question. The election is liable to be set aside if it is proved at the trial of the election petition that any of these offences was committed by the returned candidate or by a person with his consent.

The offences of bribery and undue influence shall have the same meaning as in ch IXA (ss 171B and 171C) of the Indian Penal Code 1860 (hereinafter referred to as the 'IPC') [s 18(2) 1952 Act]. By the Presidential and Vice-Presidential Elections (Amendment) Ordinance 1977, the scope and amplitude of the offences of bribery and undue influence were sought to be circumscribed so that those expressions would not have the meaning assigned to them in ch IXA of the IPC, but would be merely corrupt practices having the meanings assigned to those expressions in s 123 of the Representation of the People Act 1951. But that Ordinance was not replaced by parliamentary legislation and was allowed to lapse. As a result, bribery and undue influence at a presidential election still have the same meaning as assigned to them in the said ch IXA of the IPC.

Prior to 1974, the election of the President could be called in question if the offence of bribery or undue influence at the election was committed with the 'connivance' of the returned candidate. By the Presidential and Vice-Presidential Elections (Amendment) Act 1974, the word 'connivance' in s 18(1)(a) of the 1952

37 *NB Khare (Dr) v Election Commission of India and Ors* AIR 1958 SC 139.
38 *Ch Charan Singh and Ors v Giani Zail Singh and Ors* AIR 1984 SC 309.

Act was substituted by the word 'consent'. In other words, a presidential election shall be liable to be declared void if the offences of bribery or undue influence are committed at that election with the consent, and not the connivance, of the returned candidate. The words 'connivance' and 'consent' cannot be equated.[39]

Bribery—A general allegation in the election petition that bribery was rampant in the presidential election could not be made the subject matter of a specific charge of commission of offence of bribery so as to be a triable issue.[40]

License granted by the government to a private limited company with specific purpose of obtaining vote of an elector would constitute bribery. But it was not proved that there was any bargain for a vote in the grant of such license.[41]

Undue influence—The election of Dr Zakir Hussain as President in 1967 was called in question on the ground, among others, that 'undue influence' was exercised in his favour by the then Prime Minister, Chief Whip of the Congress Party and the Chief Minister of Maharashtra. It was alleged that the Prime Minister addressed a letter to all electors requesting them to vote for him (Dr Zakir Hussain) and deputed ministers to various state capitals to ensure his election. It was also alleged that the Chief Whip of the Congress Party wrote letters to all members of his party in Parliament requesting them to give their first preference vote to Dr Zakir Hussain and not to mark the second or any other preference in favour of other candidates. It was further alleged that the Chief Minister of Maharashtra briefed members of the state legislative assembly as to how and for whom to vote. It was held that the mere canvassing in favour of a candidate at an election could not amount to interference with the free exercise of the electoral right so as to constitute undue influence. The Prime Minister, as the leader of the party was entitled to ask the electors to vote for Dr Zakir Hussain. Similarly, no objection could be taken to the letter written by the Chief Whip of the party or to the chief minister of a state canvassing for a candidate. Although the office of the President is not a party office and after his election the President is no longer a party man, the fact remains that in a democratic system persons who stand for election are candidates sponsored by the parties and without such support none could get elected because the electors are mostly members of one party or other.[42]

The election of Shri VV Giri in 1969 was also challenged on the ground of undue influence. It was mainly alleged that undue influence was exercised on the electors through the distribution of an anonymous pamphlet making defamatory statements in respect of one of the rival candidates at the election (Shri N Sanjiva Reddy) and that the impugned pamphlet was published and distributed in the Parliament House

39 Supra.
40 *Shiv Kripal Singh v VV Giri* AIR 1970 SC 2097.
41 Ibid.
42 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904.

with the connivance of Shri VV Giri and his supporters. The Supreme Court held that the impugned pamphlet contained language which could be said to constitute undue influence, and that undue influence could be exercised even at the stage when the elector goes through the mental process of weighing the merits or demerits of candidates and makes his choice. However, it was not proved at the trial that there was any connivance on the part of Shri VV Giri either to the printing or publication and distribution of the impugned pamphlet. It was further held that undue influence could be committed even by a stranger having nothing to do with the returned candidate, but the election of the returned candidate could be declared void, if it was proved that such act materially affected the result of the election, which, however, was not proved in that case.[43]

The question of undue influence at a presidential election again arose in the case of election of Giani Zail Singh at the eighth presidential election in 1982. In an election petition filed by Ch Charan Singh and 26 other members of Parliament belonging to various opposition parties, it was alleged that: (i) Shri M H Beg, former Chief Justice of India and then Chairman of the Minorities Commission was engaged by respondent no 1 (Giani Zail Singh) for influencing the votes of minority community; (ii) that Rao Birendra Singh, a Union Minister and a supporter and close associate of respondent no 1 exercised undue influence over the voters by misusing the government machinery; (iii) that the Prime Minister participated in the election campaign of respondent no 1 and misused the government machinery for that purpose; (iv) that the Prime Minister made a communal appeal to the Akali Dal that its members should vote for respondent no 1; and (v) that government helicopters and cars were misused for the purpose of election of respondent no 1. It was alleged that these various acts were committed by the well wishers and supporters of respondent no 1 with his connivance. The Supreme Court held that the words 'connivance' and 'consent' could not be equated and what was required to be proved after the amendment to the 1952 Act in 1974 was the consent of the returned candidate. It was not proved at the trial that any of the acts alleged against Shri M H Beg, Rao Birendra Singh or the Prime Minister had been done or committed with the consent of Giani Zail Singh. It was also held that the mere act of canvassing for a candidate could not amount to undue influence within the meaning of s 171C, IPC. The Supreme Court also observed that the use of government machinery, abuse of official position and appeal to communal sentiments so long as such appeal does not amount to undue influence are not considered by the legislature to be the circumstances which would invalidate a Presidential election.[44]

The ninth Presidential election in 1987 at which Shri R Venkataraman was elected, was called in question on the ground that the Indian National Congress had

43 *Shiv Kirpal Singh and Ors v VV Giri and Ors* AIR 1970 SC 2097.

44 *Charan Lal Sahu v Giani Zail Singh and Ors* AIR 1984 SC 309.

issued a 'whip' to the party MPs to vote for Shri R Venkataraman. According to the petitioner, the whip amounted to undue influence. The Supreme Court observed that the contention of the petitioner was that the Indian National Congress issued the whip, but it was not contended by him that the alleged offence of undue influence by way of the whip was committed by the elected candidate or by any other person with his consent. The Supreme Court, therefore, dismissed the petition as not disclosing any cause of action under O 39, r 6 of the Supreme Court Rules.[45] The Supreme Court also added that while challenging presidential election, the petitioner should not make use of the Supreme Court as a forum to file petition without giving adequate thought to its contents and also provisions of law governing the case merely to seek cheap popularity.

Form of Election Petition and Court Fee

The election petition relating to a presidential election shall be made on a court fee stamp of the value of Rs 250 and shall be signed by the petitioner, or all the petitioners, if there is more than one petitioner (O 39, r 3 Supreme Court Rules 1966). The petition can also be signed by a duly authorised advocate on record of the Supreme Court.

The allegations of fact contained in the petition shall be verified by an affidavit to be made personally by the petitioner or by one of the petitioners, if there is more than one petitioner (r 6 ibid). Where, however, the petitioner is unable to make such affidavit by reason of absence, illness or other sufficient cause, such affidavit may be made by any person duly authorised by the petitioner and competent to make the same. But in such case, sanction of the judge in chambers shall have to be obtained at the time of the presentation of the petition (proviso to r 6 ibid).

Presentation of Election Petition

The election petition shall be presented to the Registrar of the Supreme Court in his chambers (r 10 ibid). Where, however, sanction of the judge in chambers is required for filing the supporting affidavit by a person other than the petitioner as aforesaid, it shall have to be presented to that judge.

Number of Copies of Election Petition to be Filed

Along with the election petition, at least 12 spare copies of the petition and of all documents which accompany it, must also be filed (r 11 ibid).

Service of the Petition

Within five days of the presentation of the petition, the petitioner or his advocate on record shall serve a notice of presentation of the petition to court, along with a copy

45 *Mithilesh Kumar Sinha v R Venkataraman* AIR 1987 SC 2371.

of the petition, on the respondent or respondents, either personally or by registered post as the Supreme Court or Registrar may direct. Copies of the petition shall also be served on the Secretary to the Election Commission, the returning officer for the election and also the Attorney General of India (r 14 ibid).

Publication of Petition

The notice of presentation of the petition shall also be published in the Gazette of India and also advertised in the newspapers at the expense of the petitioner, unless the judge in chambers or registrar dispenses with such publication or advertisement (r 15 ibid).

Trial of Petition

On the presentation of the petition to the judge in chambers or the registrar, as the case may be, he shall appoint a date for the hearing of the petition (r 13 ibid). If any respondent, or the Election Commission, or the Returning Officer, or the Attorney General for India intends to file any affidavit either in support of the petition or in opposition to the same, such affidavit must be filed not less than five days before the date fixed for the hearing, under intimation to the petitioner or his advocate. Any reply to such affidavit must be filed not less than two days before the date fixed for the hearing, under intimation to the person or his advocate on record who filed such affidavit (rr 18 and 19 ibid). The Supreme Court may, however, grant extension of time for filing such affidavits.

The further trial of election petition shall proceed, subject to any special order or direction of the Supreme Court, in the same manner in which the proceedings before that Court are conducted by it in the exercise of its original jurisdiction in other matters (O 39, r 34 Supreme Court Rules 1966). In such trial, the Supreme Court may allow oral evidence to be led by the parties to the petition. In the case of the election petitions calling in question the election of Shri VV Giri as President in 1969, the parties led extensive oral and documentary evidence and the Supreme Court examined a very large number of witnesses, consisting of almost all the prominent political personalities of that time.

The election of Shri Pranab Mukherjee at the fourteenth Presidential election, 2012, was called in question by one of the rival candidates on the ground that the nomination of Shri Mukherjee was improperly accepted by the returning officer as Shri Mukherjee was allegedly holding an office of profit under the government. Shri Mukherjee contended that he had already submitted his resignation from the office in question before filing his nomination paper, whereas the petitioner disputed that fact. On the preliminary hearing, the Supreme Court accepted the contention of

Shri Mukherjee and dismissed the election petition not seeing any necessity for proceeding with the trial further.[46]

Withdrawal of Petition

The petition may be withdrawn by the petitioner at any time before the conclusion of the trial, but only with the leave of the Supreme Court. The Supreme Court may not grant such leave, if in its opinion, the application for withdrawal of the petition has been induced by any extraneous or improper bargain or consideration. Any application for withdrawal must be made with the consent of all the petitioners in writing, if there is more than one petitioner (rr 21–24 ibid).

If the court allows the petitioner or petitioners to withdraw from prosecution of the petition, a notice of its order to that effect shall be published by the registrar in the Gazette of India and also in the newspapers in which the original petition had been advertised for general information. If within 14 days of such publication of the notice, any other candidate or any other 20 electors who might himself or themselves have been petitioner or petitioners make an application to the court for substitution as petitioner or petitioners, the court may allow such substitution upon such terms as it thinks fit. If no such substitution of petitioner or petitioners is made, the original petition shall stand dismissed (rr 26 and 27 ibid).

Abatement of Petition on Death of Petitioner

If before the hearing of the petition has been concluded, the sole petitioner or, in the case of several petitioners, the sole survivor of such petitioners, dies, the petition shall abate. But in the case of such abatement of petition also, the Supreme Court may allow the substitution of petitioner or petitioners, as in the case of withdrawal of petition (rr 30 and 32 ibid).

Abatement of Petition on Death of Respondent

If before the conclusion of the hearing of the petition, any respondent dies or gives notice that he does not intend to oppose the petition and there is no other respondent opposing the petition, the Registrar shall give notice of such fact by publication in the Gazette of India and in the newspapers in which the original petition had been advertised. If within 14 days of such publication of the notice, any other candidate or any other 20 electors who might himself or themselves have been petitioner or petitioners make an application to the court for substitution as respondent or respondents in the place of the respondent dying or not proceeding

46 *Purno Agitok Sangma v Pranab Mukherjee* Laws (SC) 2012 12-35; TLPRE 2012 0–64.

with his opposition to the petition, the court may allow such substitution upon such terms as it thinks fit (r 33 ibid).

Order on Conclusion of Trial

At the conclusion of the trial of the petition, the Supreme Court shall make an order:

(i) dismissing the election petition; or
(ii) declaring the election of the returned candidate to be void; or
(iii) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected, if the court is of the opinion that in fact the petitioner or such other candidate received a majority of the valid votes at the election [ss 17(1) and 19 of the 1952 Act]. However, the petitioner or such other candidate shall not be declared to be duly elected, if, it is proved at the trial of the petition that the election of such candidate would also have been void if he had been the returned candidate, and a petition had been filed calling in question his election (proviso to s 19 ibid).

Order as to Costs

At the time of making the final order dismissing or allowing the petition, the Supreme Court shall also make an order fixing the total amount of costs payable and specifying the persons by and to whom such costs shall be paid [s 17(2) ibid].

For this purpose, soon after the conclusion of the hearing of the petition, the registrar shall submit a statement to the court showing the court-fees and other expenses incurred by each party to the petition, and the total number of days of hearing of the petition (O 39, r 35A Supreme Court Rules 1966).

Originally, it was provided that at the time of presentation of the election petition, an amount of Rs 2,000 would be deposited by the petitioner as security for costs (O 39, r 12 ibid). This requirement of making a security deposit was done away by the Supreme Court in 1983 (O 39, r 12 deleted by GSR 466, dated 22 June 1983, wef 2 July 1983]. However, by further amendment in 1997, the Supreme Court has prescribed a deposit of Rs 20,000 as security for costs of the petition (GSR 407 dated 9 December 1997 wef 20 December 1997).

Transmission and Publication of Order of Supreme Court

After the order of the Supreme Court on an election petition has been pronounced, the Registrar shall send a copy of the same to the Central Government. On receipt of such copy of the order, the Central Government shall forthwith cause it to be published in the Gazette of India (s 20, of the 1952 Act and O 39, r 36 Supreme Court Rules 1966).

VICE-PRESIDENT OF INDIA

Introductory

According to art 63, there shall be a Vice-President of India. He shall be the ex-officio Chairman of the Council of States (art 64).

Twelve distinguished personalities have so far occupied that high office.[47] The first Vice-President, Dr S Radhakrishnan has , so far, the distinction of holding that office for the longest tenure from 1952 to 1962, before he was elevated to the office of the President in that year. The present Vice-President, Shri Mohammad Hamid Ansari was re-elected in 2012 and is holding the second term as Vice-President.

In the event of occurrence of any vacancy in the office of the President by reason of his death, resignation or removal or otherwise, the Vice-President of India shall act as President until the date on which a new President elected to fill such vacancy enters upon his office [art 65(1)]. The Vice-President shall also discharge the functions of the President, if the latter is unable to discharge his functions owing to his absence, illness or other cause, until the date on which the President resumes his duty [art 65(2)].

During any period when the Vice-President acts as President or discharges the functions of President, he shall have all the powers and immunities of the President and be entitled to the same emoluments, allowances and privileges as are admissible to the President. But during this period, he shall not perform the duties of the Chairman of the Council of States (proviso to art 64).

Term of Office of Vice-President

Term of Office of Vice-President Elected in Normal Course

The Vice-President shall hold office for a term of five years from the date on which he enters upon his office (art 67). However, notwithstanding the expiration of his term, he shall continue to hold office until his successor enters upon his office [cl (c) of proviso to art 67].

Term of Office of Vice-President Elected to Fill a Vacancy Caused by Death, Resignation

If any vacancy arises in the office of Vice-President by reason of his death, resignation or removal or otherwise, the person elected to succeed him as Vice-President shall also serve for the full term of five years from the date he enters upon his office [art 68(2)].

47 Appendix VIII.

Vacation of Office

The Vice-President may resign his office before the expiration of his term of office. Such resignation is to be given in writing under his hand addressed to the President of India [cl (a) of proviso to art 67].

Removal from Office

The Vice-President can be removed from office by a resolution of the Council of States, passed by a majority of all the then members of the Council and agreed to by the House of the People. But no such resolution for removal of the Vice-President shall be moved unless at least 14 days' notice has been given of the intention to move the resolution [cl (b) of proviso to art 67].

Unlike in the case of the President who can be removed by impeachment for violation of the Constitution, no specific ground is mentioned in the Constitution for the removal of the Vice-President.

Time Limit of Holding Vice-Presidential Election

As in the case of the President, the Constitution requires that an election to fill the vacancy in the office of Vice-President on the expiration of his term shall also be held before the expiration of the term [art 68(1)]. It was held by the Supreme Court that the presidential election must be completed before the expiration of the term of the incumbent President, so that his successor enters upon his office on the day the predecessor vacates office on the expiration of his term.[48] On the same analogy, the election of the Vice-President must also be held before the expiration of the term of the incumbent Vice-President and the provision in the Constitution that the Vice-President shall continue to hold office even after the expiration of his term, until his successor enters upon his office, will apply only to a case where his successor, though elected, has not entered upon his office.

An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal or otherwise shall be held as soon as possible after the occurrence of the vacancy [art 68(2)]. No time limit is fixed for holding such election, unlike the presidential election which has to be held within six months of the occurrence of the vacancy for any of the above reasons.

Electoral College for Election of Vice-President

The Vice-President shall be elected by the members of an electoral college consisting of the members of both Houses of Parliament [art 66(1)]. In such election, both the elected as well as nominated members of both Houses of Parliament are the members of the electoral college.

48 Re *Presidential Election, 1974* AIR 1974 SC 1682.

Unlike the presidential election, the members of the state legislative assemblies have no role to play in the election of the Vice-President.

Manner of Election of Vice-President

The election of the Vice-President shall be held in accordance with the system of proportional representation, by means of the single transferable vote. The voting at the election shall be by secret ballot [art 67(1)].

Originally, it was provided that the election shall be held by members of both Houses of Parliament assembled at a joint meeting. However, the requirement of such joint meeting was done away with by the Constitution (Eleventh Amendment) Act 1961.

Qualifications for Election as Vice-President

No person shall be eligible for election as Vice-President, unless he:

(i) is a citizen of India;
(ii) has completed the age of 35 years; and
(iii) is qualified[49] for election as a member of the Council of States.

Candidate to be Registered Elector for a Parliamentary Constituency

A candidate for vice-presidential election must be registered as an elector in the electoral roll for any parliamentary constituency in India [s 5B(2) of 1952 Act].

No Oath Required for Candidates for Election as Vice-President

Under the Constitution, no oath is prescribed for the candidates for election as Vice-President.

Ineligibility for Election as Vice-President

A person shall not be eligible for election as Vice-President, if he holds any office of profit[50] under the Government of India or the government of any state or under any local or other authority subject to the control of any of those governments [art 66(4)].

But a person shall not be deemed to hold any office of profit by reason only that he is the President of India or Vice-President of India or the governor of any state or a minister either for the union or for any state [explanation to art 66(4)].

49 The qualifications and disqualifications for being chosen as, and for being, a member of the Council of States have been discussed separately in ch 8.

50 What constitutes an office of profit under the government has been discussed fully in ch 8 dealing with qualifications and disqualifications for elections to Parliament.

Eligibility for Re-election

It is not specifically clarified in the Constitution that the Vice-President shall be eligible for re-election, though such a clarification is provided in the case of election as President. However, it is provided that the Vice-President shall not be deemed to be holding any office of profit for the purposes of eligibility for election as Vice-President [art 66(4) r/w explanation thereto]. Thus, by necessary implication, an incumbent Vice-President or a former Vice-President shall be eligible for re-election to that office for any number of terms.

Dr S Radhakrishnan, the first Vice-President, and the present Vice-President Shri Mohammad Hamid Ansari are the only Vice-Presidents to have been re-elected for a second term.

Oath or Affirmation by Vice-President Before Entering Upon Office

Though no oath or affirmation is prescribed for candidates for election as Vice-President, a person elected as Vice-President is nevertheless required to make and subscribe an oath or affirmation in the form prescribed in art 69, before entering upon his office. The said oath or affirmation enjoins upon him to bear true faith and allegiance to the Constitution as established by law and to faithfully discharge the duty upon which he is about to enter.

Conditions of Vice-President's Office

After his election, the Vice-President shall not be a member of either House of Parliament or of a House of the legislature of any state. If any sitting member[51] of Parliament or of a state legislature is elected as Vice-President, he shall be deemed to have automatically vacated his seat in Parliament or, as the case may be, the state legislature on the date on which he enters upon his office as Vice-President [art 66(2)]. He shall, however, be the ex-officio chairman of the Council of States (art 64).

The Vice-President shall be paid such salary and allowances as are payable to the Chairman of the Council of States under the Constitution. He shall not hold any other office of profit, after his election (art 64).

CONDUCT OF VICE-PRESIDENTIAL ELECTION

General

Like the election to the office of the President, the election to the office of the Vice-President is also held under the superintendence, direction and control of the Election Commission of India [art 324(1)].

51 A member of Parliament or of a state legislature does not hold an office of profit under the government and is thus eligible for election as President and Vice-President (*Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi* AIR 1986 SC 1535).

This election is also regulated by the same provisions of law, namely, the Presidential and Vice-Presidential Elections Act 1952 and the Presidential and Vice-Presidential Elections Rules 1974 made thereunder. Therefore, most of the procedural requirements for the conduct of presidential election and vice-presidential election, like the issue of notification by the Election Commission calling the election; the time table for various stages in the election process, viz, the period for filing nominations, the date for the scrutiny of nominations, the period for withdrawal of candidatures, time-gap between the last date for withdrawal of candidatures and the date of poll; issue of public notice by the returning officer and publicity thereto; requirements for valid presentation of nomination papers; security deposit by candidates; the grounds for rejection of nomination papers; countermanding of poll on the death of a candidate; procedure in uncontested and contested election; manner of voting; declaration, announcement and publication of result; are common to both the elections. As the same have been dealt with in detail in the preceding paragraphs, they require no repetition. However, there are certain points of difference which have been explained below.

Returning Officer and assistant returning officers—In the case of a vice-presidential election, assistant returning officers are appointed to assist the returning officer only at his headquarters in New Delhi, and not in any of the states.

As per the convention adopted by the Election Commission from the first vice-presidential election held in 1952, the Secretaries General to the two Houses of Parliament were being appointed as returning officer, in rotation. This convention was, however, broken in the case of the eleventh vice-presidential election held in 1997, when for the first time an officer other than the Secretary General to a House of Parliament, namely, Secretary to the Government of India in the Department of Parliamentary Affairs, was appointed as the returning officer for that election. Since the Vice-Presidential election held in 2002, the previous convention has been revived and the Secretary General to the House of the People is appointed as the returning officer for the election.

Form of nomination paper—The nomination for a vice-presidential election has to be made in Form 3 appended to 1974 Rules (r 4).

Number of proposers and seconders—Each nomination paper for a vice-presidential election must be subscribed by at least 20 electors as proposers and another 20 electors as seconders [s 5B(1)(b)].

Place of polling—At a vice-presidential election, the electors are only the members of both Houses of Parliament. Therefore, the poll for such election is taken only at the Parliament House in New Delhi (r 8).

Design and form of ballot papers—The ballot papers for a vice-presidential election are printed only in Hindi and English, and not in any regional languages. Further, they all are printed only in one colour.

Value of votes—At a vice-presidential election, every vote cast has the same value, ie, one only, unlike the presidential election where the value of votes cast by the members of Parliament and of the various state legislative assemblies are different. Therefore, the value of vote is not printed on the ballot papers for a vice-presidential election.

Counting of Votes

Date, Time and Place of Counting

As the poll for vice-presidential election is taken only at one place at the Parliament Houses in New Delhi, the counting of votes is normally taken up on the day of poll itself and in the same room in which the poll is taken. A suitable time-gap of about two hours is provided between the close of poll and the commencement of counting to enable the returning officer to complete the procedural requirements in relation to the close of poll and the commencement of counting.

Ascertaining the Quota Sufficient to Secure the Return of a Candidate

Each ballot paper cast at a vice-presidential election represents one vote at each count. The value of votes credited to each contesting candidate is equal to the number of ballot papers secured by him on which the first preference is validly marked for him. The total value of valid votes polled at the election is the sum total of the value of votes credited to all the contesting candidates. Such sum total is divided by two, and one is added to the quotient so obtained, ignoring the remainder, if any. The number so arrived at is the quota sufficient to secure the return of a candidate at the election (paras 2 to 4 of the Schedule to the 1974 Rules).

Further counting in all other respects proceeds in the same manner as for a presidential election.

Disputes relating to Vice-Presidential Election

Authority to Settle Election Disputes

Like the presidential election, all doubts and disputes arising out of or in connection with the election of Vice-President shall also be enquired into and decided only by the Supreme Court of India [art 71(1) and 23, 1952 Act].

Filing and Disposal of Election Petitions

All matters relating to filing and disposal of election petitions in connection with a vice-presidential election are also governed by the same provisions of law and the rules made thereunder as are applicable to election petitions relating to a presidential election, with the only exception that an election petition calling in question a vice-presidential election can be filed by only 10 electors as petitioners, instead of 20 electors as petitioners for a petition relating to a presidential election.

appointed or posted in a particular place or position, he should continue in such place or posting as long as he desires.[98]

98 2009(6) SCJ 454; see also *State of UP v Gobardhan Lal* 2004(11) SCC 402 : *Shilpi Bose (Mrs.) and Ors v State of Bihar and Ors* AIR 1991 SC 532 : *NK Singh v Union of India and Ors* 1994 (6) SCC 998.

CHAPTER 6

Delimitation of Constituencies

SYNOPSIS

INTRODUCTION

In the context of elections in India, the 'delimitation' involves not only the demarcation or drawing of boundaries of territorial constituencies, but also the readjustments in the allocation of seats to various states in the House of the People and in the total number of seats of the legislative assemblies of the states, unless Parliament itself chooses to fix the number of such seats. The basic object of delimitation is to secure, so far as practicable, equal representation for equal segments of the population in legislative bodies. In other words, the delimitation aims at ensuring the observance of the basic tenet of democracy: 'one man, one vote'. The other equally important aim of delimitation is to divide the geographic areas into territorial constituencies so fairly that no party or candidate may legitimately have a grievance that there has been 'gerrymandering'[1] of constituencies in favour of or against the interests of any particular party or candidate.

BAR TO INTERFERENCE BY COURTS IN DELIMITATION MATTERS

The Constitution mandates that the delimitation of constituencies as determined by the authority, to which this task is entrusted, should be final and there should not be any intervention by any authority, including the courts. Accordingly, the Constitution makers provided in art 329(a) that:

> Notwithstanding anything in this Constitution:
>
> (a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court.

1 'Gerrymandering', in US politics, means the drawing of the boundaries of electoral districts in a way that gives one party an unfair advantage over its rivals. The term is derived from the name of Governor Elbridge Gerry of Massachusetts, whose state administration enacted a law in 1812, dividing the state into new senatorial districts. The law consolidated the Federalist Party vote in a few districts and thus gave disproportionate representation to Democratic Republicans. The outline of one of the districts, which was thought to resemble a salamander, gave rise, through a popular application of the Governor's name, to the term 'gerrymander'. Gerrymandering has been condemned because it violates two basic tenets of electoral apportionment—compactness and equality of size of constituencies. A US Supreme Court ruling of 1964 stated that districts should be drawn to reflect substantial equality of population. However, using studies of regional voting behaviour, the majority parties in certain state legislatures continue to set district boundaries along partisan lines without regard for local boundaries or even contiguity. For example, in some states representatives from rural and small town districts seek to limit the representation of more densely populated urban centres. Sometimes gerrymandering is defended as the only means of securing any representation for minority groups. It is argued that violating local boundaries in drawing districts is preferable to denying a politically cohesive group any voice in state government, *Encyclopaedia Britannica*, vol 5 (Micropaedia), fifteenth edn, 1997, p 222.

...

There seems to be very sound logic and good reason behind such provision. It has always been regarded as a matter of first importance that given the important functions that Parliament and state legislatures have to perform, the elections thereto should be held regularly, as and when due and according to the fixed time table. The Constitution even stipulates the periods during which each House of Parliament and of a state legislature must meet to transact its business, and it implies that these Houses are in existence at all relevant points of time and are duly constituted on the basis of periodic elections. If the orders made by the authority delimiting the constituencies are not treated as final and are made subject to review or revision by some other authority, then any voter in any constituency, if he so wished, could hold up an election indefinitely by questioning the delimitation of constituencies from court to court.[2]

In the *Meghraj Kothari* case, a voter of the Ujjain parliamentary constituency in the State of Madhya Pradesh, felt aggrieved by the order of the Delimitation Commission, set up under the Delimitation Commission Act 1962, which undertook the delimitation of parliamentary and assembly constituencies in the whole of India on the basis of the 1961 census. The Delimitation Commission reserved the Ujjain parliamentary constituency for the scheduled castes. The said voter claimed to have an unfettered right to contest election from any parliamentary or assembly constituency in the State of Madhya Pradesh, but the reservation of Ujjain parliamentary constituency for the schedule castes deprived him of such right to contest election from that constituency, as he did not belong to the scheduled caste. He moved the Madhya Pradesh High Court seeking to quash the order of the Delimitation Commission. The high court did not grant him the relief prayed for, as the court held that its jurisdiction to go into the question of the order of the Delimitation Commission was barred by art 329(a). Aggrieved by the high court's refusal to intervene in the matter, he approached the Supreme Court. But the Supreme Court also did not interfere with the order of the Delimitation Commission, holding that art 329(a) barred such interference. It was contended on behalf of the petitioner that under art 329(a), the validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies made under arts 327 or 328 could not be called in question, but the order made by the Delimitation Commission was not law and thus not immune from challenge. The Supreme Court did not accept this contention. The Supreme Court observed that the Delimitation Commission Act 1962 provided in s 10(1) thereof, that each of the

2 *Meghraj Kothari v Delimitation Commission and Ors* AIR 1967 SC 669. See also *J & K National Panthers Party v Union of India and Ors* 2011(1) SCJ 591 wherein the Supreme Court has held that the provisions of s 142(a) of the Constitution of Jammu & Kashmir, which are identical to the provisions of art 329(a) of the Constitution of India, are an express constitutional bar to any challenge being made to the delimitation law.

orders of the Delimitation Commission delimiting the constituencies and reserving the seats in those constituencies for the scheduled castes or scheduled tribes were required to be published in the Gazette of India and in the official gazettes of the states concerned, and s 10(2) further provided that 'upon publication in the Gazette of India, every such order shall have the force of law and shall not be called in question in any Court'. The Supreme Court observed that the provisions of s 10 of the Delimitation Commission Act 1962, put the orders of the Delimitation Commission and published in the Gazette of India 'in the same street as a law made by Parliament itself'. According to the Supreme Court, the Delimitation Commission Act 1962 was made by Parliament, not under art 82, which merely envisages that upon the completion of each census the allocation of seats in the House of the People and the division of each state into territorial constituencies may have to be readjusted, but under art 327, which empowers Parliament to make laws with respect to, inter alia, all matters relating to delimitation of constituencies.

It deserves to be noted that art 329(a) makes not only the law made by Parliament under art 327, but also the law purporting to be made under that article, immune from challenge before any court. In *Vallabhbhai Kushalbhai Patel v State of Gujarat and Ors*,[3] the reservation of seven out of the 12 assembly constituencies in the Surat district by the Delimitation Commission was challenged before the Gujarat High Court, as unconstitutional, motivated by political reasons, mala fide, arbitrary and contrary to statutory guidelines in the Delimitation Commission Act 1962. The high court refused to go into any of the allegations and contentions of the petitioner, holding that its jurisdiction was barred in respect of orders made by the Delimitation Commission, which were deemed to be law purported to have been made under art 327 under the provisions of the said 1962 Act. The high court observed that art 329(a) was a constitutional device to protect a legislative measure and but for this device, the entire election machinery would break down if a voter was allowed to challenge the orders of the Delimitation Commission from court to court. The high court also rejected the contention of the petitioner that the provisions of the aforesaid Act amounted to abdication by Parliament of its legislative powers, and observed that the words 'purported to be made' in art 329(a) had to be given the widest construction, keeping in view the object underlying that article.

Following the constitutional mandate in art 329(a) and the dictum of the Supreme Court in the *Meghraj Kothari* case, the orders passed by the Delimitation Commissions and the Election Commission from time to time relating to demarcation of constituencies and reservation of seats in them have not been interfered with by the high courts, nor have they interdicted the proceedings of these Commissions leading to the finalisation of their orders by them. In *Ravinandan Singh v Election Commission of India and Anor*,[4] the Madhya Pradesh High Court

3 56 ELR 227.
4 64 ELR 301.

was petitioned that the Election Commission may be directed not to convert the Sidhi parliamentary constituency from general constituency to a reserved constituency for the scheduled castes, under the provisions of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976, whereby certain additional castes and tribes were declared by Parliament as scheduled castes and scheduled tribes and the Election Commission was empowered to locate additional seats for the scheduled castes and scheduled tribes on the basis of the consequential increase in their population. The bar under art 329(a) was sought to be overcome on the ground that the Election Commission had not yet passed its final order, and that the high court could intervene in the matter under art 226. The high court did not accept the above contention and prayer of the petitioner, holding that the Election Commission was the final authority in the matter under the said Act and art 329(a) applied not only to the final order of the Commission but also to its proceedings. The high court also held that if the population of the scheduled castes increases, the number of seats reserved for them also correspondingly increases and the Commission was entitled to convert the above constituency from a general to a reserved constituency. The Karnataka High Court also took the same view in *C Krishna v Chief Election Commissioner*,[5] where the Shanthi Nagar assembly constituency in Bangalore was converted from a general constituency to a constituency reserved for the scheduled castes. In *M Yellapa v Delimitation Commission and Anor*,[6] the question raised before the Andhra Pradesh High Court was that the Delimitation Commission, by its final order, reserved Kalyandurg assembly constituency for the scheduled castes, whereas in the draft proposals published by the Commission, it was the Madakasira constituency which was proposed to be reserved and not Kalyandurg. The high court did not interfere with the order of the Delimitation Commission and it was held to be unassailable.

The Delimitation Commission constituted in 2002, while publishing its draft proposals for inviting objections and suggestions in relation to the proposed delimitation of assembly and parliamentary constituencies in Madhya Pradesh on 19 January 2007, included 203-Depalpur assembly constituency in Dhar parliamentary constituency and 209-Mhow assembly constituency in the adjoining Indore parliamentary constituency. However, the Delimitation Commission, in its final order dated 14 May 2007, included 209-Mhow assembly constituency in the Dhar parliamentary constituency and 203-Depalpur assembly constituency in the Indore parliamentary constituency. When questioned before the Supreme Court, the apex court upheld the decision of the Delimitation Commission observing that the Commission, after considering the objections and suggestions received by it and hearing the interested parties at the public sittings, could make the changes as

5 61 ELR 85, p 143.
6 59 ELR 273.

considered necessary by it and that the court could not go into such matters in view of art 329(b) and s 10(1) of the Delimitation Act 2002.[7]

Another important ruling on this subject has recently come from the Kerala High Court in *Chief Electoral Officer v Sunny Joseph*.[8] In this case, the petitioner sought to challenge the order issued on 31 May 2005 by the Delimitation Commission under s 10(1) of the Delimitation Act 2002, which is in pari materia with s 10(1) of the Delimitation Act 1972, relating to delimitation of constituencies in Kannur district of Kerala. Though a preliminary objection regarding the maintainability of the writ petition was raised on behalf of the Delimitation Commission, a single Judge of the Kerala High Court directed the respondents to file their statements as he felt that the preliminary objection as well as the merits of the case could be dealt with simultaneously. The Delimitation Commission, however, felt aggrieved by this direction of the single judge and filed an appeal before the Division Bench of the high court. Allowing the appeal of the Delimitation Commission, the Division Bench of the high court held that the petition under art 226 of the Constitution relating to delimitation of constituencies was not maintainable in view of the specific bar contained under art 329(a) of the Constitution, and dismissed the writ petition. The court observed that though judicial review is part of the basic structure of the Constitution, the Constitution did exclude judicial review in certain situations and that arts 31(4), 31(6), 136(2), 227(4), 262(2), 243O, 243ZG, 329(a), etc, have excluded the scope of judicial review with a laudable objective that the judicial review in certain situations may not be regarded as an indispensable measure to determine the legality or propriety of actions. The Kerala High Court, while coming to the above conclusion, followed not only the decision of the Supreme Court in the above referred case of *Meghraj Kothari*,[9] but also the decisions of the Supreme Court in the cases of *State of Uttar Pradesh v Pradhan Sangh Kshetra Samiti and Ors*[10] and *Anugrah Narain Singh v State of Uttar Pradesh*[11] upholding the bar against the intervention of courts in matters relating to delimitation of constituencies for elections to local bodies. The Kerala High Court in *Chirayinkeezhu A Babu v Delimitation Commission*[12] held that the court would not interfere even where the Delimitation Commission had corrected its own mistake in reserving a constituency after issuing the final order.

Mohd Abdul Ghani and Ors v Election Commission of India[13] appears to be the lone exceptional case where the Calcutta High Court intervened and directed a group of 16 *mouzas* to be excluded from one constituency and tagged on to another

7 *Association of Residents of Mhow (Rom) v Delimitation Commission of India* 2009(4) SCJ 289.
8 (2005) 4 Ker LT 599.
9 AIR 1967 SC 669.
10 (1995) Supp 2 SCC 203.
11 (1996) 6 SCC 303.
12 Laws 2010 (KER) (3) 114; 2010 (KER LT) (2) 957.
13 (1995) 6 SCC 721.

adjacent constituency, because it considered those villages as having become contiguous to the latter constituency owing to a change in the course of the Ganges. These 16 *mouzas*, at the time of delimitation of the above constituencies in 1975, were located on western side of the Ganges and formed part of Murshidabad district and were included in Farakka and Aurangabad assembly constituencies by the Delimitation Commission. Subsequently, the Ganges changed its course and these villages now fell on the other side of the river and became contiguous to Kaliachak assembly constituency in district Malda. The state government changed the extent of the districts so as to include these *mouzas* in Malda district, taking them out of Murshidabad district. Consequently, it was proposed to the Election Commission that the territorial extent of the above constituencies may also be correspondingly changed. The Election Commission expressed its inability to do so, as it took the view that the territorial extent of the constituencies as delimited by the Delimitation Commission could not be changed or readjusted by any authority, until the next delimitation was undertaken by the authority contemplated under art 170. The high court, however, did not agree with the above view, and directed on 14 November 1984 that the territorial extent of the above assembly constituencies should be altered so as to be in conformity with the geographical changes and the changes in the administrative set up. But, on appeal by the Election Commission, the Supreme Court promptly halted the process of alteration, as directed by the high court, of the territorial extent of those assembly constituencies, by staying the high court's order on 16 November 1984. The appeal of the Election Commission was finally allowed by the Supreme Court on 1 November 1995, upholding the view of the Commission that the territorial extent of constituencies as delimited by the Delimitation Commission could not be altered by the Election Commission.[14]

Delimitation of Parliamentary and Assembly Constituencies (Except Assembly Constituencies in Jammu and Kashmir)

Initial[15] Delimitation in 1950–51—Authority to Delimit Constituencies

The Constitution, as originally enacted, provided that for the purposes of elections to the House of the People, directly by the voters in the states, the states shall be divided, grouped or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be so determined as to ensure that there shall not be less than one member for every 7,50,000 of the population and not more than one member for every 5,00,000 of the population[16] [art

14 (1995) 6 SCC 721.
15 See Election Commission's Report on First General Elections 1951–52, ch VI.
16 The limits as regards maximum and minimum numbers of population being represented by a member of the House of the People or of a state legislative assembly were done away with by the Constitution (Second Amendment) Act 1952 and the Constitution (Seventh Amendment) Act 1956.

81(1)(b)]. It was similarly provided that the representation in the legislative assembly of each state shall also be by direct election from territorial constituencies in the state on a scale of not more than one member for every 75,000 of the population [art 170(2)]. It was further provided that, upon the completion of each census, the representation of several territorial constituencies in the House of the People and in the legislative assembly of each state shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine [arts 81(3) and 170(4)]. It was also provided that such readjustments shall not affect representation in the then existing House of the People or, as the case may be, the legislative assembly of a state, until the dissolution of that House or Assembly [provisos to arts 81(3) and 170(4)]. But the Constitution was silent as to who shall undertake the initial division of states into territorial parliamentary and assembly constituencies and the allocation of seats to such constituencies. This gap was filled by Parliament by enacting provisions to that effect in the Representation of the People Act 1950. It was provided in ss 6 and 9 of this Act that, as soon as may be, after the commencement of that Act, the President shall, by order determine:

(i) the parliamentary and assembly constituencies into which each state shall be divided;
(ii) the extent of each such constituency;
(iii) the number of seats allotted to each constituency; and
(iv) the number of seats, if any, reserved for the scheduled castes or for the scheduled tribes in each constituency. To enable the President to make such orders, it was made the function of the Election Commission to formulate proposals as to the delimitation of constituencies in each state and to submit the same to the President. It was also provided that the Election Commission shall formulate such proposals in consultation with parliamentary advisory committees in respect of each state, which were to be set up by the Speaker of the provisional Parliament,[17] consisting of not less than three, and not more than seven members of Parliament representing that state (s 13, 1950 Act). Every order made by the President was to be laid before Parliament, as soon as may be after it was made, and was subject to such modifications as Parliament might make on a motion made within 20 days from the date on which the order was so laid [s 13(3) ibid]. The orders made by the President from time to time could be altered or amended by him, after consultation with the Election Commission and subject to such further modifications as Parliament might make [ss 12 and 13(3) ibid].

Pursuant to these provisions, the Election Commission formulated its proposals in consultation with the parliamentary advisory committees and submitted the same to

17 Under art 379, the Constituent Assembly was then functioning as the provisional Parliament until the election of the regular Parliament.

the President for approval and notification. These proposals were worked out on the basis of the population figures of each state as on 1 March 1950, as estimated by the Census Commissioner of India under art 387. This article provided that for purposes of elections held during a period of three years from the commencement of the Constitution (ie, between 26 January 1950 and 25 January 1953), the population of India or any part thereof would be determined in such manner as the President might by order direct, and the President had made the Constitution (Determination of Population) Order 1950 empowering the Census Commissioner to make such determination. The proposals relating to delimitation made by the Election Commission were revised in certain respects by the Central Government and a final Delimitation Order was accordingly drawn up for each state and issued by the President during May 1951. Some of these orders, when laid before Parliament as required under s 13(3) of the 1950 Act, were materially altered by it and the amendments made thereto by Parliament were notified by the Parliament Secretariat on 13 August 1951, whereby they attained finality and became the basis for the first general elections to the House of the People and legislative assemblies of the states in 1951–52.

Delimitation After the 1951 Census[18]

The delimitation of constituencies so made by the President in 1951 was temporary in character, as the Constitution mandated readjustments in the delimitation of the constituencies upon the completion of each census. Accordingly, after the 1951 census, another delimitation became due in all states. In the context of the delimitation exercise undertaken in 1950–51, the Election Commission observed that the procedure followed for the purpose did not work out smoothly or satisfactorily, and left many parties and persons aggrieved. It was also felt that the Parliament, amidst its busy schedule, would hardly find sufficient time to devote adequate attention to these matters, if again called upon to do so at the time of the next delimitation. The Election Commission, therefore, recommended to the government that the future delimitation of constituencies should be made by an independent commission, more or less judicial in composition, and the decisions of such commission should be made final in law. The government accepted this suggestion of the Election Commission and accordingly provided for the constitution of an independent Delimitation Commission under the Delimitation Commission Act 1952. The Delimitation Commission so constituted consisted of three members. Its Chairman was Mr Justice Chandrasekhar Iyer, a retired judge of the Supreme Court, and the second member was Mr Justice PK Kaul, a retired Chief Justice of a high court, whereas the then Chief Election Commissioner, Shri Sukumar Sen, was its third ex-officio member. Under the said Act, the orders of the

18 See the Election Commission's Report on Second General Elections 1957, ch VII.

Delimitation Commission were given finality as having the force of law, and were not subject to any modification or review by Parliament or by any court of law. Hardly had this Delimitation Commission completed its task of readjusting the number of seats allocated to various states in the House of the People, the total number of seats of the legislative assemblies of various states and the territorial extent of parliamentary and assembly constituencies by the end of July 1956, that a necessity arose for further delimitation of these constituencies on the basis of the changes made by Parliament in the allocation of seats to the various states in the House of the People and in the total number of seats in the legislative assemblies of the states, consequent upon the whole scale reorganisation of the states in India under the States Reorganisation Act 1956 and the Constitution (Seventh Amendment) Act 1956. The States Reorganisation Act contemplated the setting up of a new Delimitation Commission for the purpose. However, the government reappointed the same members as the members of the new Delimitation Commission which completed its task on 19 December 1956. The orders of the Commission in respect of all the states were consolidated in a formal order called the Delimitation of Parliamentary and Assembly Constituencies Order 1956. The constituencies delimited by this order formed the basis for the second and third general elections to the House of the People and the state legislative assemblies held in 1957 and 1962 respectively.

Delimitation After 1961 Census[19]

After the decennial census of 1961, another delimitation of all parliamentary and assembly constituencies was called for under the provisions of the Constitution. Again, an independent Delimitation Commission was set up for the purpose on 29 January 1963, under the Delimitation Commission Act 1962. This time also, it was a three member Commission. It consisted of Shri JL Kapur, a retired Judge of the Supreme Court, as its Chairman, Shri CP Sinha, a retired Chief Justice of the Assam High Court, and Shri KVK Sundaram, the then Chief Election Commissioner, as members. The Commission finished the task originally assigned to it by July 1966, but it had to undertake additional work on the reorganisation of Punjab, Haryana and Himachal Pradesh and the creation of a new Union Territory of Chandigarh under the Punjab Reorganisation Act 1966. At this stage, Shri CP Sinha resigned his membership of the Delimitation Commission and a new member, Shri RC Soni, a retired judge of the Punjab and Haryana High Court, was appointed in his place. The Delimitation Commission so reconstituted then completed its work in all respects. It was on the basis of the orders of this Commission that the fourth and fifth general elections to the House of the People were held in 1967 and 1971 respectively and a number of general elections and mid-term general elections were

19 See the Election Commission's Report on Fourth General Elections 1967, ch 1.

held to various states legislative assemblies in 1967, 1968, 1969, 1971 and 1972. On 30 September 1967, the various orders of the Delimitation Commission were consolidated by the Election Commission into one single order called the Delimitation of Parliamentary and Assembly Constituencies Order 1966.

Delimitation After 1971 Census[20]

Then, upon the completion of the 1971 census, the next delimitation became due and the Parliament again provided for the setting up of an independent Delimitation Commission for that decennial exercise. This time, the Parliament enacted the necessary legislation under the nomenclature of Delimitation Act 1972, instead of the earlier nomenclature of Delimitation Commission Acts which it had passed in 1952 and 1962. Under this 1972 Act also, the Delimitation Commission was a three member Commission. This Commission was set up on 22 February 1973 and was headed again, by Shri JL Kapur, who was the Chairman of the earlier Commission set up in 1963. The second member of the Commission was Shri Tarun Kumar Basu, a sitting Judge of the Calcutta High Court, the third member being the then Chief Election Commissioner, Shri T Swaminathan, ex-officio. This Commission completed its task on 20 October 1975.

Associate Members of Delimitation Commission

In all these Delimitation Commissions, there was provision for association of associate members for the purpose of assisting the Commission in its duties in respect of each state. For example, the Delimitation Act 1972 provided that 10 associate members shall be associated with the functioning of the Delimitation Commission in respect of each state. Five of such associate members were to be the members of the House of the People representing that state and the other five being the members of the state legislative assembly. These members were to be nominated by the Speaker of the House of the People or, as the case may be, the Speaker of the legislative assembly concerned, having due regard to the composition of the said House or assembly. Where, however, the number of members of the House of the People representing any state was five or less, then all such members were to function as the aforesaid associate members [ss 5 (1) and (2) Delimitation Act 1972]. However, these associate members had no right to vote in the proceedings of the Delimitation Commission or to sign any decision of that Commission [s 5(4) ibid].

20 See the Election Commission's Report on General Elections in Manipur, Uttar Pardesh, 1974–75, ch II.

Procedure and Powers of Delimitation Commissions

These Delimitation Commissions were empowered to determine their own procedures and were also vested with the powers of a civil court under the Code of Civil Procedure 1908, in the matter of summoning and enforcing the attendance of witnesses from any part of India, requiring the production of any document, and requisitioning any public record from any court or office.[21]

It was further provided that if there was any difference of opinion among the members of the Commission, the opinion of the majority shall prevail and orders of the Commission shall be expressed in terms of the views of the majority. The orders of the Commission were required to be published in the Gazette of India and in the official gazettes of the states concerned, and upon such publication in the Gazette of India, every such order had the force of law and could not be called in question in any court [ss 10(1) and (2) ibid]. These orders were also to be laid before the House of the People and the legislative assemblies of the states concerned, but the same could not be modified by them in any manner [s 10(3) ibid].

Delimitation After 1981 and 1991 Censuses

No Delimitation Commission was set up after 1975 till July 2002, as the Constitution was amended by the Constitution (Forty-second Amendment) Act 1976, thereby freezing the number of seats allocated to various states in the House of the People, the total number of seats in the various state legislative assemblies and the extent of all parliamentary and assembly constituencies, until the first census to be taken after the year 2000.[22]

But notwithstanding such embargo, occasions arose after 1976, where some readjustments had become necessary in the number of seats allocated to certain states in the House of the People and in the total number of seats of those state legislative assemblies on account of conferment of statehood on the Union Territories of Arunachal Pradesh and Mizoram in 1986; or on the reorganisation of Goa, Daman and Diu in 1987; or on the creation of a legislative assembly for the National Capital Territory of Delhi in 1991. On the reorganisation of the state of Uttar Pradesh under the Uttar Pradesh Reorganisation Act 2000, the newly created state of Uttaranchal had to be delimited afresh on the basis of 1971 census as the number of assembly constituencies in the state was increased from 22 to 70. Some readjustments also became necessary in the reservation of seats for the scheduled castes and scheduled tribes on account of some additional castes and tribes being recognised as scheduled castes and scheduled tribes under the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976 and on account of changes affected in the number of seats reserved for the scheduled tribes in the Legislative

21 See, for example, s 7, Delimitation Act 1972 r/w explanation thereto.
22 See also ch 2, pp 44–48.

Assemblies of Arunachal Pradesh, Meghalaya, Mizoram, Nagaland and Tripura under the Constitution (Fifty-seventh Amendment) Act 1987 and the Constitution (Seventy-second Amendment) Act 1992. In all such cases, the responsibility of delimiting the parliamentary and assembly constituencies or locating the additional reserved constituencies for the scheduled castes and scheduled tribes was entrusted by Parliament to the Election Commission, instead of setting up any separate body for the purpose. It is worthy of notice that even to the Delimitation Commissions set up from time to time, secretarial assistance has always been provided mainly by the Election Commission and the main ground work, including the formulation of draft proposals, has been done by the officers and staff drawn on deputation from the Election Commission.

Fresh Delimitation After 2001 Census

As mentioned earlier, after the delimitation exercise by the Delimitation Commission set up under the Delimitation Act 1972 was completed by that Commission in October 1975, the Constitution underwent certain significant changes by the Constitution (Forty-second Amendment) Act 1976. Articles 81, 82 and 170 were amended to provide that there shall be no further delimitation exercise in the country till the publication of the relevant population figures of the census to be taken first after the year 2000, that is to say, till after the 2001 census. By those amendments to the Constitution, not only the territorial extent of the parliamentary and assembly constituencies was frozen, but the number of seats allocated to various states in the House of the People and the total number of seats in the legislative assemblies of all states were also frozen till the next delimitation exercise after the 2001 census. Ordinarily, this freeze on the number of seats in the House of the People and the state legislative assemblies and the extent of the parliamentary and assembly constituencies would have lifted after the census of 2001, and the normal provisions of the Constitution envisaging a fresh delimitation after every decennial census would have revived in the year 2001. However, some of the states, particularly in the southern region of the country, felt that if the population again became the criterion for allocation of seats to the states in the House of the People after the 2001 census, their interests would again suffer and they might lose in the matter of their representation in that House. But, at the same time, it was accepted that the embargo placed on the delimitation of constituencies in 1976 had resulted in vast disparities in terms of population and electors of several constituencies vis-à-vis others. For instance, the number of electors in Outer Delhi parliamentary constituency had risen from 4,43,858 in 1977 to 31,03,525 in 1999. On the other hand, the number of electors in New Delhi and Chandni Chowk parliamentary constituencies had increased from 2,70,702 and 3,13,714 in 1977 only to 5,43,035 and 3,76,654 in 1999 respectively. In order that the interests of the states which had effectively implemented the family planning measures, which was the principal

reason for freezing the delimitation exercise in 1976 till 2001, are not adversely affected and, at the same time, the vast disparity in terms of the population and electors in various parliamentary and assembly constituencies may be removed, Parliament adopted a *via media*. It was provided in 2002, by the Constitution (Eighty-fourth Amendment) Act 2001, that the number of seats allocated to various states in the House of the People and the total number of seats in the state legislative assemblies, as determined on the basis of 1971 census, would remain further frozen till the year 2026 (as the population policy evolved by the government expected that a uniform population growth rate would be achieved throughout the country by the year 2026). But that eighty-fourth constitutional amendment further provided that all parliamentary and assembly constituencies in the country would be delimited afresh on the basis of the 1991 census. The 1991 census was prescribed as the basis for the fresh delimitation exercise on the premise that its relevant figures were already available, and that the relevant figures of the next census taken in 2001 may be published in 2003 or so and that any delimitation exercise undertaken on the basis of 2001 figures would not be completed by the time the next general election to the House of the People was held in September-October 2004, as normally scheduled.

Consequent thereto, Parliament also enacted the Delimitation Act 2002 to provide for the setting up of a separate Delimitation Commission. Under this Act, the Delimitation Commission was to consist of three members—a sitting or retired judge of the Supreme Court as its Chairman, Chief Election Commissioner or an Election Commissioner, to be nominated by the Chief Election Commissioner, as ex-officio member of the Commission, and the State Election Commissioner, appointed under art 243K of the Constitution to conduct elections to *panchayats* and municipalities in the state, as the second ex-officio member pertaining to the delimitation work in that state. Accordingly, a Delimitation Commission was constituted by the Central Government on 12 July 2002 with Shri Kuldip Singh, a retired judge of the Supreme Court, as its Chairman, Shri BB Tandon, Election Commissioner (as he then was), a nominee of the Chief Election Commissioner, as ex-officio Member, and the State Election Commissioners of each state as ex-officio members for their respective states. The Act further provided that the Election Commission would provide the necessary secretarial assistance to the Delimitation Commission and one of the secretaries to the Election Commission shall function as the secretary to the Delimitation Commission. The Act also provided that all expenditure in the delimitation exercise would be borne by the Central Government. This time, the Act also provided that the Delimitation Commission shall have power to call upon the Registrar General and Census Commissioner of India or his nominee, the Surveyor General of India or his nominee, any other officer of the Central Government or state government, any expert in geographical information system or any other person whose expertise and knowledge are considered necessary by the Commission, to provide assistance to it and persons so called upon shall be

duty bound to assist the Commission. The Act also provided for the association of five members of the House of the People and five members of the state legislative assembly as associate members for each state on the same pattern as was provided in the earlier Delimitation Acts and as discussed above. The associate members initially nominated by the Speaker to the House of the People in 2002 representing the House then in existence, had to subsequently vacate their office on the dissolution of that House in 2004 and a new set of such associate members was nominated by the new Speaker of the new House constituted in 2004. Similarly, there has been a change in the associate members representing the state legislative assemblies of several states, which have been reconstituted on the basis of general elections held thereto between July 2002 and February 2006. Interestingly, even Shri BB Tandon ceased to be ex officio member of the Commission on his elevation to the office of Chief Election Commissioner in June 2005 and he then nominated Shri N Gopalaswami, one of the Election Commissioners, to replace him as ex officio member of the Commission.

Soon after its constitution, the Delimitation Commission started its work on the basis of the 1991 census. However, the Commission received several representations to the effect that the delimitation process should be undertaken on the basis of the latest census of 2001, and not on the basis of the 10-year old outdated census figures of 1991. The Central Government and Parliament also saw reason in this demand and agreed to amend the Constitution. The Constitution and the Delimitation Act 2002 were then further amended by the Constitution (Eighty-seventh Amendment) Act 2003 and the Delimitation (Amendment) Act 2003 to provide that the delimitation of parliamentary and assembly constituencies shall be done by the Delimitation Commission on the basis of the 2001 census. This opportunity was also availed of to remove a lacuna in the Delimitation Act 2002 to provide that in respect of the duties of the Delimitation Commission relating to the States of Meghalaya, Mizoram and Nagaland, the Governor of the state concerned shall nominate a person to act as the ex-officio member in place of the State Election Commissioner, as no such State Election Commissioner was appointed in those states under art 243K. Pursuant to these amendments to the Constitution and the Delimitation Act, the Delimitation Commission had to start its work *de novo* after the Census Commissioner published the relevant figures of the 2001 census on 31 December 2003.

The Delimitation Commission so constituted in July 2002 completed its task in May, 2008 and was wound up on 31 May, 2008. Here, it may be pertinent to point out that this Commission was not entrusted with the task of delimiting the parliamentary constituencies in the state of Jammu and Kashmir. The parliamentary constituencies in that state as delimited on the basis of 1971 census still continue to be in force.

Deferment of Delimitation Exercise in the States of Arunachal Pradesh, Assam, Manipur and Nagaland

When the Delimitation Commission took up the delimitation exercise in the states of Arunachal Pradesh, Assam, Manipur and Nagaland, it was agitated in those states that the census operations of 2001 which formed the basis for collection of census data in those states suffered from several defects and the final figures of that census were questioned by several organisations before the Gauhati High Court. There was also strong resentment among the scheduled tribes in the states of Arunachal Pradesh, Manipur and Nagaland as the seats reserved for them in various districts of those states were getting seriously disturbed adversely affecting their interests. This led to violent agitations in those states threatening the peace and public order. In these circumstances, Parliament intervened and amended the Delimitation Act 2002, by inserting a new s 10A therein on 14 January 2008, empowering the President to defer the delimitation exercise in those states. Accordingly, the delimitation exercise in those states was deferred by the Presidential orders dated 8 February 2008. By a further amendment to the Representation of the People Act 1950, by inserting s 8A, the power has been vested in the Election Commission to undertake the delimitation exercise in the said states as and when the President so directs.[23]

Delimitation Commission's Order with Respect to Jharkhand Not to Have any Legal Effect

In the state of the Jharkhand also, there was violent agitation as the number of seats for the scheduled tribes was getting reduced in the state legislative assembly on the basis of 2001 census. Here too, Parliament intervened and amended the Delimitation Act, 2002, by insertion of a new s 10B on 14 January 2008, to the effect that the Delimitation Commission's orders dated 13 April 2007 and 17 August 2007 with respect to delimitation of constituencies in Jharkhand shall have no legal effect and the delimitation of constituencies as it stood before the said orders shall continue to be in force until the year 2026. Thus, the delimitation of constituencies in Jharkhand is presently governed by the delimitation order passed under the State of Bihar (Reorganisation) Act 2000.

Date of Enforcement of Delimitation Commission's Orders

Articles 82 and 170 of the Constitution, as amended by the Constitution (Forty-second Amendment) 1976, provide that the orders of any Delimitation Commission making readjustment in the extent of parliamentary and assembly constituencies shall take effect from such date as the President may, by order, specify. Earlier, these

23 The Representation Of The People (Amendment) Act, 2008

orders became effective as soon as notified by the Delimitation Commission. Pursuant to the above amendment, the orders of the Delimitation Commission, 2002, in respect of all states and union territories (except Arunachal Pradesh, Assam, Jharkhand, Manipur and Nagaland) were brought into effect by Presidential order on 19 February 2008, except the orders relating to the states of Meghalaya and Tripura which were made effective from 20 March 2008, as the general elections in those two states were already in progress in February 2008.

Post 2001 Delimitation–Readjust of Representation of Scheduled Castes and Scheduled Tribes in Parliamentary and Assembly Constituencies

When the Delimitation Commission was undertaking its exercise of delimiting parliamentary and assembly constituencies on the basis of 2001 census, the Parliament enacted the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 2002 (Act 1 of 2003), whereby certain additional castes and tribes were specified as scheduled castes and scheduled tribes and certain scheduled castes were converted into scheduled tribes and *vice versa*. A demand was made by certain affected castes and tribes that seats should be reserved in the House of the People and state legislative assemblies by taking into account their additional population as a result of the above specification of new scheduled castes and scheduled tribes. The Delimitation Commission, however, felt that it could not do so as that Commission was to go by the population figures as ascertained and published by the Registrar General for the 2001-census. The Delimitation Commission, however, brought this demand to the notice of the central government and the matter rested there.

After the whole exercise of delimitation was over in 2008 and elections were being held to the legislative assembly of Uttar Pradesh in 2012, a writ petition[24] was filed before the Supreme Court praying for reservation of seats for the scheduled tribes in the House of the People and state legislative assemblies, particularly, the legislative assembly of Uttar Pradesh, giving due regard to the additional population of scheduled tribes in the state by reason of conversion of certain scheduled castes into scheduled tribes in some of the districts of the state. It was further prayed that such reservation of seats for the scheduled tribes should be made by the Election Commission before the then ensuing general election to the Uttar Pradesh legislative assembly. Despite the reservation expressed by the Election Commission that the population of scheduled castes and scheduled tribes which had been additionally specified in 2002 was not taken into account and published by the Registrar General as part of the census operation of 2001, the Supreme Court directed the Election Commission to reserve the seats for the scheduled castes and scheduled tribes in

24 *Virendra Pratap and Anr v Union of India and Anr* Civil Writ Petition No. 540 of 2011 decided on 10 January 2012.

proportion to their population under arts 330 and 332 by taking into account the aforesaid additional population of scheduled castes and scheduled tribes. As the Election Commission explained to the Supreme Court that this task could not be completed before the calling of the then ensuing general election to the Uttar Pradesh legislative assembly in view of the procedural requirements involved, the Supreme Court passed an order on 10 January 2012 that needful may be done within three months of the passing of that order. The Election Commission, however, considered that it would be desirable to amend the law empowering the Election Commission to do so in order to put the matter beyond any pale of doubt and, accordingly, approached the central government for necessary remedial action. The Election Commission also pointed out to the government that a similar exercise was done in 1976 after the then Delimitation Commission had completed its task in 1975 and certain additional scheduled castes and scheduled tribes were specified by the Schedule Castes and Scheduled Tribes Orders (Amendment) Act 1976 and the Election Commission was specifically empowered to undertake that exercise by that Act.. The central government, after due consideration of the matter, felt that the benefit of reservation to the scheduled castes and scheduled tribes may be extended not merely on the basis of the Act of 2002 but also of all similar subsequent Acts enacted upto 31 May 2012. Thereupon, an ordinance called the 'Readjustment of Representation of Scheduled Castes and Scheduled Tribes in Parliamentary and Assembly Constituencies Ordinance 2013' was promulgated by the President on 30 January 2013 enjoining, *inter alia*, upon the Registrar General to ascertain or estimate the revised population of scheduled castes and scheduled tribes by taking into account all the eleven Acts which had been enacted by Parliament between 2002 and 31 May 2012, and to publish such revised population figures in the gazette of India, and empowering the Election Commission to readjust the representation of scheduled castes and scheduled tribes in the parliamentary and the assembly constituencies in all states and union territories on the basis of such revised population figures. Subsequently, this ordinance was sought to be replaced by an Act of Parliament in the Budget session of 2013, but it could not be enacted as the Bill was referred to the Parliamentary Standing Committee on the Ministry of Law and Justice, etc. on 18 March 2013. As a result, the said ordinance lapsed on 4 April 2013. The Parliamentary Standing Committee has now submitted its report on 2 May 2013 recommending the passage of the Bill and the matter is thus pending before Parliament. Meanwhile, the earlier ordinance which lapsed on 4 April 2013 was replaced by another ordinance on 5 June 2013. The second ordinance also lapsed on 4 September 2013, as the said Bill could not be enacted into law even in the Monsoon session. Now, the third ordinance has been promulgated on 27 September 2013. The Registrar General and the Election Commission are in the process of taking follow up action as envisaged in the said ordinances and the Bill now pending before Parliament.

Principles of Delimitation

The Constitution has laid down certain basic principles to be observed and adhered to by any authority undertaking the exercise of delimitation. These principles have been supplemented by the Parliament whenever it provided for the setting up of an independent Delimitation Commission or entrusted the task to the Election Commission.

The Constitution prescribes the maximum limits[25] beyond which the total membership of the House of the People and of the state legislative assemblies cannot go [arts 81(1) and 170(1)]. Additionally, the minimum membership strength of the state legislative assemblies is also laid down by the Constitution [art 170(1)]. These limits cannot be transgressed and every delimitation authority, whether it be Parliament itself or any other agency created or specified by it, has to so fix the total number of seats in the House of the People and in the legislative assembly of each state that such numbers fall within the prescribed parameters.

The Constitution also lays down in art 81(2)(a), the basic principle for the allocation of seats to various states in the House of the People. The number of seats in the House of the People shall be allotted to each state in such manner that the ratio between that number and the population of the state is, so far as practicable, the same for all states, so that these seats are equitably distributed among all states. However, an exception has been made in the case of smaller states whose population does not exceed six million, in order that their interests are duly safeguarded in the matter of their adequate representation in the House of the People [proviso to art 81(2)].

The Constitution further ordains that seats shall be reserved[26] for the scheduled castes and scheduled tribes in the House of the People and in the state legislative assemblies in proportion to their population in each state (art 330).

In so far as the delimitation of parliamentary and assembly constituencies is concerned, the basic principle laid down by the Constitution is that each state shall be so divided into territorial parliamentary and assembly constituencies that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the state [arts 81(2)(b) and 170(2)]. Initially, the Constitution had also prescribed that there shall be not less than one member for every 7,50,000 of the population and not more than one member for every 5,00,000 of the population of a state, in the House of the People, and not more than one member for every 75,000 of the population of a state in the state legislative assembly [arts 81(1)(b) and 170(2), as originally enacted]. However, these limits were not considered practicable in view of the fast increasing population of the country and were removed by the Constitution (Second Amendment) Act 1952 and the Constitution (Seventh Amendment) Act 1956.

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25 For details, see chs II and III.

26 *Subrata Acharjee v Union of India;* 2002 (2) SCC725, AIR 2002 SC 843.

Whenever Parliament has enacted law after any decennial census providing for the delimitation of constituencies, it has given some directives to the Delimitation Commission, which that Commission has to keep in mind and observe. These directives are in addition to the above-mentioned principles laid down by the Constitution itself as permanent mandate to any authority undertaking the exercise of delimitation. In the last such Act passed by Parliament in 2002, namely, the Delimitation Act 2002, Parliament has laid down in s 9(1) thereof that:

(a) All constituencies shall be single-member constituencies and shall, as far as practicable, be geographically compact areas;
(b) In delimiting the constituencies, regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience;
(c) Every assembly constituency shall be so delimited as to fall wholly within one parliamentary constituency;
(d) Constituencies in which seats are reserved for the Scheduled Castes in any state shall be distributed in different parts of the state and located, as far as practicable, in those areas where the proportion of their population to the total population of those areas is comparatively large; and
(e) Constituencies in which seats are reserved for the Scheduled Tribes in any state shall, as far as practicable, be located in areas where the proportion of their population to the total population of those areas is the largest.

It deserves to be specially noted that whereas the Delimitation Commission has been given some flexibility and discretion in the matter of identification and location of constituencies in which the seats are to be reserved for the scheduled castes inasmuch as the same are to be located in different parts of the state and in those areas where the population of the scheduled castes is *comparatively* large, no such discretion is available to that Commission in the matter of reservation of seats for the scheduled tribes. The seats for the scheduled tribes have to be compulsorily reserved in those constituencies where the proportion of their population to the total population is the *largest*, even if all the constituencies so reserved fall in the same part of the state. This is so because most of the scheduled tribes are concentrated in some pockets, districts or parts of the states.

The same dispensation was continued under the latest Delimitation Act 2002 also, in the matter of identification and location of constituencies to be reserved for the scheduled castes and scheduled tribes.

Abolition of Multi-member Constituencies

The Constitution permits the creation of multi-member parliamentary and assembly constituencies. In fact, from the time of the first delimitation in 1951 and until the year 1961, there were several multi-member parliamentary and assembly

constituencies. When the parliamentary and assembly constituencies were delimited for the first time in 1951 for the purposes of the first general elections in 1951–52, there were 86 two-member parliamentary constituencies and 578 two-member assembly constituencies. In addition, there was also one three-member parliamentary constituency of North Bengal and a three-member assembly constituency of Nasik-Igatpuri in the State of Bombay.[27] At the time of the second general elections in 1957, there were 91 double-member parliamentary constituencies and 584 double-member assembly constituencies.[28] Such multi-member constituencies were provided where at least one of the seats allocated to such constituency was reserved for the scheduled castes or scheduled tribes, the other being a general seat. However, these multi-member constituencies were generally not liked by political parties and candidates, as they extended to very vast areas, and the candidates found it very inconvenient and expensive to carry out their election campaigns therein, as they had to approach the electorates almost twice the size of electorates in single-member constituencies. These large constituencies were also found difficult to manage from the administrative point of view. In double-member constituencies, every elector was given two ballot papers and he was required to vote separately for two candidates of his choice, but very often both the ballot papers were wrongly cast in favour of one candidate, necessitating the rejection of one of these ballot papers at the time of counting and this delayed the counting process over considerably long periods. In some cases, even the candidates were found to be deliberately misleading voters to cast both the votes for them. Further, in the case of any challenge to an election of a member from a multi-member constituency, the whole election came under cloud, including the election of the other member about whom there was no complaint. In view of these practical and legal difficulties, the Parliament decided that the in future, all parliamentary and assembly constituencies shall be single-member constituencies and all double-member constituencies were abolished by the Two-Member Constituencies (Abolition) Act 1961 in January 1961.

However, it is worthy of notice that the Constitution still permits the creation of multi-member constituencies and it is only the Parliament which has taken a policy decision to have only single-member parliamentary and assembly constituencies.

Process of Delimitation[29]

How the constituencies are delimited can be best explained by illustrating the manner and methodology adopted by the Delimitation Commission set up in 1973. This Commission was to readjust: (i) the allocation of seats to the various states in the House of the People; (ii) the total number of seats in the legislative assembly of

27 See the Election Commission's Report on First General Elections 1951–52, pp 56–57.
28 See the Election Commission's Report on Second General Elections 1957, p 70.
29 See Election Commission's Report on General Elections to Legislative Assemblies of Manipur, Orissa, Pondicherry and Uttar Pradesh in 1974 and Gujarat in 1975, ch II.

each state; (iii) the number of seats to be reserved for the scheduled castes and scheduled tribes in the House of the People and each legislative assembly; and also (iv) the territorial extent of all parliamentary and assembly constituencies in the country, on the basis of the 1971 census. This census was taken on 1 April 1971 and the population figures ascertained at the census were published in June 1972 by the Census Commissioner (Registrar General of India). The delimitation of constituencies had to be undertaken keeping in mind the parameters and principles laid down by the Constitution and the Delimitation Act 1972, as discussed above. The Delimitation Commission had to ensure that, as far as practicable, all constituencies should be more or less equal in population and should be geographically compact areas in which administrative units were kept intact and not unnecessarily broken. These administrative units mainly consisted of districts, sub-divisions, *talukas* or police stations. However, for proper delimitation, the Delimitation Commission had to select even a lower administrative unit so that it could be kept unbroken, like, village *panchayat*, *panchayat* union, revenue inspector circle, *lekhpal* circle, *pargana*, *mouza*, depending upon the administrative set up of the states concerned. Apart from the above, physical features of the areas, like, hills, deserts, rivers, streams, etc, means of communication and considerations of public convenience had also to be kept in view while drawing the boundaries of the constituencies. For all this, detailed maps showing not only the above geographical features and means of communication and the boundaries of the administrative units, but also the population (both general and of the scheduled castes and scheduled tribes separately) of each such units, were needed. The census authorities had done their house-to-house enumeration on the basis of the census blocks and charges demarcated by those authorities themselves, which were different in many cases from the lowest administrative units selected by the Delimitation Commission, and consequently the population had to be reworked in terms of these latter administrative units. The preparation of the above maps giving all the needed information and statistical data was a very laborious and time-consuming job, and in some states it could be completed only by early 1975 by the state governments.

The Constitution, at that time, provided that the total number of seats allocated to the various states in the House of the People shall not exceed 525. It further provided that the ratio between the number of seats allocated to a state and its population shall, as far as practicable, be the same for all states. This principle of equal representation was, however, subject to exception in the case of small states having a population of less than six millions. These states were Himachal Pradesh, Manipur, Tripura, Meghalaya, Nagaland and Jammu and Kashmir. In so far as the last named state was concerned, the Constitution (Application to Jammu and Kashmir) (Second Amendment) Order 1974 had itself allocated six seats to it in the House of the People. The Delimitation Commission decided to allocate four seats to Himachal Pradesh, two seats each to Manipur, Meghalaya and Tripura and one seat to Nagaland in the House of the People. After allocating these 17 seats to the above

smaller states, the balance quota available for distribution among the remaining 15 states then in existence, came to 508. Out of this, the Commission decided to keep one seat in reserve for meeting any future contingency. The total population of the aforesaid remaining 15 states at the 1971 census was 529,042,059. This number was divided by 507 and the average population per parliamentary constituency came to 1,043,375. The population of each state was then divided by this average number to determine the number of seats to which that state became entitled in the House of the People. In this whole process, whereas the State of Nagaland got one seat, the State of Uttar Pradesh got the maximum number of seats, ie, 85. But no state was loser in relation to the seats already held by it in the then existing House of the People, whereas some of the states got additional representation on the basis of their increased population.

In so far as the union territories were concerned, their representation in the House of the People had been fixed by Parliament itself under the Government of Union Territories Act 1963, and the task of the Delimitation Commission was to demarcate the territorial extent of the parliamentary constituencies therein, where more than one seat had been allocated to any union territory, namely, Arunachal Pradesh, Delhi and Goa, Daman and Diu. All other union territories were allocated one seat each, and the whole of such territories constituted one parliamentary constituency each.

According to the Delimitation Act 1972, each parliamentary constituency was to comprise an integral number of assembly constituencies in a state and the total number of assembly constituencies in the state was to be an integral multiple of parliamentary constituencies in the state. There was, however, no guideline in the Act as regards such integral multiple, and it was left to the Delimitation Commission to determine such multiple, having regard to the broad parameters laid down by the Constitution that a state legislative assembly shall not have less than 60 members and not more than 500 members. The Delimitation Commission had thus to see that the legislative assembly of a state was neither too big nor too small, keeping in view its population, size, geographical features, means of communication, etc. The Commission chose the least objectionable course by retaining the same integral multiple as had been adopted at the time of the earlier delimitation in relation to almost all the states, except in a few states where on practical considerations and the requirements of the states concerned somewhat bigger legislative assemblies were considered desirable. Such multiple varied between five (in the case of Uttar Pradesh) and 30 (in the case of Manipur, Meghalaya and Tripura). Further, an attempt was made to ensure that all parliamentary constituencies in a state were comprised of equal number of assembly constituencies therein (which was to be the same as the integral multiple adopted for determining the total number of seats in the state legislative assemblies). But, here too, certain departures had to be made in respect of a few parliamentary constituencies in some

states, like, Assam, Gujarat, Manipur and Meghalaya, due to some compelling geographical or practical considerations.

Having determined the allocation of seats to the various states in the House of the People and also the total number of seats in the legislative assembly of each state in the manner aforesaid, the Delimitation Commission then worked out the number of seats, out of such total number of seats, to be reserved for the scheduled castes and scheduled tribes in respect of each state separately, in proportion to their population.

The next and the more cumbersome task of the Commission was to determine the territorial extent of parliamentary and assembly constituencies in these states. As each parliamentary constituency was to be comprised of a given number of assembly constituencies therein, the actual task of delimiting the constituencies was the demarcation of territorial extent of the assembly constituencies. The Delimitation Commission decided that, as far as practicable, the territorial extent of the assembly constituencies should be co-terminus with the boundaries of the district within which such constituencies fall, and, therefore, further decided to allot a full integral number of assembly constituencies to each district depending upon its population. For this purpose, the total number of assembly constituencies in a state was divided among the several districts in the state in the ratio of their population to the total population of the state. In such distribution, there were, however, a few cases in which even one full constituency could not be allotted to a district on the basis of its population, the district being either too small or too sparsely populated. In such cases, some areas of the adjoining districts had to be combined with these districts so as to form one complete assembly constituency. In some other cases also, where the entitlement of a district included a fraction which could neither be rounded off to the next higher integer nor ignored, the combination of certain areas from the bordering districts had to be resorted to, so that there was balancing in the population of these constituencies. In any such massive exercise, the strict adherence to the formula of equal population in each constituency was not possible and, therefore, some variations had to be made, particularly in view of the other important considerations of geographical compactness of areas, availability of means of communication and transport and public convenience. These variations ranged between 10 percent, either way, from the average population per constituency. The Supreme Court has observed in *RC Poudyal and Ors v Union of India*[30], and recently reiterated in *J & K National Panthers Party v Union of India and Ors*[31], that the constitutional scheme would indicate that the concept of 'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle, but it is not intended to be expressed with arithmetical precision. Articles 332 (3A)

30 AIR 1993 SC 1804.

31 2011(1) SCJ 591.

and 333 are illustrative instances. The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of India's territory. The differing degrees of political development and maturity of various parts of the country, may not justify standards based on mathematical accuracy. The apex court also observed that the problem of the equality of the value of votes is further complicated by the progressive rural depopulation and increasing urbanisation.

The Supreme Court further observed in *Subrata Acharjee v Union of India*,[32] that the leverage given by constitutional mandate by reason of inclusion of the words 'readjusted by such authority and in such manner as Parliament may by law determine' in arts 82 and 170 depicts the intent of the Parliament as to its true effect. It is an enabling provision for adjustment of seats in accordance with the situation. Proportionality, though mainly dependent upon the basis of population, cannot always be done with arithmetical precision and mathematical nicety. However, in the case of *Virendra Pratap and Ors v Union of India and Anr* (Civil Writ Petition No. 540 of 2011), the Supreme Court took the view that the reservation of seats for the scheduled castes and scheduled tribes has to be made by the authorities delimiting the constituencies strictly in accordance with the provisions of arts 330 and 332 in proportion to their population. In that case, the Election Commission, while delimiting the assembly constituencies in the newly formed state of Uttarakhand under the Uttar Pradesh Reorganization Act 2000, had allotted three seats to the scheduled tribes in that state having regard to the historical and political reasons, whereas in proportion to their population, the scheduled tribes were entitled to only 2.1 seats in the state assembly. The Supreme Court set aside the order of the Election Commission reserving the third seat for the scheduled tribes in that state, without however disturbing the composition of the then existing Assembly.

In accordance with the above distribution of assembly seats to the various districts and on the basis of the principles mentioned above, a working paper was prepared by the Secretariat of the Delimitation Commission (which mainly consisted of officers and staff drawn from the Election Commission) in respect of each state. This working paper contained the proposals for the delimitation of all parliamentary and assembly constituencies in the state. After its approval by the full members of the Delimitation Commission, each such working paper was circulated to the associate members of the Commission representing the state, in accordance with the provisions of the Delimitation Act 1972. These working papers were then further considered by the Commission with the associate members and modified in the light of these joint deliberations, wherever the same were agreed to by all concerned. Where, however, such agreement could not be reached and any associate members wished the changes suggested by them to be placed before the public for their

32 2002 (2) SCC725, AIR 2002 SC 843.

opinion, dissenting proposals were given by them. The proposals so approved by the Commission and the associate members and the dissenting proposals, if any, were then published as the draft proposals of the Delimitation Commission in the Gazette of India and in the official gazettes of the states concerned, for inviting suggestions and objections thereto from the general public, as required under s 9(2) of the said 1972 Act. Publicity to these draft proposals was also given through the district election officers by displaying them in conspicuous places for the information and perusal of the public and all others concerned. They all were invited to make their suggestions and objections by a specified date, which was normally not less than one month from the date of the publication of these draft proposals in the official gazettes. The suggestions and objections received by the Delimitation Commission in response to the above by the stipulated date were then further considered by the Commission and associate members at open public sittings held in different parts of each state. It was in the light of these suggestions and objections and the submissions heard by the Delimitation Commission at the public sittings that it finalised its proposals for the delimitation of parliamentary and assembly constituencies in respect of each state.[33] The proposals so finalised were then published by the Delimitation Commission in the form of final orders in the Gazette of India and in the official gazettes of the states concerned and, upon such publication, these final orders of the Delimitation Commission had the force of law under s 10(2) of the Delimitation Act 1972 and the same could not be called in question in any court.

More or less, the same methodology was adopted by the Delimitation Commission set up under the Delimitation Act 2002 to delimit the constituencies on the basis of 2001 census. This Commission was, however, not required to undertake any readjustment in the number of seats to be allocated to various states in the House of the People or in the total number of seats of any state legislative assembly, as the same remain unchanged under the Constitution (Eighty-fourth Amendment) Act 2001 until the first census to be taken after the year 2026, and its task was limited to readjust the territorial extent of the constituencies on the basis of 2001 census. The draft proposals worked out after consultation with the associate members, were published not only in the official gazettes, but also in two newspapers which had local circulation, so as to give them widest possible publicity. These draft proposals were also circulated among the members of the House of the

33 In the Delimitation Order relating to Orissa, one of the assembly constituencies was named Chilka, as it included the famous Chilka lake within its territorial extent. But the general public of the area desired the constituency to be named as Banpur after the name of another important place in the constituency. However, the Delimitation Commission did not accept the demand of the public on the ground that the name of the adjacent constituency was Ranpur and it could cause confusion. When the general election to the Orissa legislative assembly was subsequently held in January-February 1974, no nomination was filed from the Chilka assembly constituency in protest against the decision of the Delimitation Commission. The seat of this constituency was subsequently filled in the legislative assembly by holding a bye-election in June-July 1974.

People and state legislative assemblies concerned, for inviting objections and suggestions thereto from all interested. The Commission issued its final orders after holding public sittings in one or more places in the state concerned and after further consultation with the associate members.

Similar process was followed by the Delimitation Commission set up under the Delimitation Act 2002 for undertaking the exercise entrusted to it on the basis of 2001 census, except that it was not required to readjust the number of seats already allocated to the states in the House of the People and refix the total number of seats in the state legislaltive assemblies already determined on the basis of 1971 basis.

Meaning of Population

The Constitution basically contemplates that all readjustments in the allocation of seats to various states in the House of the People, total number of seats of various state legislative assemblies and territorial extent of parliamentary and assembly constituencies should be based on the population as ascertained at the last preceding census of which the relevant figures have been published [art 81(3) and explanation to art 170(2)]. However, as mentioned above, there has been a temporary suspension of the above constitutional intent after 1976 and the present dispensation is that the population means:

(i) the population as ascertained at the 1971 census for the purposes of allocation of seats to various states in the House of the People and fixing the total number of seats in the state legislative assemblies, and

(ii) the population as ascertained at the 2001 census for the purposes of re-delimiting the territorial extent of all parliamentary and assembly constituencies and also for determining the number of seats to be reserved for the scheduled castes and scheduled tribes in the House of the People and state legislative assemblies.

This dispensation is to stay until the first census to be taken after the year 2026, unless any further change in the Constitution is made in the meanwhile.

Maintenance of Delimitation Orders Up-to-date

As every Delimitation Commission constituted in 1952, 1963 and 1973 became *functus officio* and ceased to exist after the completion of the task assigned to it, the Election Commission was entrusted with the responsibility of consolidating all orders made by a Delimitation Commission into a single order, and to keep such order corrected up-to-date (ss 8 and 9, 1950 Act). In pursuance thereof, the Election Commission could correct any printing mistake or any error arising therein from inadvertent slip or omission, or make such amendments as appeared to it to be necessary or expedient where the boundary or name of any district or any territorial division mentioned in any delimitation order was altered (s 9 ibid). But the Election

Commission, while carrying out the above corrections so as to update the consolidated order, could not change or alter the extent of any constituency, as determined by the Delimitation Commission [s 11(1)(b), Delimitation Act 1972]. The Supreme Court held that the exercise of updating the Delimitation Order had to be made merely for the purpose of correcting the description of that part of the constituency which had undergone a change in description because of the subsequent change in the boundaries or name of any district or of any territorial division mentioned in the Delimitation Order, but not the extent.[34] Section 11(1)(b) of the Delimitation Act 1972 did not permit the making of any change in the boundary or area or in the extent of the constituency as described in the Delimitation Order because of the express prohibition therein. Section 9(1)(b) of the 1950 Act must be construed similarly for a harmonious construction of these provisions. The Supreme Court observed that if the same words which are used in s 9(1)(b) of the 1950 Act were also used in s 11(1)(b) of the 1972 Act, with the further addition containing the express restriction, there was no occasion to construe s 9(1)(b) of the 1950 Act differently to permit an exercise expressly forbidden by s 11(1)(b) of the 1972 Act.

The latest Delimitation Act 2002 also contained provisions similar to those in the 1972 Act for the consolidation of the orders to be made by the Delimitation Commission constituted in 2002 and for maintaining those orders up-to-date, but without making any alteration in the territorial extent of any parliamentary or assembly constituency while carrying out such exercise of updating those orders. Subsequently, the Representation of the People Act, 1950 was also amended by the Representation of the People (Amendment) Act, 2008 to empower the Election Commission to consolidate all orders of the Delimitation Commission into one single order to be called the Delimitation of Parliamentary and Assembly Constituencies Order 2008. Pursuant to the above provisions in the Delimitation Act and the 1950 Act, the Election Commission has consolidated all the orders of the Delimitation Commission into one single order called 'Delimitation of Parliamentary and Assembly Constituencies Order 2008' on 26 November 2008. In this order, the delimitation orders relating to the states of Arunachal Pradesh, Assam, Manipur and Nagaland are the old orders issued by the earlier Delimitation Commission on the basis of 1971 census, as the delimitation in these four states was deferred as explained above. In respect of Jharkhand also, the old delimitation order made under the Bihar Reorganisation Act 2000 on the basis of 1971 census is in force, as the revised order issued by the Delimitation Commission on the basis of 2001 census has been set aside by Parliament as mentioned above.

The Supreme Court has held in *Laxmi Kant Bajpai v Hazi Yaqoob and Ors*[35] that the Election Commission has no power to change the boundaries or areas or extent

34 *Election Commission of India v Mohd Abdul Ghani and Ors* (1995) 6 SCC 721.

35 2010(3) SCJ 241.

of any constituencies as determined by the Delimitation Commission. In the above case, a question also arose whether the state government has the power to break up municipalities which formed part of the constituencies as delimited by the Delimitation Commission. The apex court held that the state government has the power to break-up every municipality into territorial constituencies and there is no bar on its power to decrease or increase the areas of wards. The notifications issued by the Delimitation Commission in 1973 and 1976 specified that the extent of 397-Meerut constituency shall be the same as the Meerut Municipality. The Supreme Court observed that the said notification was still in force in its original form. Therefore, the normal corollary to be derived was that the territory of Meerut assembly constituency shall comprise all that area falling in the different wards mentioned in the delimitation order as it existed on the date of making the nomination for the election in question. The court further observed that had the intention of the Delimitation Commission been to restrict the extent of the constituency to as it existed on the date of publication of such notification, it should have been clearly specified.[36]

Holding of General Election After the Completion of a Decennial Census—Whether Permissible

After a decennial census has been taken and its relevant figures published, is it permissible to hold a general election to the House of the People or to a state legislative assembly on the basis of the then existing constituencies which were delimited having regard to the earlier census? This question directly arose in 1974 at the time of the sixth presidential election held in that year. The final population figures of the 1971 census were published in June 1972. The Governor of Gujarat thereafter dissolved the legislative assembly prematurely on 15 March 1974 under art 174(2)(b). Some political parties insisted that the general election to constitute the new Gujarat legislative assembly might be held urgently so that the electoral college for the presidential election, which was then due in August 1974, was complete by the inclusion of members of that assembly in the electoral college. However, the government took the view that the said general election could not be held on the basis of the then existing assembly constituencies which were delimited

36 Author's note: With respect, it is pointed out that the Hon'ble Court did not take notice of the Note (1) appended by the Delimitation Commission to its aforesaid notifications of 1973/1976 that "any reference in this Part, to a district, tehsil, kanungo circle, pargana, lekhpal circle, ward or other territorial division shall be taken to mean the area comprised within that district, tehsil, kanungo circle, pargana, lekhpal circle, ward or other territorial division on the *first date of August 1975*, except that a reference to ward in Meerut municipality shall be taken to mean the area comprised within the wards as on *first day of March 1974*." Thus, the extent of any assembly or parliamentary constituency as delimited by the Delimitation Commission had to be determined with reference to the date specified by the Delimitation Commission in its relevant order and not as on the date on which the election was being held subsequently from that constituency.

having regard to the population figures of 1961 census. As the matter was not free from doubt, a reference was made by the President to the Supreme Court for its advisory opinion under art 143. The Supreme Court held that after the relevant figures of population at the last preceding census have been ascertained and published, elections to the legislative assembly of a state can be held, under art 170(2) r/w the explanation thereto and art 170(3), only on the basis of the total number of seats in the assembly and the division of the state into territorial constituencies, as readjusted, having regard to the latest population figures and not on the basis of the earlier delimitation.[37]

The above view taken by the Supreme Court, was likely to create problems in the holding of timely elections to the House of the People and state legislative assemblies if the delimitation of parliamentary and assembly constituencies on the basis of the latest census figures could not be completed by the time the general elections to these houses became due. To overcome such difficulties, art 82 and art 170(3) were amended by the Constitution (Forty-second Amendment) Act 1976, by inserting provisos therein to the effect that any readjustment in the delimitation of parliamentary and assembly constituencies on the basis of the latest census figures shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the House of the People or, as the case may be, a state legislative assembly, may be held on the basis of the territorial constituencies existing before such readjustment.[38]

Delimitation of Council Constituencies

Introductory

The legislative councils of the states having such a council are so composed that one-third of their members are elected by the local authorities' constituencies, and one-twelfth of their members each are elected by the graduates' constituencies and teachers' constituencies. These three types of constituencies are called the council constituencies [s 2(c), 1950 Act]. Who can be enrolled as electors in these constituencies and how the electoral rolls for these constituencies are prepared and

37 Re *Presidential Election*, 1974 AIR 1974 SC 1682.

38 By the aforesaid Constitution (Forty-second Amendment) Act 1976, it was also provided that it shall not be necessary to undertake any further delimitation until the relevant figures for the first census taken after the year 2001 have been published. Subsequently, as already explained before, art 82 and 170(3) have been further amended by the Constitution (Eighty-fourth Amendment) Act 2001 and the Constitution (Eighty-seventh Amendment) Act 2003 to provide that there shall be no further readjustment in the allocation of seats to the states in the House of the People and in the total number of seats in the state legislative assemblies as determined on the basis of the 1971 census, and in the territorial extent of parliamentary and assembly constituencies as to be determined on the basis of the 2001 census.

revised have been discussed in detail in ch 3 and ch 7, and need not be repeated here. Suffice to state that the number of members to be elected from such constituencies to every legislative council of a state having such council has been determined and prescribed by Parliament itself (s 10, 1950 Act r/w the Third Schedule thereto). But it may be necessary to explain how these council constituencies are delimited or demarcated.

Authority to Delimit Council Constituencies

From the very beginning in 1950, the power to delimit council constituencies has been vested in the President (s 11, 1950 Act) and he continues to possess those powers till date.

Initial Delimitation in 1951

It was provided that as soon as may be after the commencement of the said 1950 Act, the President shall, by order, determine: (i) the constituencies into which each state having a legislative council shall be divided for the purpose of elections from the local authorities' constituencies, graduates' constituencies and teachers' constituencies; (ii) the extent of each such constituency; and (iii) the number of seats allotted to each constituency. It was further provided in the original 1950 Act that the President shall make the above order on the proposals to be made in this behalf by the Election Commission (s 13 ibid). Furthermore, the Election Commission was also required to consult the parliamentary advisory committees for the states concerned, as were set up to advise it in the matter of first delimitation of parliamentary and assembly constituencies, before submitting its proposals to the President for the delimitation of the council constituencies [13(2) ibid]. The orders made by the President in this behalf were to be placed before Parliament as soon as may be after they were made, and Parliament could modify them on a motion made within 20 days from the date on which any order was so laid [s 13(3) ibid]. But no directive or guiding principle was laid down either in the Constitution or in the 1950 Act, as to what should be the basis for the demarcation of the territorial extent of these constituencies or for the allocation of seats to each such constituency. The Election Commission was of the view[39] that as the elections from these constituencies were to be held on the basis of proportional representation by means of a single transferable vote, such constituencies should be multi-member constituencies. The parliamentary advisory committees also mostly agreed with the Commission's view. Pursuant thereto, necessary proposals were made to the President, which were accepted by him and notified by separate orders relating to each state concerned in September 1951. Parliament also later approved these orders with some modifications.

39 See Election Commission's Report on First General Elections 1951–52, ch VI.

Power to Amend or Alter the Delimitation Orders

The President was further empowered to alter or amend any such order from time to time, after consultation with the Election Commission (s 12, 1950 Act). By an amendment made in 1956 by the Representation of the People (Amendment) Act 1956, the requirement of consulting the parliamentary advisory committees was dispensed with. Now, any order made by the President, relating to the delimitation of council constituencies, can be amended or altered by the President after consulting the Election Commission, but any such alteration or amendment is still subject to modification by Parliament within 20 days from the date on which the order making such amendment or alteration is laid before Parliament [ss 12(1) and 13(3), 1950 Act]. In any such amending order, the President may also make provisions for the allocation of any member representing any council constituency as in existence immediately before the making of the amendment order to any other constituency either delimited anew or altered by such order. He can also provide for such other incidental and consequential matters, as he may deem necessary.

In exercise of this power, the President, on the recommendations of the Election Commission, has amended the aforesaid orders from time to time, keeping in view the changes that take place in the size of the electorates of these constituencies, consequent upon reorganisation of administrative units, new local authorities being constituted as constituent units of the local authorities' constituencies, and the rise in the level of literacy whereby more and more persons are becoming graduates or teachers qualifying for registration in the graduates' and teachers' constituencies.

Under the present orders, most of the council constituencies have been converted into single-member constituencies, as it was felt that the multi-member constituencies were very large in areas and not easily manageable and the candidates and parties were also finding it difficult to conduct effective campaigns in such vast constituencies.[40]

On the reorganisation of the states of Bihar and Uttar Pradesh under the Bihar Reorganisation Act 2000 and Uttar Pradesh Reorganisation Act 2000, the numerical strength of the legislative councils of Bihar and Uttar Pradesh has been reduced and, consequently, the number of council constituencies in both the states has also come down. By the aforesaid reoganisation Acts, Parliament itself readjusted the territorial extent of the council constituencies in both the states, and also made provisions for allocation of sitting members representing those constituencies in the state councils to the constituencies as so readjusted.[41]

In 2005, Parliament amended art 169 of the Constitution and enacted the Andhra Pradesh Legislative Council Act 2005 and provided for the recreation of

40 The orders relating to council constituencies are contained in the *Manual of Election Law*, published by the Government of India, Minister of Law and Justice.

41 See the Third Schedule to Bihar Reorganisation Act 2000, and the Third Schedule to Uttar Pradesh Reorganisation Act 2000.

Legislative Council for the state of Andhra Pradesh. Pursuant to the provisions of that Act which reserved 31 seats for local authorities constituencies, 8 and 8 seats for graduates' and teachers' constituencies respectively in the state council consisting of 90 members. The President was empowered to delimit the above council constituencies on the recommendation of the Election Commission. Accordingly, the Election Commission undertook that exercise and the final order of the President delimiting the above constituencies was issued on 26 September 2006.

Subsequently, Parliament further amended art 169 to create a legislative council for the state of Tamil Nadu as well and enacted the Tamil Nadu Legislative Council Act 2010. In pursuance of that Act, the Election Commission delimited the council constituencies and the Presidential Order delimiting those constituencies was issued on 30 September 2010. This delimitation exercise was, however, challenged before the Supreme Court in *M. Bharathiar v Union of India and Ors.*[42] and the Supreme Court stayed the Presidential Order and also stayed the holding of elections to the Tamil Nadu legislative council on the basis of that delimitation order. As a result, the Tamil Nadu legislative council has not yet been constituted, as the stay order of that Supreme Court still continues to be in force. Meanwhile, the Tamil Nadu legislative assembly has also passed a resolution that the state legislative council be not constituted.

Delimitation of Assembly Constituencies in Jammu and Kashmir

Introduction

The delimitation of parliamentary constituencies in the State of Jammu and Kashmir is governed by the provisions of the Constitution of India and the Delimitation Acts as passed by Parliament from time to time. But the delimitation of assembly constituencies in that state for the purposes of elections to its state legislative assembly, is governed separately by the provisions of the Jammu and Kashmir Constitution (ss 47, 48, 48A and 49) and the Jammu and Kashmir Representation of the People Act 1957 (ss 3, 3A, 4, 4A, 4B and 4C). These provisions are almost similar to those in the Constitution of India and the Delimitation Acts passed by Parliament from time to time, but they contemplate a separate Delimitation Commission to be set up for delimiting the assembly constituencies in the state. However, in actual practice, the same Central Delimitation Commissions as were set up for delimitation in other states and for the delimitation of parliamentary constituencies in Jammu and Kashmir in 1963 and 1973 were adopted and appointed as the State Delimitation Commissions for Jammu and Kashmir also, under the relevant state laws.

42 SLP No. 345 of 2011.

However, there was one material difference between the provisions of the Constitution of India and the Jammu and Kashmir Constitution in the matter of delimitation. Whereas under the Constitution of India, as it stood before its amendment by the Constitution (Forty-second Amendment) Act 1996, a general election to constitute a new state legislative assembly could not be held on the basis of the earlier delimitation after the population figures of the latest census had been published, the Jammu and Kashmir Constitution permitted, and still permits, that if upon the completion of a census, but before the final readjustment of territorial constituencies, the state legislative assembly is dissolved prior to the expiry of its normal duration and the governor of the state is satisfied that holding of general election to constitute the new assembly without delay is necessary, he may, after consulting the Election Commission, direct that the general election shall be held on the basis of the last preceding delimitation of territorial constituencies [s 48-A, Jammu and Kashmir Constitution as inserted by the Jammu and Kashmir Constitution (Twelfth Amendment) Act 1975]. After 1976, even the Constitution of India envisages that any delimitation done on the basis of the latest census shall take effect only from such date as the President may specify in this behalf, as explained above.

Separate State Delimitation Commission After 1981–Census

As mentioned above, after the amendment of the Constitution of India in 1976, no Central Delimitation Commission was set up in 1981 and 1991. But no corresponding amendment was made to the Jammu and Kashmir Constitution and it still mandates delimitation of assembly constituencies in the state after every census. Therefore, after the 1981 census, an independent three-member Delimitation Commission was set up by the Jammu and Kashmir government in December 1981 under s 3 of the Jammu and Kashmir Representation of the People Act 1957. For certain reasons beyond its control, that Commission could not complete its task expeditiously and even the 1991 census could not be taken in the state. Therefore, the term of that Commission was extended and its composition also underwent several changes with one or the other of its members demitting office on resignation from time to time. Initially, the Commission consisted of two Judges of the Jammu and Kashmir High Court and the Chief Election Commissioner as ex-officio member. Somewhere in 1991, a view was taken by the then Chief Election Commissioner that there was an anomaly in the constitution of the Delimitation Commission inasmuch as the Chairman of the Commission was a judge of the high court, whereas his position was equated to that of a Judge of the Supreme Court and he was only a member of that Commission. Thereupon, s 3 of the Jammu and Kashmir Representation of the People Act 1957 was amended by the Jammu and Kashmir Representation of the People (Amendment) Act 1992, to provide that the third member of the Commission will be a deputy election commissioner of the

Election Commission, to be nominated by the Chief Election Commissioner, instead of the Chief Election Commissioner himself. Thereafter, an order was passed on 28 September 1992 purporting to be the final order of the Delimitation Commission delimiting the assembly constituencies in the state. But the Election Commission refused[43] to give any cognisance to this order as being the order of the Delimitation Commission, as it showed the name of the then Chief Election Commissioner as being one of the members of the Delimitation Commission. The controversy was finally set at rest by the association of one of the deputy election commissioners nominated by the Chief Election Commissioner as a member of the Delimitation Commission, and the Commission so reconstituted, giving a fresh look to its earlier proceedings. The Commission ultimately completed its task on 27 April 1995, with the issue of the final order which formed the basis of the general election to the state legislative assembly held in 1996.

There was no census in the state in 1991. After the 2001 census, no Delimitation Commission has, however, been set up so far by the state government for re-delimitation of assembly constituencies in the state on the basis of the said 2001 census. In fact, the Jammu and Kashmir State Legislature amended s 47(3) of the Jammu and Kashmir Constitution by the Jammu and Kashmir Constitution (Twenty-Ninth Amendment) Act 2002, whereby it was provided that no further delimitation of assembly constituencies in the state shall be undertaken until relevant figures for the first census taken after the year 2026 have been published. The Supreme Court upheld the validity of the said amendment to the J & K Constitution in *J & K National Panthers Party v Union of India and Ors.*[44] The apex court held that ensuring uniformity in the value of votes is not a constitutionally mandated imperative of free and fair election under our constitutional dispensation and, therefore, the argument that the said amendment altered the Basic Structure of the Constitution is without substance.

The Supreme Court also held that the provisions of s 142(a) of the Constitution of Jammu & Kashmir, which are identical to the provisions of art 329(a) of the Constitution of India, are an express constitutional bar to any challenge being made to the delimitation law.

Delimitation of Council Constituencies in Jammu and Kashmir

The number of council constituencies, their territorial extent and the number of seats assigned to such constituencies, for the purposes of elections to the Jammu and Kashmir legislative council are prescribed by the Jammu and Kashmir Constitution itself (s 50, ibid).

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43 Order dated 4 January 1993 of the Election Commission of India.

44 2011(1) SCJ 591.

As per the above provisions of the Jammu and Kashmir Constitution, only six members of the state legislative council shall be elected by the council constituencies as follows:

(i) One member by the members of municipal councils, town area committees and notified area committees in the Province of Kashmir (the whole of the Kashmir province thereby forming the Kashmir local authorities' constituency) [s 50(4)(a)];

(ii) One member by the members of municipal councils, town area committees and notified area committees in the Province of Jammu (the whole of the Jammu province thereby forming the Jammu local authorities' constituency) [s 50(4)(b)];

(iii) Two members by the members of *panchayats* and such other local bodies in the province of Kashmir as the governor of the state may by order specify (the whole of the Kashmir province thereby forming the Kashmir *panchayats'* constituency) [s 50(5)(a)];

(iv) Two members by the members of *panchayats* and such other local bodies in the province of Jammu as the governor of the state may by order specify (the whole of the Jammu province thereby forming the Jammu *panchayats'* constituency) [50(5)(b)].

CHAPTER 8

Qualifications and Disqualifications for Membership of Parliament and State Legislatures

SYNOPSIS

INTRODUCTION

Qualifications and Disqualifications, Two Different Concepts

Any person aspiring to be a member of Parliament or of a state legislature in India, whether by election or by nomination, must be qualified, and must not be disqualified, under the Constitution or under any law for such membership. Qualifications are those positive attributes of a person which make him eligible to occupy a particular position, post or public office. Disqualifications, on the other hand, are those negative aspects of a person which militate against his occupying such position, post or public office, despite his being qualified therefor. Under the Constitution, 'qualifications' and 'disqualifications' for membership of Parliament and state legislatures are two different concepts and 'lack of qualification' would not be tantamount to 'disqualification'.[1] Therefore, the Constitution prescribes certain qualifications and also certain disqualifications separately. The qualifications for membership of Parliament are prescribed in art 84, whereas disqualifications for such membership are laid down in art 102. Likewise, art 173 prescribes the qualifications for membership of state legislatures and it is art 191 which lays down disqualifications therefore.[2]

Another noteworthy point and an important distinguishing feature between qualifications and disqualifications is that whereas the qualifications under arts 84 and 173 apply to 'being chosen as' (that is to say, for being elected or nominated as) a member of Parliament or of a state legislature, the disqualifications under arts 102 and 191 apply both to 'being chosen as', and 'for being' (that is to say, for continuing as) such member. In other words, whereas the qualifications must be fulfilled at the time of contesting an election, or being nominated, as a member of Parliament or of a state legislature, the disqualifications have relevance both at the time of election or nomination and also thereafter at all times for continuing as such member, if elected or nominated. Impliedly, even if an elected or nominated

1 See *Shyamdeo Pd Singh v Nawal Kishore Yadav* AIR 2000 SC 3000; see also Election Commission's opinion dated 31 October 1981 to the President in Re *Pranab Kumar Mukherjee* and opinion dated 19 November 1992 in Re *Suraj Mandal and Ors.*

2 Qualifications and disqualifications for membership of Jammu and Kashmir state legislature are separately prescribed in the Constitution of Jammu and Kashmir and in Part VI of the Jammu and Kashmir Representation of the People Act 1957. Qualifications and disqualifications for membership of the Legislative Assemblies of the National Capital Territory of Delhi and Union Territory of Pondicherry are also prescribed separately in the Government of National Capital Territory of Delhi Act 1991 and the Government of Union Territories Act 1963, respectively. All these have been discussed separately in this chapter.

member loses the qualification which he fulfilled at the time of his election or nomination, his membership of the House concerned is not affected, but if he becomes disqualified after his election or nomination, he will lose the membership of the House, as he will be disqualified 'for being' such member. In the case of Rajendra Saluja, a member of the Madhya Pradesh legislative assembly, it was contended before the Governor of the state that Shri Saluja was not eligible to continue as a member of the assembly as he had contested and won the election from a constituency reserved for the scheduled castes and his scheduled castes certificate was subsequently cancelled by the state's screening committee. The Madhya Pradesh High Court had also upheld the decision of the screening committee. However, the Election Commission, on the matter being referred to it for its opinion by the Governor, opined that such question of loss of qualification could not be raised before the Governor under art 192(1), nor could it be enquired into by the Election Commission.[3]

In *Jose Padickal v Ibrahim Sulaiman Sait and Ors,*[4] it was alleged that a member of the Kerala legislative assembly, by giving a call for boycott of the Republic Day celebrations, had violated the oath to bear true faith and allegiance to the Constitution, which he had taken to be qualified for election under art 173(a) and for taking a seat in the assembly under art 188, and it was contended that he was no longer eligible to continue as a member of the state assembly. The Kerala High Court, however, did not accept that contention, holding that the violation of oath taken at the time of becoming member did not constitute disqualification for continuing as a member after election and that the high court could not add new disqualification. Similarly, it was contended that Shri Pranab Kumar Mukherjee, who was elected to the Council of States from the State of West Bengal, had become disqualified to continue as a member of that Council on his name being deleted from the electoral roll in West Bengal, which was an essential qualification for election to the Council from that state. The Election Commission opined to the President that the deletion of his name from the electoral roll did not affect his continuance as member of the Council of States, as the lack of qualification did not amount to disqualification for continuing as member of Parliament.[5] Likewise, Shri Murasoli Maran was also held to be not disqualified to continue as a member of the Council of States for allegedly inciting the burning of the Constitution by writing some provocative articles in the magazine *Murasoli*.[6]

Another significant feature worth noticing in this behalf is that, apart from those qualifications and disqualifications which have been specifically laid down by the

3 Opinion dated 24 June 2013 to the Governor of Madhya Pradesh in re *Rajendra Saluja*.

4 Original Petition No 22 of 1987 before the Kerala High Court.

5 Election Commission's opinion dated 13 October 1981 in Re *Pranab Kumar Mukherjee*.

6 See the Election Commission's opinion dated 26 December 1988 to the President in Re *Murasoli Maran*.

Constitution itself, it is only the Parliament which alone is empowered to prescribe any additional qualifications and disqualifications, not only for membership of Parliament but also for membership of state legislatures [arts 84(c), 102(1)(e), 173(c) and 191(1)(e)]. In *Shrikant v Vasantrao,*[7] the Supreme Court held that 'it is not possible to add to or subtract from the disqualifications, either on the ground of convenience, or on the grounds of equity or logic or perceived legislative intention'.

As qualifications and disqualifications are two different and distinct concepts, every candidate is required to make a declaration in his nomination paper that he is qualified and not also disqualified for being chosen to fill the seat which he intends to contest [Forms 2A to 2E (Forms of Nomination Papers), 1961 Rules]. At the time of scrutiny of nomination papers, the returning officer also has to be satisfied that the candidate is qualified and is not disqualified for being chosen to fill the seat [s 36(2)(a), 1951 Act].

Crucial Date for Determining Qualifications and Disqualifications

The crucial date for determining whether a candidate is qualified and is not disqualified for contesting an election is not the date on which the candidate files his nomination paper but is the date fixed for the scrutiny of nominations on which the returning officer scrutinises his nomination paper [s 36(2)(a), ibid]. In the earlier stages, there was some doubt and confusion on this issue. Section 32 of the 1951 Act provided, and still provides, that any person may be nominated as a candidate for election to fill a seat in Parliament or in a state legislature, if he is qualified to be chosen to fill such seat. One view was that the candidate should be qualified on the date on which his nomination paper is filed. The other view was that he should be qualified on the date on which the returning officer scrutinises his nomination paper. This ambiguity in law was removed in 1961 by amending s 36(2)(a) of the 1951 Act by the Representation of the People (Amendment) Act 1961 to expressly provide that the returning officer shall determine whether a candidate is qualified or disqualified, on the date fixed for the scrutiny of nominations. As such, the existence of qualifications and non-existence of disqualifications are to be enquired into by the returning officer with reference to the date of scrutiny of nominations.[8] For example, if a candidate is below the prescribed minimum age for standing for election on the date on which he files his nomination paper, he shall nevertheless be qualified for contesting the election, if he has attained the minimum qualifying age for the purpose on the date of scrutiny of nominations. Likewise, if a candidate is undergoing some disqualification on the date of filing his nomination paper, like, the holding of office of profit under the government, he will still be eligible to

7 2006(2) SCC 682.

8 *Vidya Charan Shukla v Purushottam Lal Kaushik* AIR 1981 SC 457; *BR Kapoor v State of Tamil Nadu* AIR 2001 SC 3435, (2001) 7 SCC 231.

contest the election if, on the date of scrutiny of nominations, the period of his disqualification has expired or such disqualification has ceased to be operative by removal or otherwise. But if a candidate stands disqualified on the date of the scrutiny of nominations, eg, having been convicted for a specified offence attracting disqualification, he shall remain disqualified for contesting that election even if such disqualification is removed subsequently for any reason.[9]

The date means the whole of the day which starts at the earliest moment at the midnight and, therefore, the candidate should be qualified and not disqualified right from that moment on the date of scrutiny of nominations.[10] However, in *Ram Swarup v Hari Ram,*[11] the Supreme Court took a slightly liberal view that a candidate should not be disqualified when the returning officer actually commences the scrutiny of nominations. In that case, the candidate was holding an office of profit under the state government and his resignation was accepted with a stipulation that he should pay a month's salary in lieu of notice period and he had deposited the month's salary on the date fixed for the scrutiny of nominations but well before the scrutiny was taken up by the returning officer. It was held that the candidate could not be regarded as holding an office of profit at the relevant time and his nomination could not be rejected on that count.

Qualifications for Membership of Parliament and State Legislatures (Except State Legislature of Jammu and Kashmir)

General

Some of the qualifications for membership of Parliament and state legislatures are laid down by the Constitution, whereas some more have been supplemented by parliamentary law. Those which are fundamental and inalienable are prescribed by the Constitution itself. These are:

(i) citizenship of India;
(ii) oath or affirmation to bear true faith and allegiance to the Constitution of India; and
(iii) minimum qualifying age.

In so far as membership of Parliament is concerned, these constitutional qualifications are laid down in art 84. For membership of state legislatures, these are separately laid down in art 173, but almost in identical language. Both these articles, in cl (c) thereof, empower Parliament to prescribe by, or under, any law such other

9 *BR Kapoor v State of Tamil Nadu* AIR 2001 SC 3435, (2001) 7 SCC 231 popularly known as Kumari J Jayalalithaa's disqualification case.

10 *Pashupati Nath Singh v Harihar Prasad Singh* AIR 1968 SC 1064.

11 (1983) 3 SCC 373.

qualifications as may be considered necessary or appropriate by it from time to time. Parliament has prescribed these additional qualifications in chs I and II of Part II of the 1951 Act (ss 3 to 6, 1951 Act). Basically, there is only one such additional qualification—that the candidate should be a registered elector.

Constitutional Qualifications

(i) Citizenship of India

Citizenship of India, fundamental qualification—Article 84(a) and art 173(a) peremptorily ordain that a person shall not be qualified to be chosen to fill a seat in Parliament or in a state legislature, unless he is a citizen of India. Citizenship of India has been prescribed by the Constitution makers not only an essential qualification for membership of Parliament or state legislatures, but it has also been further specifically laid down in the Constitution that a person shall be disqualified for such membership if he is not a citizen of India [art 102(1)(d) and art 191(1)(d)].

Laws governing citizenship of India—Citizenship of India is governed by the provisions both of the Constitution and of the statutory law. The Constitution makes detailed provisions in Part II thereof with respect to those persons who were regarded as citizens of India at the commencement of the Constitution, that is to say, on 26 January 1950. However, for those who are born on or after 26 January 1950, their citizenship status is governed by the provisions of the Citizenship Act 1955. Under art 5, every person who had his domicile in the territory of India on 26 January 1950, and (i) who was born in the territory of India; or (ii) either of whose parents was born in the territory of India; or (iii) who had been ordinarily resident in the territory of India for not less than five years immediately preceding 26 January 1950, was conferred with the citizenship of India. Articles 6 and 7 made provisions with regard to the citizenship of those persons who had migrated to India from Pakistan (including the present Bangladesh which was at that time part of Pakistan), either before or after 19 July 1948 (but before 26 January 1950), in the wake of the partition of British India in 1947. Article 7 dealt with those persons who had migrated from India to Pakistan (including the present Bangladesh) after 1 March 1947, but who returned to India under a permit for resettlement or permanent return. The question of citizenship of persons of Indian origin, but ordinarily resident in any country outside India at that time, was regulated by the provisions of art 8. Article 9 stated that if any person had voluntarily acquired the citizenship of any foreign state, he shall not be considered a citizen of India. It was provided in art 10 that every person who was or was deemed to be a citizen of India under arts 5–8 shall continue to be citizen of India, subject to such law that may be made by Parliament regarding citizenship. The power to regulate the right of citizenship of persons born on or after 26 January 1950 and with respect to the acquisition and

termination of citizenship and all other matters relating thereto was vested in Parliament by art 11.

Pursuant thereto, Parliament enacted the Citizenship Act 1955. Under that Act, the citizenship of India either automatically devolves by birth or descent or can be acquired by registration or by naturalisation or on the accession of any territory to India. Section 3 of that Act originally provided that every person born in the territory of India on or after 26 January 1950 became a citizen of India by birth. But the mere birth in the territory of India did not confer citizenship on a person whose father was granted diplomatic immunity as an envoy of a foreign sovereign power accredited to the President of India and was not a citizen of India, or whose father was an enemy alien and his birth occurred in a place then under occupation of the enemy. However, the law relating to citizenship by birth has undergone significant changes under the Citizenship (Amendment) Act 1986 and the Citizenship (Amendment) Act 2003. A person now born in India after 1 July 1987 but before 3 December 2004 shall be a citizen of India only if either of his parents was or is a citizen of India at the time of his birth; and a person born on or after 3 December 2004 shall be a citizen only if (i) both of his parents are citizens of India; or (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth. A person born outside India acquires citizenship of India by descent, if his father is a citizen of India at the time of his birth and, if his father is also a citizen of India by descent, his birth is registered at an Indian consulate within one year of the birth (s 4 ibid). Persons who are married to citizens of India can become Indian citizens on application after being ordinarily resident in India at least for five years [s 5(1)(c) ibid]. If any foreign territory accedes to India, such of its inhabitants become citizens of India as may be specified by the Central Government in this behalf (s 7 ibid). Therefore, when Pondicherry, a former French establishment, Goa, Daman and Diu, former Portuguese territories, and Sikkim, a former independent state, acceded to India and became part of the Indian union, special orders were issued by the Central Government at the relevant points of time to confer citizenship of India on the residents of those territories. In the wake of large influx of people from Bangladesh into India, particularly Assam, in 1971 and thereabouts, and the violent agitation which later took place in Assam demanding the expulsion of such Bangladeshis from Assam, the Citizenship Act 1955 was amended by the Citizenship (Amendment) Act 1985, to make some special provisions in s 6A thereof, with regard to Bangladeshis who had migrated to Assam before 1 January 1966 and those who so migrated on or after 1 January 1966 but before 25 March 1971, in order to give effect to the Assam Accord which the Government of India entered into on 15 August 1985, with the agitationist organisations spearheading the above agitation.

Thus, any question whether a person fulfills or not the qualification of being a citizen of India is to be decided with reference to the provisions of the Constitution and the Citizenship Act 1955, as may be relevant and applicable to the person

concerned. Such question is to be determined by the authorities and the fora prescribed or provided for under the aforesaid provisions of the Constitution and the Citizenship Act. The Supreme Court has observed in *Lal Babu Hussain v Electoral Registration Officer and Ors*,[12] that the question whether a person is a foreigner, that is to say, not a citizen of India, is a question of fact which would require a careful scrutiny of evidence, since the enquiry is quasi-judicial in character, and has to be determined by the Central Government and not by courts, as was held earlier by that court in *Government of Andhra Pradesh v Syed Mohd Khan*[13] and *State of Uttar Pradesh v Rehamatullah*.[14]

The Supreme Court has further laid down in *Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi*,[15] that once a person is admitted or held to be a citizen of India, it shall be presumed that he has not ceased to be an Indian citizen, unless there is a decision of the Central Government under s 9(2) of the Citizenship Act 1955 that he has acquired the citizenship of a foreign country. The courts cannot independently hold an enquiry into that question on their own. But a constitution bench of the Supreme Court had earlier held in *Akbar Khan Alam Khan and Anor v Union of India and Ors*,[16] that a question whether a person had never been an Indian citizen as distinguished from the question of any person having acquired citizenship of another country (and consequent thereupon his Indian citizenship having been terminated) can be examined in a civil court.

In the case of *Hari Shanker Jain v Sonia Gandhi*,[17] the Supreme Court held that the validity of a certificate granting citizenship by registration under s 5(1)(c) of the Citizenship Act 1955 can be questioned in an election petition and such question can be tried by the high court hearing the election petition if the question is whether the candidate is qualified for, or disqualified from, contesting the election.

12 AIR 1995 SC 1189. In view of this judgment of the Supreme Court, the Election Commission had instructed the electoral registration officers in Assam in 1997, that wherever they are in doubt with regard to the citizenship status of any person seeking registration as elector, they should not decide such question themselves, but refer the case of such person to the appropriate tribunal under the Foreigners Act 1946 or, as the case may be, the Illegal Migrants (Determination by Tribunals) Act 1983. Under the Illegal Migrants (Determination by Tribunals) Act 1983, only the cases of illegal migrants who entered Assam from Bangladesh after 25 March 1971 were to be referred to the tribunals set up under that Act. By its order dated 12 July 2005 in *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665, AIR 2005 SCW 3393, the Supreme Court has struck down the said Act as unconstitutional and has directed that all cases pending before the tribunals set up under that Act shall stand transferred to the Foreigners Tribunals set up under the Foreigners Act 1946.

13 AIR 1962 SC 1778.

14 AIR 1971 SC 1382.

15 AIR 1986 SC 1534.

16 [1962] 1 SCR 779.

17 AIR 2001 SC 3689.

Following the above decision of the Supreme Court, the Andhra Pradesh High Court held a returned candidate ineligible for registration as an elector on the basis of a registration certificate from the central government and, consequently, declared his election also void, as the court held that the registration certificate as citizen of India was obtained by furnishing wrong information to the government and that the returned candidate was not a citizen of India.[18]

(ii) Oath or Affirmation Under the Constitution

Real purpose of oath or affirmation—Every candidate to be qualified to contest an election to Parliament or a state legislature has to make and subscribe either an oath in the name of God or a solemn affirmation in the form prescribed for the purpose in the Constitution [arts 84(a) and 173(a)].

Initially, there was no such requirement of making and subscribing an oath or affirmation by a candidate at an election to Parliament or a state legislature. It was prescribed in 1963 by the Constitution (Sixteenth Amendment) Act 1963, on the recommendation of the Committee on National Integration and Regionalism that 'every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office should pledge himself to uphold the Constitution and preserve the integrity and sovereignty of the Union'.[19] The real purpose of the oath is that the person concerned must give an undertaking to bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India.[20]

The requirement of making and subscribing the oath or affirmation by a candidate is mandatory. The failure to make the oath or affirmation will render the nomination paper of the candidate liable to rejection.[21] At the time of the first election to the House of the People from Sikkim in 1977, after it became part of the Indian union, the nomination papers of all the candidates but one, were rejected as they had failed to make and subscribe the requisite oath or affirmation. The only candidate who had made the oath was declared elected unopposed. His uncontested election was held to be valid by the Sikkim High Court.[22]

Form of oath or affirmation—The oath or affirmation is to be made and subscribed by a candidate for election to Parliament in Form IIIA in the Third Schedule to the Constitution, and for election to a state legislature in Form VIIA in that Schedule.

As mentioned above, a candidate has either to make an oath in the name of God or a solemn affirmation. But taking an oath and also making an affirmation are not

18 *Addi Sreenivas v Ramesh Chennamaneni* (Election Petition No.1 of 2010 decided on 14 August 2013) 2013 (1) SCJ 646.

19 See Statement of Objects and Reasons appended to Bill No 1 of 1963.

20 *VR Sutaria v NP Bhanvadia* AIR 1970 SC 765.

21 *Pashupati Nath Singh v Harihar Prasad Singh* AIR 1968 SC 1064.

22 See (1977) 1 Sikkim LJ 39.

mutually destructive, nor do they render each other nugatory.[23] In *Aad Lal v Kanshi Ram*,[24] in the form of oath submitted by a candidate the expressions 'swear in the name of God' and 'solemnly affirm' were both there and the one or the other alternative was not struck off. But the endorsement made on the form by the returning officer, before whom the oath was taken made it clear that the candidate had made and subscribed the oath in the name of God and that the words 'solemnly affirm' were not scored out in the form due to rush of work. But these words were scored out in the certificate issued by him to the candidate immediately after he had taken the oath. The Supreme Court held that in the circumstances, the candidate had made and subscribed a valid oath at the time of filing his nomination paper.

In *VR Sutaria v NP Bhanvadia*,[25] a candidate for election to fill a seat in Gujarat legislative assembly took oath in Gujarati and in the Gujarati form, the words legislative assembly were translated as 'Rajya Sabha' (which literally translated mean the Council of States, but have been referred to in the judgment as the legislative council). The question before the Supreme Court was whether the oath in such wrong form was validly taken. The Supreme Court held that there was substantial compliance with the requirements of art 173(a) in the circumstances surrounding the making and subscribing of the oath, even if its compliance was not literal, as the vital requirements of taking the oath were met.

Persons before whom oath or affirmation to be made—The requisite oath or affirmation under the Constitution is to be made and subscribed by the candidates before some person authorised in that behalf by the Election Commission [arts 84(a) and 173(a)].

The Election Commission has authorised several persons in this behalf.[26] Principally, the oath or affirmation may be made and subscribed before the returning officer or any of the assistant returning officers of the constituency from which the candidate is seeking election. In addition, all stipendiary magistrates of the first class, district judges and persons belonging to the judicial service of a state are also so authorised. If, for any reason, a candidate cannot appear before any of the aforesaid persons for making and subscribing the oath or affirmation, the following persons have also been authorised by the Election Commission in this behalf:[27]

(a) where the candidate is confined in a prison, the superintendent of the prison;
(b) where the candidate is under preventive detention, the commandant of the detention camp;

23 See ILR (1968) 1 Punj 422.
24 AIR 1980 SC 1358.
25 AIR 1970 SC 765.
26 See the Election Commission's Notification No 3/6/68(1), dated 18 March 1968, published as SO 1111, dated 18 March 1968 in the *Gazette of India, Extraordinary*.
27 Ibid.

(c) where the candidate is confined to bed in a hospital or elsewhere owing to illness or any other cause, the medical superintendent in charge of the hospital or the medical practitioner attending on him;
(d) where the candidate is out of India, the diplomatic or consular representative of India in the country where the candidate happens to be or any person authorised by such diplomatic or consular representative;
(e) where the candidate is for any other reason unable to appear or prevented from appearing before the returning officer concerned or any assistant returning officer as aforesaid, any other person nominated by the Election Commission on application made to it in this behalf.

In *PN Vallarasu v MG Ramachandran and Ors*,[28] a question arose whether a person covered by any of the cll (a) to (e) above must make and subscribe the oath before the person referred to in that very clause or he could do so before any other authorised person also. In that case, Shri MG Ramachandran, the then Chief Minister of the State of Tamil Nadu, was undergoing treatment in Brooklyn Hospital in New York in the United States of America, and he was a candidate for election to the Tamil Nadu legislative assembly from Andipatti assembly constituency. The secretary of the political party to which he belonged made a request to the Election Commission to authorise a person before whom Shri Ramachandran could make and subscribe the oath or affirmation. The Election Commission thereupon issued a telex message to the Ambassador of India and the Consulate General of India in New York, instructing them that they may authorise one of the Indian medical practitioners attending on Shri Ramachandran to administer the oath or affirmation to him. But, instead, Shri Ramachandran made and subscribed the affirmation before the consular agent of the Consulate General of India, New York. It was contended that the affirmation was not validly made before the person authorised by the Election Commission in this behalf, as he should have made such affirmation before the medical practitioner attending on him in terms of cl (c) above and of the Election Commission's above referred telex message. The Madras High Court did not agree with that contention and held that the oath or affirmation could be made before any of the persons authorised by the Election Commission, including the diplomatic or consular representative of India or any person authorised by such diplomatic or consular representative where a candidate happened to be out of India, and that the various cll (a) to (e) were not mutually exclusive.

Oath or affirmation, when to be made—Previously, there was some uncertainty as to when and by which time the requisite oath or affirmation should be made by a candidate. Such doubt or confusion has now been removed by the pronouncements of the Supreme Court on this issue. According to these decisions of the Supreme

28 83 ELR 378.

Court, the requisite oath or affirmation is to be made and subscribed by the candidate at any time after he has filed his nomination paper with the returning officer but, before the date fixed for the scrutiny of nomination papers. The Supreme Court has held in *Pashupati Nath Singh v Harihar Prasad Singh*,[29] that the words 'having been nominated' in the prescribed form of oath or affirmation clearly show that such oath or affirmation cannot be made by a candidate before he is nominated and thus it has to be made and subscribed after he has been nominated. A candidate is nominated when his nomination paper is duly presented to the returning officer.[30] The Supreme Court has further held in the *Pashupati Nath Singh* case, that a candidate should be qualified and not disqualified from the earliest moment of the day on which the scrutiny of nomination papers is taken up by the returning officer. Thus, the requisite oath or affirmation so as to be qualified to contest an election must be taken latest by the midnight of the date preceding the commencement of the date of scrutiny of nominations at that midnight hour. In *Haji Saif-ud-din v MA Khan*,[31] the decision of the returning officer in not allowing a candidate to take oath on the date of scrutiny of nominations but before he commenced scrutiny, and consequently rejecting his nomination, was held to be a valid decision by the Jammu and Kashmir High Court.

The candidates will, therefore, be well advised to be careful to make and subscribe the oath or affirmation only after and not before their nomination paper has been presented to the returning officer, but well before the commencement of the date of scrutiny of nominations. They should be more particular about this aspect where they make and subscribe the oath or affirmation before a person other than the returning officer and should satisfy themselves before doing so that their nomination paper has in fact been presented to the returning officer by that date and hour.

Oath or affirmation by a candidate contesting election from more than one constituency—If a candidate is contesting election from more than one parliamentary or assembly constituency at a general election to the House of the People or, as the case may be, to a state legislative assembly, the making and subscribing of the requisite oath or affirmation in one such constituency is sufficient and he need not make separate oaths or affirmations in respect of each of the constituencies from where he is contesting election. It was held by the Supreme Court in *Khader Khan Hussain Khan and Ors v Nijalingappa*,[32] that once the requisite oath or affirmation is made and subscribed by a candidate in respect of one nomination paper, the necessary qualification under the Constitution is obtained by

29 AIR 1968 SC 1064.
30 *Krishna Mohini v Mohinder Nath Sofat* (2000) 1 SCC 145.
31 40 ELR 35.
32 AIR 1969 SC 1034.

him and that removes the bar laid down in art 84(a) or, as the case may be, in art 173(a) in respect of all the constituencies from where he is contesting elections.

However, it must be noted that such a candidate will have to make and subscribe separate oaths or affirmations, if he is contesting elections both to the House of the People and to a state legislative assembly at a simultaneous election, because the oaths or affirmations for elections to Parliament and state legislatures are made under separate provisions of the Constitution and in separate forms prescribed for the purpose.

Manner of Making Oath or Affirmation

Articles 84(a) and 173(a) require that a candidate should make and subscribe the requisite oath or affirmation. These articles do not require that the requisite oath or affirmation should be administered. Wherever the Constitution requires that the oath or affirmation has to be administered, it specifically says so; for instance, art 75(4) requires the oath of office and secrecy to be administered by the President to a union minister before he enters upon his office. As such, administration of oath or affirmation is not necessary when a candidate makes and subscribes it under art 84(a) or art 173(a). The words 'make' and 'subscribe' in these articles indicate that the declaration of the oath or affirmation shall be reduced to writing and signed in token of acceptance of the same. The word 'subscribe' itself means to write under something or to give consent to something written by signing one's name underneath.[33] But there cannot be any objection if the oath or affirmation is administered.

The oath or affirmation will not be invalid for the reason that while the candidate made it, the returning officer was sitting and not standing. Articles 84(a) and 173(a) do not require the returning officer to be in a particular position (sitting or standing) at the time of making the oath or affirmation by the candidate.[34]

The Election Commission has instructed that the mere signing on the paper on which the form of oath or affirmation is written is not sufficient.[35] The authorised person before whom the oath or affirmation is made and subscribed should ask the candidate to read it aloud and then to sign and give the date on the paper on which it is written. If the candidate is illiterate or unable to read the form, the authorised person should read out the oath or affirmation, and ask the candidate to repeat the same and thereafter take his thumb impression on the form. The authorised person should endorse on the form that the oath or affirmation has been made and subscribed by the candidate on that date and hour, and hand over the original to the candidate, after keeping a copy thereof for his record, so as to enable the candidate to present the original form to the returning officer. The authorised person will also

33 *G Vasantha Pai v CK Ramaswamy* AIR 1978 Mad 342.
34 *Ali Singhani Bhagwandas Madhav Singh v Rajiv Gandhi* AIR 1991 All 145.
35 See the *Hand Book for Returning Officers*, published by the Election Commission.

give a certificate to the candidate, even without requiring the candidate to apply for such certificate, that he has made and subscribed the requisite oath or affirmation before him on that day at a particular hour.

It will be the responsibility of the candidate himself to ensure that the original form of oath or affirmation is produced before the returning officer concerned before the time fixed for the scrutiny of nomination papers. Where, however, the candidate is confined in a prison or detention camp, it is the responsibility of the superintendent or commandant of such prison or camp to forward the original form to the returning officer of the concerned constituency and also to inform him telegraphically or otherwise of the fact of the candidate having made and subscribed the oath or affirmation on the particular date and hour.[36] He will also hand over a certified copy of the form to the candidate for his record.

Though, strictly speaking, it is for the candidate himself to remember to make and subscribe the requisite oath or affirmation so as to be qualified to contest the election, the Election Commission has nevertheless instructed the returning officers that they should also remind the candidates to comply with the above essential requirement within the stipulated period, where they have not done so at the time of the presentation of their nomination papers. Now that the Election Commission has prescribed a check memo which has to be filled by the returning officer at the time of the receipt of the nomination papers, such reminder can be given by the returning officer to the candidate through an appropriate entry provided in that check memo. A copy thereof is furnished to the candidate by the returning officer.

(iii) Age Qualification

Minimum qualifying age—The Constitution has laid down that a person shall not be qualified to be chosen to fill a seat in the Council of States or in the legislative council of a state having such Council (that is to say, in the upper Houses of Parliament and state legislatures), unless he is of 30 years of age [arts 84(b) and 173(b)].

To be qualified to be chosen to fill a seat in the House of the People or in a state legislative assembly (that is to say, in the lower Houses of Parliament and state legislatures), the candidate must not be less than 25 years of age [arts 84(b) and 173(b)].

As mentioned above, such age qualification should be fulfilled by the candidate on the date fixed for the scrutiny of nominations [s 36(2)(a), 1951 Act]. If a candidate has not attained the minimum qualifying age on the date of scrutiny of nominations, his election shall be void even if he has completed the qualifying age on the date of his election, as his nomination paper shall be deemed to have been improperly accepted.[37]

36 See the *Hand Book for Returning Officers*, published by the Election Commission.

37 *Amritlal Ambalal v Himathbhai Gomanbhai* AIR 1968 SC 1455.

The above minimum qualifying ages for elections to upper and lower Houses of Parliament and state legislatures were fixed by the Constitution makers, when they had prescribed the minimum qualifying age for voting at elections to lower houses as 21 years. The minimum qualifying age for voting has now been lowered from 21 to 18 years by the Constitution (Sixty-first Amendment) Act 1988. Certain voices are being raised in some quarters that the minimum qualifying age for elections to Parliament and state legislatures should also correspondingly be lowered and persons of the ages of 25 and 21 years should be made eligible to contest elections to upper and lower Houses of Parliament and state legislatures respectively. But opposition has also been voiced to this move on the ground that the persons of such young age may not be mature enough to discharge the important constitutional functions and duties which Parliament and state legislatures have to perform. Even the Election Commission has expressed similar reservations in the matter of reducing the minimum qualifying age for membership of Parliament and state legislatures.

Failure to mention age in nomination paper—Every candidate must indicate his age in the column meant for the purpose in the nomination paper. Failure to do so may be a defect of substantial character and the nomination paper may be liable to be rejected on this ground.[38] At the time of the 1984 general election to the House of the People, the nomination paper of the late Chaudhary Charan Singh, former Prime Minister of India, in Sonepat parliamentary constituency was rejected as he had failed to mention his age in his nomination paper, though no one could be in any manner of doubt that he fulfilled the age qualification. It is pertinent to add here that at the time of the above referred decisions, a candidate was not required to file any affidavit in support of his nomination paper. Now that an affidavit is filed by every candidate in Form 26 declaring his age therein, it would perhaps be advisable to treat such defect as a defect of non-substantial character in these changed circumstances.

Proof of age—Normally, the age of a candidate as shown in the electoral roll may be accepted as his correct age by the returning officer. But such entry in the electoral roll or in the elector's identity card is not conclusive, particularly where a doubt or objection is raised that the candidate is below the minimum qualifying age. In such a case, the burden of proof will lie initially on the objector to prove that the candidate is below age, and it will shift on the candidate if some prima facie evidence is led by the objector.[39] It will then be his duty to prove that he is not underage as his date of birth is within his special knowledge and the failure on his part to adduce satisfactory evidence may go against him in view of the provisions of s 106 of the Indian Evidence Act 1872. In *Sushil Kumar v Rakesh Kumar*,[40] the allegation in the

38 *Brijendra Lal Gupta v Jwala Prasad* AIR 1960 SC 1049.

39 *Mayadhar Nayak v SDO, Jajpur* AIR 1982 Ori 221.

40 AIR 2004 SC 230.

election petition that at the relevant time even the elder brother of the returned candidate was underage was not specifically denied by him in his written statement, and that was held by the Supreme Court to be admission of the allegation by the returned candidate against him. In the same case, a report by the chief electoral officer to Governor of the State to the effect that the returned candidate was underage was held to be admissible in evidence though not having any statutory backing.

In such cases, the entry of age of the person in the school register has been considered to be a relevant piece of evidence, but slight evidence to the contrary may displace the presumption in favour of its correctness.[41] In *Birad Mal Singhvi v Anand Purohit*,[42] copies of extracts of school register, certificate and mark list of secondary education board were produced, but no person conversant with the date of birth of the candidate was examined. The rejection of the nomination in that case based on the documents produced, showing that the candidate was below 25 years of age, was held to be valid by the Supreme Court.

The Election Commission has instructed that where the age of a candidate is not correctly shown in the electoral roll, he should mention his correct age in the nomination paper, as any such incorrect entry in the electoral roll will be overlooked by the returning officer under s 33(4) of the 1951 Act.[43] At a recent biennial election to the Council of States from Assam, Dr. Manmohan Singh wrongly indicated his age in his nomination paper as well as in the supporting affidavit; however, he subsequently filed another affidavit declaring his correct age and that affidavit was taken on record by the returning officer and he accepted the nomination paper.

Statutory Qualifications

General

In addition to the qualifications which the Constitution has itself prescribed as fundamental qualifications for membership of Parliament and state legislatures, the Constitution has empowered Parliament to lay down such other qualifications for membership of these houses as it considers and deems appropriate from time to time in the interests of smooth and efficient functioning of these houses, to give true meaning and effect to the other provisions of the Constitution and to keep pace with the changing times in a dynamic and vibrant democracy. Parliament can prescribe such additional qualifications not only for its own membership but also for the membership of state legislatures [arts 84(c) and 173(c)].

In exercise of the above power, the only additional qualifications laid down by Parliament in this behalf are contained in chs I and II of Part II of the 1951 Act (ss

41 *Bhagwan Das Singla v Harchand Singh* AIR 1971 Punj 65.
42 AIR 1988 SC 1796.
43 See the *Handbook for Candidates* issued by the Election Commission.

3–6). In all these sections, the basic qualification prescribed by Parliament is that the candidate should be a registered elector.

Meaning of Elector

'Elector' is defined in s 2(1)(e) of the 1951 Act to mean in relation to a constituency, a person whose name is entered in the electoral roll of the constituency for the time being in force, and who is not subject to any of the disqualifications mentioned in s 16 of the 1950 Act.

An entry in an electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in s 16 of the 1950 Act [s 36(7), 1951 Act]. Therefore, no question can be raised before the returning officer at the time of scrutiny of nominations, or before the high court in an election petition, that the person concerned was not qualified to be included in the electoral roll, except on the ground that he was suffering from any of the disqualifications under s 16 of the 1950 Act. In *Hari Pd Mulshankar Trivedi v VB Raju*,[44] the Supreme Court held that the high court, while trying an election petition, could not go into the question whether the name of Shri Raju had been validly included in the electoral roll in the State of Gujarat, as it was alleged that he was not ordinarily resident in that state. A similar view was earlier taken by the Supreme Court in various other cases,[45] that the validity of an entry in the electoral roll could be questioned only in accordance with the provisions of 1950 Act and the rules made thereunder, which formed a complete code, and before the authorities prescribed therein, and not before the high court in an election petition under the 1951 Act. However, in *Hari Shanker Jain v Sonia Gandhi*,[46] the Supreme Court held that an entry in an electoral roll could be questioned if it was contended that the person to whom that entry relates is not a citizen of India.

A question recently arose 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 and who has no right to vote at an election under s 62(5) of 1951-Act, can be regarded as an elector within the meaning of s 2(1)(e) of that Act. The Patna High Court had earlier taken a view on 30 April 2004 in *Jan Chaukidar (Peoples Watch) v Chief Election Commissioner and Ors* that such a person who had no right to vote under s 62(5) would neither be a voter nor an elector and that the law temporarily takes away the power of such person to go anywhere near the election scene. The Supreme Court, by its decision dated 10 July 2013, in *Chief*

44 AIR 1973 SC 2602.
45 *Durga Shankar Mehta v Raghuraj Singh* AIR 1954 SC 520; *Kabul Singh v Kundan Singh and Ors* AIR 1970 SC 340 and *PR Belagali v BD Jatti* AIR 1971 SC 1348.
46 AIR 2001 SC 3689.

Election Commissioner v Jan Chaukidar (Peoples Watch) and Ors[47], upheld the view of the Patna High Court that a person who has no right to vote by virtue of the provisions of s 62(5) 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 the state.

This decision generated a lot of controversy and it was apprehended that enforcement of the above decision could give a handle to influential candidates to keep their rivals away from the election fray. The government filed a review petition before the Supreme Court, but without waiting for the outcome of the said review petition, the government felt that there was an urgent need for suitably addressing the situation arising out of the said order of the Supreme Court. Therefore, the Parliament passed the Representation of the People (Amendment and Validation) Act 2013 (with retrospective effect from 10 July 2013, i.e., the date of Supreme Court's order), whereby a proviso was added to s 62(5) to the effect that 'by reason of a prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector.' It was also provided in s 7(b) that a person shall be disqualified for being chosen as, or for being, a member of Parliament or state legislature only if he is so disqualified under the provisions of Chapter III of Part II (containing ss 8 to 10A, explained elaborately in subsequent paragraphs) of the Act and on no other ground. Furthermore, it was provided that the above amendments shall have overriding effect over any judgment of any court to the contrary.

Candidate whether to be elector from same constituency—In *PR Belagali v BD Jatti,*[48] a point was also raised that the candidate should be an elector in the same constituency from which he was contesting election. The Supreme Court rejected that contention, holding that though the 'ordinary residence' in the constituency concerned is an essential condition for registration as an elector in that constituency under the 1950 Act, no such condition is to be found either in the Constitution or in the 1951-Act for a candidate to be from the same constituency.

The above general rule is, however, subject to certain exceptions in the case of autonomous districts of Assam, Sikkim and Lakshadweep, which have been separately explained in the subsequent paragraphs in this chapter.

Qualification for Election to the Council of States

The Council of States consists of representatives of the states and union territories [art 80]. Therefore, Parliament originally prescribed in s 3 of the 1951 Act that a

47 Civil Appeal Nos. 3040-3041 of 2004 2013(5) SCJ 631.

48 AIR 1971 SC 1348; also see *Hari Pd Mulshankar Trivedi v VB Raju* 1974 (3) SCC 415. *Bindeshwar Sah v Union of India and Ors* before Patna High Court CWJ 3468 of 2009) decided on 25 June 2012.

person shall not be qualified to be chosen as a representative of any state or union territory in the Council of States, unless he was an elector for a parliamentary constituency in that state or territory.

In order to be an elector in any constituency, his name should be registered in the electoral roll of the constituency and one of the essential conditions for such registration is that he should be ordinarily resident in the constituency concerned [s 19(b), 1950 Act]. Thus, by necessary implication, it meant that for being chosen as a representative of any state or union territory in the Council of States the person concerned should be ordinarily resident in that state or territory. Sometime in 1993, the Election Commission made an observation that some well-known persons who could not be regarded as ordinarily resident in a particular state or union territory were getting themselves enrolled as electors in such state or territory with a view to getting elected therefrom to the Council of States. Certain enquiries were initiated, at the behest of the Commission, by the electoral registration officers of the constituencies concerned, against some of these persons, and proceedings started to delete their names from the electoral rolls under s 22 of the 1950 Act. These acts of the electoral registration officers were challenged before the High Courts of Bombay, Gujarat and Guwahati. The Election Commission moved the Supreme Court for transfer of all these matters from the high courts to the Supreme Court itself for determination of the issue involved which was common in all the cases. The Supreme Court, by an interim order, stayed the proceedings in the cases before the Bombay and Gujarat High Courts, but permitted the Guwahati High Court to consider and decide the matter, so that it could be benefited by the views of the High Court on the issue raised. The Guwahati High Court disposed of the case[49] before it on January 3, 1996. The High Court, inter alia, held that:

> ...the "ordinary resident" in a constituency as mentioned in the 1950 Act shall mean a habitual resident of that place or a resident as a matter of fact in regular, normal or usual course. It means an usual and normal resident of that place. The residence must be permanent in character and not temporary or casual. It must be as above for a considerable time, he must have the intention to dwell permanently. He must have a settled abode at that place for a considerable length of time for which a reasonable man will accept him as the resident of that State.

The High Court also observed that:

> While in the case of Lok Sabha (House of the People), the right has been given to a citizen of India to contest from any constituency, that right has been curtailed in the case of an election to the Rajya Sabha (Council of States) by laying down the law that the person concerned must be registered as a voter of

49 *Manmohan Singh (Dr) v Election Commission of India and Ors.*

that (sic) constituency of that State and other qualification is that he must be ordinarily resident of that constituency.

The Election Commission accepted the correctness of the above finding of the high court with regard to the meaning of 'ordinarily resident' and, therefore, the Supreme Court, before whom an appeal was filed by the Election Commission against the high court's finding on another point, did not disturb the above finding of the high court relating to the meaning of 'ordinarily resident' in the 1950 Act.[50]

In 2003, however, Parliament made a very significant amendment to s 3 of the 1951 Act. Under the amended provision, a candidate for election to the Council of States need not be a registered elector in the state or union territory from where he is contesting election to the said council. Now, he may be registered as an elector in any parliamentary constituency in any state or union territory in India. The reason which weighed with Parliament in making the above amendment in the qualification clause is stated in the statement of objects and reasons appended to the Representation of the People Act (Amendment) Bill, 2001 (dated 20 November 2001), which was ultimately enacted as the Representation of the People (Amendment) Act 2003 (wef 28 August 2003), as follows:

> Section 3 of the Representation of the People Act 1951 prescribes residential qualification for contesting elections to the Council of States. There have been numerous instances where the persons who are normally not residing in a particular State have got themselves registered as voters in that state, simply to contest an election to the Council of States. The Chief Election Commissioner, while discussing this aspect in the all party meeting held on 29 April 2001 was of the view that a precise definition of 'ordinarily resident' was very difficult and emphasized that it was for the political parties, acting through Parliament, to carry out what in their judgment, might be the best possible solution, in the light of the experience of the past fifty years.
>
> ...In the light of the above, the aforesaid issues were examined in depth by the Government and it has been decided to do away with the requirement of residence of a particular state or union territory for contesting election to the Council of States from that state or union territory...

In view of the above amendment to s 3 of the 1951 Act in 2003, it is no longer necessary that a candidate for election to the Council of States should be an elector registered in the state or union territory from which he is contesting election. But he must be a registered elector in some parliamentary constituency in the country.

50 See judgement dated December 1, 1999 of the Supreme Court in *Election Commission of India v Dr Manmohan Singh and Ors* [2000] 1 LRI 264; AIR 2000 SC 231; (2000) 1 SCC 591.

The aforesaid amendment to s 3 of the 1951 Act was challenged[51] before the Supreme Court by Shri Kuldip Nayar, a former member of the Council of States, questioning its constitutional validity on the ground that the deletion of requirement of domicile in the state concerned for getting elected to the Council of States was violative of principle of federalism and it affected the status, position, role and character of the Council of States in the constitutional scheme. Some other writ petitions—one, by Shri Indrajit, a former member of the House of the People and a noted journalist—on similar grounds were also filed before the Supreme Court. By an interim order dated 9 April 2004, the Supreme Court made all elections to the Council of States held subsequent to the filing of the abovementioned writ petitions subject to the outcome of the writ petitions. A Constitution Bench of the Supreme Court, however, dismissed all the above writ petitions on 22 August 2006, negativing the above contentions of the petitioners. The Supreme Court held that it is no part of federal principle under the Constitution of India that the representatives of the states in the Council of States must belong to that state. The apex court further observed that the Constitution has no requirement that a person chosen to represent a state in the Council of States must necessarily be a voter in that state itself. The Constitution, after prescribing certain qualifications and disqualifications, has left it to the Parliament to provide other qualifications and disqualifications and the Parliament, in the light of the experience during the last more than five decades, has decided, in its legislative wisdom, that a person chosen to be a representative of a state in the Council of States need not necessarily be an elector within the particular state. By the amended provision, the field of consideration before the state legislative assembly in the matter of election of the state's representative in the Council of States has been enlarged, and if the members of the assembly decide to elect a person who is not ordinarily a resident of the state, they would do so with the full knowledge of all circumstances and it would be their decision as to who should be the representative of their state.

Qualifications for Election to the House of the People

The House of the People, as its name implies, is the House consisting of representatives of people of the country. Therefore, Parliament considered that the people across the country should not be unduly restricted in the matter of choice of their representatives, unless certain special considerations require otherwise in the interests of the people of any state or any area. Accordingly, a candidate for election to the House of the People from any parliamentary constituency in India (except the parliamentary constituencies of Sikkim and Lakshadweep and in the autonomous

51 *Kuldip Nayar v Union of India and Ors* [2006] 8 SCALE 257; AIR 2006 SC 3127; (2006) 7 SCC 1.

districts of Assam) may be an elector in any parliamentary constituency in any part of the country [s 4(d), 1951 Act].

In the case of the Sikkim parliamentary constituency, the candidate should be an elector of that constituency [s 4(ccc), ibid].

A candidate contesting election from the Lakshadweep parliamentary constituency should also be an elector from the same constituency and, as the seat in that constituency is reserved for the scheduled tribes in that union territory, the candidate must also belong to any of those scheduled tribes [s 4(cc), ibid].

In the case of the seats reserved for the scheduled tribes in the autonomous districts of Assam, the candidate must belong to any of those scheduled tribes and must also be an elector in one of the parliamentary constituencies in those districts [s 4(c), ibid].

If a candidate is contesting election in any state or union territory (except autonomous districts of Assam, Sikkim and Lakshadweep mentioned above) from a parliamentary constituency in which the seat is reserved for the scheduled castes or scheduled tribes, he must belong to any of the scheduled castes or, as the case may be, the scheduled tribes, whether of that state or of any other state, and should be registered as an elector in a parliamentary constituency in any part of India [ss 4(a) and 4(b) ibid].

Eligibility to contest election from reserved constituencies—A significant point worth noticing here is that in the case of the constituencies, whether parliamentary or assembly, reserved for the Scheduled Castes or Scheduled Tribes, the contest is limited to the candidates belonging to these castes or tribes, as the case may be. But in the case of general constituencies, there is no such limitation and even the members of the scheduled castes or scheduled tribes are free to be contestants from those general constituencies (s 55, 1951 Act).

In *NE Horo v Jahanara Jaipal Singh*,[52] the respondent was held by the Supreme Court to be eligible to contest election from a constituency reserved for the scheduled tribes on the ground that though she was not a scheduled tribe by birth, but on her marriage to a scheduled tribe person according to the rituals of that tribe and having been accepted by that tribe as its member, she acquired the status of a scheduled tribe member. A Christian by birth when converted to Hinduism and married to a member of scheduled caste, was held to be belonging to her husband's caste on the evidence that she had not only been accepted but also welcomed by the important members, including the president and vice-president, of the community.[53]

However, in *Sobha Hymavathi Devi v Setti Gangadhar Swami and Ors*,[54] the Supreme Court has held that a non-tribal who marries a tribal could not claim to

52 AIR 1972 SC 1840, (1972) 1 SCC 771.
53 See *Kailash Sonkar v Smt Maya Devi* AIR 1984 SC 600.
54 AIR 2005 SC 800, (2005) 2 SCC 244.

contest a seat reserved for tribals. The apex court has observed that arts 330 and 332 speak of reservation of seats for scheduled tribes in legislatures and the object is clearly to give representation in legislatures to scheduled tribe candidates considered to be deserving of such special protection. The Supreme Court has further observed that the principle relating to reservation under arts 15(4) and 16(4) in appointment or posts under the state as laid by that court should be extended to the constitutional reservation of seats for scheduled tribes in the House of the People and in the state legislative assemblies. The said reservations are constitutional reservations intended to benefit the really underprivileged and not to those who come to the class by marriage and to that extent the decision in *Horo's* case can be said to run counter to the above view and cannot be accepted as correct, the apex court held. The Supreme Court clarified that whether it be a reservation under art 15(4) or 16(4) or 330 or 332, the said reservation would benefit only those who belong to a scheduled caste or scheduled tribe and not those who claim to acquire the status by marriage.

Again in *Meera Kawaria v Sunita*,[55] the Supreme Court observed that it is beyond any doubt or dispute that a person who is a high caste Hindu and not subjected to any social or educational backwardness in his life, by reason of marriage alone cannot ipso facto become a member of a scheduled caste or scheduled tribe. In absence of any strict proof he cannot be allowed to defeat the very provisions made by the State for reserving certain seats for disadvantaged people.

In order to ensure that the intended benefit of reservations goes to legitimate persons, the Supreme Court has laid down in *Km Madhuri Patil v Additional Commissioner, Tribal Development*,[56] detailed guidelines to streamline the procedure for applications for issuance of social status certificate, verification of such certificate by a scrutiny committee, verification procedure by a vigilance cell, finality of the order of the scrutiny committee, time limit of three months for disposal by the high courts of matters brought before them under art 226 in such cases and other allied matters. The Supreme Court has further held in the above mentioned *Sobha Hymavathi Devi* case that the high court, when trying an election petition is not precluded from going into the question of status of a candidate or proceeding to make an independent enquiry into that question inspite of the production of a caste certificate by a candidate. At best, such a certificate could be used in evidence and its evidentiary value will have to be assessed in the light of the other evidence let in, the apex court observed.

A returned candidate was born to Christian parents, married to a Hindu and professed Hindu religion and was accepted as a member of Cheramar caste, which is

55 AIR 2006 SC 597.
56 AIR 1995 SC 94, (1994) 6 SCC 241.

a scheduled caste for Hindus, after reconversion to Hinduism. He was found qualified to contest election from a constituency reserved for the scheduled castes.[57]

In *M Chandra v M Thangamuthu and another*,[58] the election petitioner alleged that the returned candidate was Christian by birth and continued to profess Christianity and could not contest election from a constituency reserved for the scheduled castes. The returned candidate, however, contended that her marriage was performed as per Hindu customs and her husband was from Hindu Pallan community, a scheduled caste, that she lived and continued to live as Hindu by following Hindu customs and traditions and that she was accepted by the Hindu community. The Supreme Court, on appraisal of the evidence, accepted the returned candidate's contentions and held her eligible to contest election from a constituency reserved for scheduled castes.

The law relating to scheduled castes and scheduled tribes has been elaborately discussed in all its aspects by the Supreme Court in *Punit Rai v Dinesh Chaudhary*.[59]

Qualifications for Election to a State Legislative Assembly (Other Than Sikkim Legislative Assembly)

In the case of an election to a state legislative assembly from an assembly constituency, a person shall not be qualified to be chosen, unless:

(i) In the case of a seat reserved for the scheduled castes or for the scheduled tribes of that state (other than the autonomous districts of Assam), he is a member of any of those castes or tribes, as the case may be, and is an elector for any assembly constituency in the state [s 5(a), 1951 Act];
(ii) In the case of a seat reserved for an autonomous district of Assam in the legislative assembly of that state, he is a member of a scheduled tribe of any of the autonomous districts of that state, and is an elector for the assembly constituency in which such seat or any other seat is reserved for that district [s 5(b) ibid]; and
(iii) In the case of any other seat in any state, he is an elector for any assembly constituency in that state [s 5(c) ibid].

Qualifications for Election to the Sikkim Legislative Assembly

In the legislative assembly for the State of Sikkim, there is special reservation of seats for the Sikkimese of Bhutia[60] Lepcha origin and for the sanghas belonging to the

57 *Kodikunnil Suresh @ J Monian v NS Saji Kumar , etc. etc.* 2011(5) SCJ 325 [Case law on the subject of conversion and reconversion to Hinduism discussed in detail in the judgment].
58 2010(8) SCJ 98.
59 AIR 2003 SC 4355.
60 'Bhutia' includes Chumbipa, Dopthapa, Dukpa, Kagatey, Sherpa, Tibetan, Tromopa and Yolmo [expln to s 5A(2) of the 1951 Act].

recognised monasteries in the state. Therefore, special qualifications have been laid down for contesting elections to that state legislative assembly.

In the case of a seat reserved for the Sikkimese of Bhutia-Lepcha origin, the candidate should be a person either of Bhutia or Lepcha origin and should be an elector in any assembly constituency in the state (other than the constituency reserved for the sanghas) [s 5A(2)(a), 1951 Act].

In the case of a seat reserved for the sanghas, the candidate should be an elector of the sanghas constituency [s 5A(2)(c), ibid]. This constituency extends to the whole of the State of Sikkim and the electors of the constituency are the sanghas belonging to monasteries, recognised for the purpose of elections held in Sikkim in April 1974 under the regime of the then Chogyal, before Sikkim became part of the Indian union in 1976 (s 25A, 1950 Act).

In the case of election from any other constituency, the candidate should be an elector in any assembly constituency in the state [s 5A(2)(d), 1951 Act]. But if the seat in that constituency is reserved for the scheduled castes of the state, he must also belong to any of those castes in the state [s 5A(2)(b) ibid].

Qualification for Election to State Legislative Council

The only qualification for election to a state legislative council as laid down by Parliament is that the candidate should be an elector in any assembly constituency in the state [s 6(1) ibid].

It may be noted that the candidate should be an elector in any assembly constituency and not in a council constituency. It is also not necessary that a candidate for an election from a graduates' or a teachers' constituency should possess the same qualifications as are prescribed under the Constitution for enrolment as an elector in those constituencies. In other words, legally speaking, even an illiterate person may stand as a candidate for an election from a graduates' or a teachers' constituency. The Supreme Court held in *S Narayan Swami v G Panneerselvam*,[61] that the Constitution makers never wanted to make it obligatory that only graduates should represent graduates and, therefore, the omission to prescribe the qualification that a candidate from a graduates' constituency should also be a graduate is deliberate. The Supreme Court again reiterated the same view in *NS Varadachari v G Vasantha Pai*,[62] and observed that it was for the electors themselves to decide as to who can be their best representative.

No Educational Qualification Prescribed for any Candidate

As will be observed from the above, no educational qualification has been prescribed even for candidates from graduates' and teachers' constituency, which have been

61 AIR 1972 SC 2284.
62 AIR 1973 SC 38.

specifically created under the Constitution to give special representation to graduates and teachers in the upper Houses of state legislatures. There was thus no question of prescribing any educational qualifications for elections to the lower Houses, ie, House of the People and state legislative assemblies. It is not that this issue did not occupy the minds of the Constitution makers, but having regard to the overwhelming majority of electors in India then being illiterate, they left it to Parliament to consider this aspect on appropriate occasion at a future date.

When art 84 (art 68A of the Draft Constitution) which lays down the qualifications for membership of Parliament was being considered and debated upon in the Constituent Assembly, on 18 May 1949, the distinguished President of the Constituent Assembly and the first President of the Republic of India, Dr Rajendra Prasad observed:

> I will now put the amendment to vote, and also the article if the amendment is accepted as amended. Before doing so, I desire to make an observation but not with a view to influencing the vote of the House. In this country we require very high qualifications for anyone who is appointed as a Judge to interpret the law which is passed by the legislature. We know also that those who are expected to assist a Judge are required to possess very high qualifications, for helping the Judge in interpreting the law. But it seems that members are of opinion that a man who has to make the law needs no qualifications at all, and a legislature, if we take the extreme case, consisting of persons with no qualifications at all may pass something which is non-sensical and the wisdom of all the lawyers and all the Judges will be required to interpret that law. That is an anomaly but it seems to me that in this age we have to put up with that kind of anomaly and I for one, although I do not like it, would have to put up with it.

That article was passed by the Constituent Assembly without any further consideration of the above observation of the distinguished President.

However, subsequently when the corresponding provisions of art 173 (art 152 of the Draft Constitution) laying down the qualifications for membership of state legislatures were being considered on 2 June 1949, Professor KT Shah moved an amendment to the proposed article and stated:

> Sir, I move
>
> That in article 152, after the word 'age' where it occurs for the first time the words 'is literate, and is not otherwise disqualified from being elected': and after the word 'age' where it occurs for the second time, the words 'is qualified to vote in the constituency from which he seeks election, and is not otherwise disqualified from being elected' be added.
>
> The important point that I would like to make for the consideration of this amendment is the necessity of at least candidates being literate who seek to be elected to the Legislature. We have an appalling volume of ignorance in this country—utter illiteracy. And the danger of illiteracy becoming predominant, or rather the danger of illiterate candidates coming into the legislature, appears to me to be so great that I think we would do well to lay down a positive requirement or qualification for candidates, seeking election to the legislature, to be literate at least.
>
> Under the prevailing state of things, it is difficult to demand that electors shall be all literate, as we have some 85 per cent of the population illiterate, and with adult franchise the voters would naturally be largely illiterate. It is, however, a misfortune which we would like to correct at the earliest opportunity, and I trust that within a measurable period of time—perhaps ten years—illiteracy would be completely abolished; and voters will all have this minimum of requirement in democratic citizenship.
>
> But even while it prevails, and while this danger of something like over three-fourths of the population, if not more, being illiterate is before us, I think it is necessary to insert in this Constitution the positive requirement that the candidate will be at least literate; and that anyone who is not literate will be disqualified.
>
> The other items, Sir, in my amendment making disqualifications for candidates, are not so very important; and I do not lay so much stress by them. The amendment moved by the Chairman of the Drafting Committee, if carried, would perhaps attend to some of those. But in this matter of literacy of the candidate, I feel very strongly; and I trust the House will agree with me, and lay down this qualification of literacy by the Constitution, and not by an Act of Parliament only.

Replying to the above amendment moved by Professor KT Shah, Dr BR Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly observed:

> Then, with regard to the amendment of Professor K T Shah about literacy, I think that is a matter which might as well be left to the Legislatures. If the Legislatures at the time of prescribing qualifications feel that literacy qualification is a necessary one, I no doubt think that they will do it.

Even while originally moving the above referred art 84 (draft art 68A), Dr BR Ambedkar had observed:

> I think the House will agree that it is desirable that a candidate who actually wishes to serve in the Legislature should have some higher qualifications than merely being a voter. The functions that he is required to discharge in the House require experience, certain amount of knowledge and practical experience in the affairs of the world, and I think if these additional qualifications are accepted, we shall be able to secure the proper sort of

candidates who would be able to serve the House better than a mere ordinary voter might do.

But Parliament has so far not considered it advisable to lay down any educational qualification for membership of Parliament or of state legislatures. It seems a bit ironical as is felt in certain quarters, that every candidate wishing to contest election to Parliament or a state legislature has to make and subscribe an oath or affirmation under the Constitution that he will bear true faith and allegiance to the Constitution as by law established. If elected, he has to reiterate such oath or affirmation before he takes his seat in the House to which he has been chosen. But if he is illiterate, can he even read the Constitution, much less comprehend its provisions to which he is acknowledging his true faith and allegiance? Even the oath or affirmation which he is making and subscribing is being read out to him by some one else.

In early 1950s, when Parliament prescribed the qualifications for members of Parliament and state legislatures, quite understandably, it decided not to lay down any educational qualification as that would have meant shutting the doors of those august Houses to vast multitudes, who were illiterates and even to the freedom fighters who had left schools and colleges to join the fight for independence and were without formal education. But will the same considerations still be relevant in the new millennium and after more than 50 years of independence, when the primary education to each child is sought to be guaranteed as a fundamental right? Some of the states have already achieved very high levels of literacy and the country has reached new heights in science and technology and has acquired the status of a nuclear power state. With the fast changing times and in this age of economic globalisation, the role of parliamentarians and legislators has also now become more challenging and demanding and highly complex global treaties and pieces of legislation have to be deliberated upon and enacted.

Time has now thus come when Parliament should seriously consider the laying down of some minimum educational qualifications for membership of Parliament and State Legislatures. This will not only improve the standard of representation in those Houses and enhance the quality of legislative activity, but will also give the much needed impetus to the literacy drive, as in that event even those who are not literate so far, would strive to achieve those minimum educational standards, if they want to enter or stay in political life. The Election Commission also holds the same view.[63] However, the entire matter centres round the literacy drive and literacy rate in the country.

It is, however, noteworthy that all candidates are now enjoined upon to state, in an affidavit, their educational qualifications at the time of filing their nomination

63 See Election Commission's counter-affidavit in *Baljit Singh v Union of India and Ors* Civil Writ Petition No 1599 of 1997 before the Delhi High Court.

papers, in pursuance of the Supreme Court's directive in *People's Union for Civil Liberties v Union of India*.[64]

DISQUALIFICATIONS FOR MEMBERSHIP OF PARLIAMENT AND STATE LEGISLATURES (EXCEPT STATE LEGISLATURE OF JAMMU AND KASHMIR)

General

Like qualifications for membership of Parliament and state legislatures, certain fundamental disqualifications, which militate against a person entering the sacred portals of those august Houses, have also been laid down by the Constitution itself. What more should disqualify a person from being a member of those Houses in the fast changing political, social and economic scenario in the country, the Constitution makers left it to the collective wisdom of Parliament. The basic disqualifications which the Constitution itself laid down are contained in art 102, in relation to membership of Parliament, and in art 191, in relation to membership of state legislatures. These basic disqualifications are:

(i) holding an office of profit under the government of India or the government of any state;
(ii) being of unsound mind;
(iii) being an undischarged insolvent;
(iv) not being a citizen of India or voluntarily acquiring the citizenship of a foreign state or being under an acknowledgement of the allegiance or adherence to a foreign state.

The Constitution now also lays down an additional disqualification on the ground of 'defection', but it is relevant only for sitting members of Parliament and state legislatures for continuing as such member [art 102(2) and 191(2) r/w the Tenth Schedule to the Constitution].

Parliament has supplemented the above basic disqualifications by prescribing some further disqualifications in ch III (ss 8, 8A, 9, 9A, 10 and 10A) of Part II of the 1951 Act.

Constitutional Disqualifications

(i) Office of Profit Under the Government

Prohibition of holding office of profit under the Government, real object of—A person shall be disqualified both for being chosen as, and also for being, ie, continuing as, a member of either House of Parliament or of the legislative assembly or legislative council of a state, if he holds any office of profit under the Government

64 (2003) 4 SCC 399; see also Election Commission's order and circular No 3/ER/2003/JS-II, dated 27 March 2003.

of India or the government of any state. However, Parliament, in the case of members of Parliament, and the legislature of a state, in the case of its own members, may by law declare any office, the holder of which shall not be so disqualified on the ground that he is holding an office of profit under the government [art 102(1)(a) and art 191(1)(a)]. A minister either for the Union or for a state is not deemed to be holding an office of profit under the government for the purposes of such disqualification [explanations to art 102(1)(a) andart 191(1)(a)].

By the Constitution (Forty-second Amendment) Act 1976, arts 102(1)(a) and 191(1)(a) were amended to an effect totally contrary to the present effect. Under the amended articles, it was provided that a person shall be disqualified on the ground of holding an office of profit under the government, only if Parliament or the state legislature concerned had declared by law that the holding of that particular office would attract disqualification. The underlying object of the amended provision was to remove any ambiguity on the issue whether a person holding a particular office of profit is disqualified or not. But the exercise to identify and single out such offices proved to be so difficult, that this amended provision was never brought into force and was ultimately rescinded by the Constitution (Forty-fourth Amendment) Act 1978, so as to restore the original position of arts 102(1)(a) and 191(1)(a).

A person holding an office of profit under the Government of India is not only disqualified for membership of Parliament, but is also disqualified for membership of any state legislature. Likewise, a holder of office of profit under any state government is disqualified for membership of Parliament and of all state legislatures in the country.

The underlying principle and the real intention of the Constitution makers in incorporating this salutary provision in the Constitution is to keep the legislature independent of the executive. It was felt desirable that members of legislatures should not feel themselves beholden to the executive government and lose their independence of thought and action in the discharge of their public duties as true representatives of the people. This provision also acted as a check on the executive governments of the union and the states to hold out blandishments to members of the legislatures, so that the latter would be free to carry out their duties to their electorates uninfluenced by any considerations of personal loss or gain. If the executive governments had untrammeled powers of offering to legislators any appointments, positions or offices which carry emoluments of some kind or other, it could result in conflict between the discharge of public duties by them as legislators and their own private interests.[65] Explaining the true principle behind arts 102(1)(a) and 191(1)(a), the Supreme Court observed in *MV Rajashekaran v Vatal Nagaraj*:[66]

65 See opinion dated 2 March 1953 of the Election Commission to the President in Re *Brijraj Singh Tiwari and Ors* 51 ELR 1; observations of the Bombay High Court in 1958 in *Deorao Lakshman Anande (Dr) v Keshav Lakshman Borkar* 13 ELR 334.

66 AIR 2002 SC 742.

> The approach which appeals to us to interpret the expression 'office of profit' is that it should be interpreted with the flavour of reality bearing in mind the object for enactment of Article 102(1)(a), namely, to eliminate or in any event to reduce the risk of conflict between the duty and interest amongst members of the legislature by ensuring that the legislature does not have persons who receive benefits from the executive and may thus be amenable to its influence.

The same principle was emphasised by the Supreme Court in *Shibu Soren v Dayanand Sahay*,[67] thus:

> The court has to bear in mind that what is at stake is the right to contest an election, a very important right in any democratic set-up. 'A practical view not pedantic basket of tests' must, therefore, guide the courts to arrive at an appropriate conclusion. A ban on candidature must have a substantial and reasonable nexus to the object sought to be achieved, namely, elimination of or in any event reduction of possibility of misuse of position which the concerned legislator holds or had held at the relevant time. The principle for debarring holders of office of profit under the government from being member of Parliament is that such person cannot exercise his functions independently of the executive of which he becomes a part by receiving 'pecuniary gain'.

For determination of the core question, each case has to be judged in the light of the relevant provisions of the statute and its own peculiar facts, keeping in view the object of enacting arts 102(1)(a) and 191(1)(a), namely, that there should not be any conflict between duties and interests of an elected member to ensure that the concerned legislature does not contain persons who receive benefits from the executive and may on that account be under its obligation and, thus, amenable to its influence while discharging their legislative functions.

Again, re-emphasising the object of art 191(1)(a)[which is similar to art 102(1)(a) of the Constitution], the Supreme Court observed in *MV Rajashekaran v Vatal Nagaraj*:[68]

> The very object of providing the disqualification under Article 191 of the Constitution is that the person elected to the Legislative Assembly or the Legislative Council should be free to carry on his duty fearlessly without being subjected to any kind of governmental pressure. The Court, therefore is required to find out as to whether there exists any nexus between the duties discharged by the candidate and the Government, and that a conflict is bound to arise between impartial discharge of such duties in course of his employment with the duties which he is required to discharge as a Member of Legislature, on being elected. While examining the aforesaid question the Court has to

67 AIR 2001 SC 2583.

68 AIR 2002 SC 742.

look at the substance and not the form and, further it is not necessary that all factors and tests laid down in various cases must be conjointly present so as to constitute the holding of an office of profit under the Government.

The apex court had earlier observed in *Madhukar GE Pankakar v Jaswant Chobbildas Rajani*:[69]

> There is a haphazard heap of case-law about the expressions 'office' and 'under the government', but they strike different notes and job of the courts is to orchestrate them in the setting of the statute. After all, all law is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under Government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing government to promote personal advantage. So this is the mischief to be suppressed. At the same time it has to be borne in mind that the Constitution mandates the state to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time government servants but as part time participants in people's projects sponsored by government? For instance, if a national legal services authority funded largely by the state comes into being, a large segment of the legal profession may be employed part time in the en-nobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists, and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of 'office of profit' to cast the net so wide that all our citizens with specialties and know-how are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by government or corporations controlled by the state may be detrimental to democracy itself. Even athletes may hesitate to come into sports councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view, even if it involves "judicious irreverence" to vintage precedents, is the wiser desideratum.

69 AIR 1976 SC 2283.

Again, the apex court observed in *Pradyut Bordoloi v Swapan Roy*:[70]

> The inquisitive over-view-eye would finally query: on account of holding of such office would the government be in a position to so influence him as to interfere with his independence in functioning as a member of the legislative assembly and/or would his holing the two offices – one under the government and the other being a member of legislative assembly, involve a conflict of interests inter se. This is how the issue has to be approached and resolved.

It, however, deserves to be noted that it is not the holding of every office which disqualifies a person for membership of Parliament or of a state legislature, but it should be the holding of (i) an office; (ii) an office of profit; (iii) an office under the Government of India or the government of any state; and (iv) an office other than an office declared by the appropriate legislature by law not to disqualify its holder. All these ingredients must be satisfied together, before a person can be said to be so disqualified.

Meaning of 'office'—The word 'office' has not been defined either in the Constitution or in the 1951 Act. It has, however, been interpreted by the courts to mean a position or place to which certain duties are attached, especially one of a more or less public character.[71] The Bombay High Court took the view in *Deorao Lakshman Anande (Dr) v Keshav Lakshman Borkar*,[72] that the word 'office' does not necessarily imply that it must have an existence apart from the person who may hold it. The mere fact that the post which a person holds will cease to exist as soon as he gives it up or other persons cannot be appointed to that post, is not a ground for holding that that person does not hold an 'office'. In order to make use of the special knowledge, talent, skill or experience of certain persons, posts are created which exist only for so long as they hold them. It will be difficult to hold that such persons are not holders of offices. But the majority view of the Supreme Court in *Kanta Kathuria (Smt) v M Manak Chand Surana*[73] was that the word 'office' has various meanings and the appropriate meaning to be ascribed to that word in art 191(1)(a), when read with the words 'its holder' occurring in that article, would be that there must be an office which exists independently of the holder of the office. Further, the very fact that the legislature of the state has been authorised by art 191(1)(a) to declare an office of profit not to disqualify its holder, contemplates existence of an office apart from its holder. In other words, the legislature of a state is empowered to declare that an office of profit of a particular description or name would not disqualify its holder and not that a particular holder of an office of profit would not

70 AIR 2001 SC 296.
71 *Kanta Kathuria (Smt) v M Manak Chand Surana* AIR 1970 SC 694.
72 13 ELR 334.
73 AIR 1970 SC 694.

be disqualified. The minority view, however, seemed to uphold the view which was taken by the Bombay High Court in *Dr Deorao Lakshman Anande's* case, and also by the Rajasthan High Court in the case of *Smt Kathuria*[74] from which that appeal was filed before the Supreme Court. In this case, Smt Kathuria was appointed by the Government of Rajasthan as special government pleader to conduct arbitration cases between the State Government and Modern Construction Company arising out of the construction of Rana Pratap Sagar Dam and Jawahar Sagar Dam. The majority view of the Supreme Court held that she was not holding an 'office', as the post of special government pleader was specially created for her.

The above view was reiterated by the Supreme Court in *Rabindra Kumar Nayak v Collector, Mayurbhanj*,[75] wherein it was again laid down that the term 'office' means one subsisting, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders. The permanency should be attached to the office and not to the term for which a person holds it. In this case, an assistant public prosecutor appointed to a regular post, but as a stopgap arrangement, was held to be holding an office which disqualified him. However, in *MV Rajashekaran v Vatal Nagaraj* above, the Supreme Court held a one-man commission set up by the government of Karnataka to study the problems of Kannadigas in the border areas of Kerala, Maharashtra, etc, as an 'office' within the meaning of art 191(a) of the Constitution.

But the mere appointment to an office does not amount to the holding of the office. A person cannot occupy an office until he enters upon the same and the entry upon an office is not necessarily simultaneous with the appointment to the office.[76] If a position to which a person is appointed is neither accepted nor acted upon by the person appointed, he cannot be regarded as holding that position or office.[77]

The Supreme Court also held in *Tek Chand v Dile Ram*[78] that where a candidate in government service had submitted application of voluntary retirement before date of filing nomination paper and no communication was made to him either refusing or accepting voluntary retirement sought by him, voluntary retirement became effective from the date of expiry of period specified and he could not be said to continue to hold office under the government till voluntary retirement notice was accepted.

In *Jaipal Singh v Sumitra Mahajan*,[79] the Supreme Court, however, drew a distinction between voluntary retirement and resignation. Though, voluntary retirement and resignation involve voluntary acts on the part of the employee to

74 39 ELR 390.
75 (1999) 2 SCC 627.
76 *Chandulal v Ramdas* 41 ELR 214 (SC).
77 *Mahadeo v Shantibhai* 40 ELR 81 (SC).
78 AIR 2001 SC 905.
79 AIR 2004 SC 2066, (2004) 4 SCC 522.

leave service, they operate differently; one of the basic distinctions between the two is that in the case of resignation, it can be tendered at any time but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. In the case of resignation, a prior permission is not mandatory, while in the case of voluntary retirement, permission of concerned employer is requisite condition.

Licencees and contractors, not holders of 'office'—Persons holding any contract with or licence from a government to perform certain functions which the government itself might be undertaking or performing does not amount to holding an 'office'. A lessee of tolls under the Northern India Ferries Act 1878 is only a contractor who collects toll from the persons who use ferries against the payment which he has already made to the government in advance at the time of the auction. Because of the fact that such lessee has the right to secure the services of the police whenever needed, he cannot be deemed to be a person holding an office, just like an excise contractor or a fair-price shop dealer who sells grains supplied by the government is not a holder of an office.[80] The Election Commission has held that a person acquiring a gas agency from the Indian Oil Corporation, a Government of India undertaking, is not holding any 'office', and in any case, not an office under the Government.[81] Likewise, the Andhra Pradesh High Court held that a person authorised to run a fair-price shop under the Andhra Pradesh Scheduled Commodities (Regulation and Distribution by Card System) Order 1973 was not holding any 'office'.[82] Similarly, a person holding a permit to ply a bus was held to be not holding any 'office'.[83]

Meaning of 'office of profit'—Again, an 'office' so as to fall within the meaning of dis-qualificatory clauses in arts 102(1)(a) and 191(1)(a) must be an 'office of profit'. To constitute an 'office of profit' within the meaning of the aforesaid articles, pecuniary advantage measurable in terms of money is an essential element. Mere prestige and like advantages attached to an office are not sufficient to make it an 'office of profit'. The Supreme Court laid down in *Ravanna Subanna v Kaggeerappa*[84] that:

> The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit.

80 *Dewan Joynal Abedin v Abdul Wazed* (1988) Supp SCC 580.
81 See Election Comission's opinion dated 25 April 1986 to the Governor of Madhya Pradesh under art 192(2) in Re *Shri Awantika Prasad Marmat*.
82 *Cheekati Parasuram Naidu v Mariserla Venkatarami Naidu and Ors* AIR 1985 AP 169.
83 *Yugal Kishore Sinha v Nagendra Prasad Yadav* AIR 1964 Pat 543.
84 AIR 1954 SC 653.

In this case, the fee of Rs 6 which the non-official Chairman of the Gubbi Taluk Development Committee was entitled to draw for each sitting of the Committee he attended was held not to be a payment by way of remuneration or profit, but was given as a consolidated fee for the out-of-pocket expenses which he had to incur for attending the meetings of the Committee.

An office of profit really means an office in respect of which a profit may accrue. It is not necessary that it should be possible to predicate of a holder of an office of profit that he was bound to get a certain amount of profit irrespective of duties discharged by him.[85] In this case, an advocate on panel of lawyers for the railways was held to be holding an office of profit, though he was paid only for those cases in which he was asked to appear by the railways. In *Rabindra Kumar Nayak v Collector, Mayurbhanj* also, an assistant public prosecutor appointed as a stopgap arrangement on a daily fee of Rs 100, though in fact he did not receive any such fee, was nevertheless held to be holding an office of profit which disqualified him.

The following observations of the Supreme Court in *Shibu Soren v Dayanand Sahay*[86] are highly relevant for determination of the question whether an office carries profit:

> The expression "office of profit" has not been defined either in the Constitution or in the Representation of the People Act. In common parlance, the expression 'profit' connotes an idea of some pecuniary gain. If there is really some gain, its label—'honorarium'—'remuneration'—'salary' is not material – it is the substance and not the form which matters and even the quantum or amount of "pecuniary gain" is not relevant—what needs to be found out is whether the amount of money receivable by the concerned person in connection with the office he holds, gives to him some "pecuniary gain", other than as 'compensation' to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit to him.
>
> The honorarium of Rs 1750/- paid to the chairman of the Interim Council of the Jharkhand Area Autonomous Council, besides other daily allowances and perquisites of rent free accommodation and car with a driver, could not be said to be in the nature of compensatory allowances and was in the nature of remuneration or salary, inherently implying an element of 'profit' and 'pecuniary gain' to the person holding such office.

Following the above decisions of the Supreme Court, the Bombay High Court has held in *Chandrakant Uttam Chodankar v Dayanand Rayu Mandrekar*,[87] that office of Chairman of Goa Khadi and Village Industries Board is an office of profit under the

85 *Mahadeo v Shantibhai* [1969] 2 SCR 422.
86 AIR 2001 SC 2583.
87 AIR 2006 Bombay 16.

Government of Goa, as the chairman is getting the facilities like unlimited use of petrol, mobile phone, chauffer driven car, personal staff, etc. Affirming the above decision of the Bombay High Court, the Supreme Court held that Chairman, Vice-Chairman and other members of the Goa, Daman and Diu, Khadi and Village Industries Board were holding offices of profit under the government as they were in receipt of variety of perquisites like mobile telephone and chauffeur-driven car which were permitted to be used for unlimited purposes and not restricted to official purposes, and the same could not be considered to be compensatory allowance. In addition, they were also entitled to such salary, other honorarium and allowances from the funds of the board as the government may from time to time fix, notwithstanding that they had not drawn any such salary, etc.[88]

In one of the earliest cases which arose in 1953 for the opinion of the Election Commission under art 192(2), the question was whether certain members of the Vindhya Pradesh legislative assembly had become disqualified for holding 'office of profit' on their appointment as members of the district advisory councils. They were paid, in addition to the travelling allowance, a daily allowance at the rate of Rs 5 for each day of residence at the place where the meeting was held. The Commission opined that reimbursement of mere out-of-pocket expenses should not be treated as 'profit', but by making the daily allowance rate same for resident and non-resident members, the members residing in the district headquarters where the council meetings took place should be deemed to have held 'office of profit'. Accordingly, 12 of the 60 members of the legislative assembly were declared disqualified.[89] Again, the Election Commission held a member of the Madras legislative assembly to be holding an 'office of profit' on his appointment as a Director of the Neyveli Lignite Corporation Private Limited, a company owned and controlled by the Government of India, and receiving a sitting fee of Rs 100 for each meeting of the Board of Directors.[90]

However, in *Umrao Singh v Darbara Singh*,[91] the Supreme Court held that the Chairman of a *Panchayat Samiti* who was paid some allowances, did not hold an office of profit, as the allowances represented the amount which he was expected to spend on an average per month for the purpose of properly discharging his official duties.

88 *Dayanand Rayu Mandrekar v Chandrakant Uttam Chodankar and Ors* 2008(3) SCJ 372.
89 Re *Brijraj Singh Tiwari and Ors* 51 ELR 1.
90 Re *N Mahalingam* 51 ELR 287.
91 AIR 1969 SC 263.

Again, the Supreme Court held in *Divya Prakash v Kultar Chand Rana*,[1] that a member of the Himachal Pradesh legislative assembly nominated as the Chairman of the Himachal Pradesh Board of School Education under s 18 of the Himachal Pradesh Board of School Education Act 1969 was not holding an 'office of profit' as he was appointed only in an honorary capacity and was not receiving any salary for that post.

The Karnataka High Court also held in *Ramakrishna Hegde v State of Karnataka and Ors*[2] that Shri Hegde did not hold an office of profit as the Deputy Chairman of the Planning Commission of India, because he was not receiving any remuneration other than the compensatory allowance. The Election Commission had opined otherwise in this case and had held him to be holding an office of profit, as salary was attached to that office and Shri Hegde had only voluntarily agreed not to draw such salary.[3]

The Election Commission also held that Shri R Mohanrangam, a then sitting member of the Council of States was holding an office of profit as Special Representative of the Government of Tamil Nadu at New Delhi as such appointment gave him certain benefits enjoyed by the ministers of the state government.[4] But the Election Commission opined that Shri SA Dorai Sebastian did not hold an office of profit as member of the Minorities Commission of India, as he was being given only compensatory allowances as permissible to a member of Parliament.[5]

The Election Commission opined[6] that Smt Jaya Bachchan became disqualified for being member of the Council of States on her appointment as Chairperson of the Uttar Pradesh Film Development Council by the government of Uttar Pradesh. On her appointment, she was given the status of a cabinet minister and was entitled to certain salary, allowances, and other perquisites. Though she contended that she had not drawn any salary or allowances nor availed of any other facilities allowed to her, the Election Commission nevertheless held her to be holding an office of profit under the government of Uttar Pradesh as she was entitled to receive the said salary, allowances, etc. The Supreme Court,[7] before whom Smt Jaya Bachchan agitated the issue, upheld the view taken by the Commission, holding that:

1 AIR 1975 SC 1067.
2 AIR 1993 Kant 54.
3 See the Election Commission's opinion dated 24 July 1991 to the Governor of Karnataka in Re *Ramakrishna Hegde*.
4 See the Election Commission's opinion dated 31 August 1982 to the President in Re *R Mohanrangam*.
5 See the Election Commission's opinion dated 1 October 1982 to the President in Re *SA Dorai Sebastian*.
6 See the Election Commission's opinion dated 2 March 2006 to the President in *Re Smt Jaya Bachchan*.
7 (2006) 5 SCC 266, AIR 2006 SC 2119 – approved in JT 2008 (12) SC.

> ...For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket/actual expenses, then the office will be an office of profit for the purpose of Article 102 (1)(a)....It is well settled that where the office carries with it certain emoluments or the order of appointment states that the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments. What is relevant is whether pecuniary gain is "receivable" in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly.

The Supreme Court held in *Consumer Education and Research Society v Union of India and others*[8] that the disqualification, when declared by the President, will become operative from the date the member accepted the office of profit.

Meaning of office 'under the government'—A disqualification under art 102(1)(a) or art 191(1)(a) is attracted not by the mere holding of an office or an office of profit, but on holding an office of profit under the Government of India or of any state. Thus, the question to be determined in such a case is what constitutes an office under the Government of India or of any state. In *Maulana Abdul Shakoor v Rikhab Chand and Anor*,[9] the question arose before the Supreme Court whether the manager of the Madarsa Durgah Khwaja Sahib Akbari, a school run under the Durgah Khawaja Sahib Act 1955, was holding an office of profit under the government, as he was appointed by the administrator-cum-secretary of the *Durgah* Committee who was a nominee of the Central Government. The Supreme Court held that though the Committee of the Durgah Endowment was to be appointed by the Government of India and its members were removable by the government, the committee was a body corporate with perpetual succession and its employees were not holders of office of profit under the Government of India. As the said manager was neither appointed by the Government of India nor was removable by that government and nor was he paid out of the revenues of Government of India, he did not hold an office of profit under the Government of India and was thus not disqualified. The Supreme Court held that the power of the government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of government revenues are important factors in determining whether that person is holding an office of profit under the

8 2009(8) SCJ 257.
9 AIR 1958 SC 52.

government, though payment from a source other than government revenue is not always a decisive factor.

In *Ramappa v Sangappa*,[10] the question was whether the holder of a village office who had a hereditary right to that office was disqualified under art 191(1)(a). The Supreme Court observed that the appointment of Patels and Shanbhogs was made by the government under the Mysore Village Offices Acts 1908, though it may be that under the statute it had no option but to appoint the heir to the office, if he fulfilled the statutory requirements. The office was, therefore, held by them by reason of the appointment by the government and not simply because of a hereditary right to it. They worked under the control and supervision of the government, could be removed by the government and were paid by it. Applying the tests laid down in the abovementioned *Maulana Abdul Shakoor* case, the persons concerned were held to be disqualified.

The tests for determining the aforesaid question as laid down in *Maulana Abdul Shakoor's* case were further elaborated by the Supreme Court in its subsequent decision in *Guru Govinda Basu v Shankari Prosad Ghosal*.[11] In this case, the question arose whether a chartered accountant, who was a partner in a firm of auditors which acted as auditor of certain government companies, namely, Life Insurance Corporation of India, the Durgapur Projects Limited and Hindustan Steel Limited, wholly owned by the Government of India, and who was also appointed by the State Government of West Bengal as a Director of the West Bengal Financial Corporation, was holding an office of profit under the government. The Supreme Court laid down that:

> ...where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under authority so empowered.

Applying the above tests, the Supreme Court held the said chartered accountant to be holding an office of profit under the Government of India, as he was appointed as auditor of the said companies by the Central Government and the Comptroller and Auditor-General of India exercised full control over him and his remuneration was fixed by the Central Government, though it was paid by the companies concerned. He was also held to be holding an office of profit under the Government of West Bengal. The Supreme Court also laid down that for holding an office of profit under the government, one need not be in the service of government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and

10 [1959] SCR 1167.
11 AIR 1964 SC 254.

'the holder of a post or service under the Government' (see arts 309 and 314). The Supreme Court further observed that the Constitution has also made a distinction between the 'the holder of an office of profit under the Government' and 'the holder of an office of profit under a local or other authority subject to the control of Government' [see arts 58(2) and 66(4)].

The above tests for determining the question whether a particular office is an office under the government or not, were more succinctly elucidated by the Supreme Court in a subsequent decision in *Shivamurthy Swami Inamdar v Agadi Sanganna Andanappa*,[12] as follows:

(i) Whether the government makes the appointment;
(ii) Whether the government has the right to remove or dismiss the holder;
(iii) Whether the government pays remuneration;
(iv) What the functions of the holder are and does he perform them for government; and
(v) Does the government exercise any control over the performance of these functions.

On a careful examination of the ratio laid down by the Supreme Court in a catena of cases, some of the tests or principles that emerge for determining whether a person holds an office of profit under the Government were again summarised by the apex court in *Satrucharla Chandrasekhar Raju v Vyricherla Pradeep Kumar Dev*[13] thus:

(1) The power of the government to appoint a person in office or to revoke his appointment at its discretion. The mere control of the government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature.
(2) The payment from out of the government revenues are important factors in determining whether a person is holding an office of profit or not of the government. Though payment from a source other than the government revenue is not always a decisive factor.
(3) The incorporation of a body corporate and entrusting the functions to it by the government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the government, but in substance, it may just be the alter ego of the government itself.
(4) The true test of determination of the said question depends upon the degree of control the government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its

12 (1971) 3 SCC 870.
13 AIR 1992 SC 1959.

dependence on the government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of the Government.

All questions whether a particular person is holding an office of profit under the Government of India or of a state or not have thus to be decided by applying the above tests to the facts and circumstances of each case.

Applying the above tests, the Supreme Court held in *Surya Kant Roy v Imamul Hai Khan*,[14] that the chairman of a board constituted under the Bihar and Orissa Mining Settlement Act, 1920, appointed by the state government from amongst the members of the board, was not the holder of an office under the government, as he was neither paid the remuneration by the government nor did he perform his functions for the government. The Supreme Court observed:

> ...the office held by the respondent is held under a local authority. The holding of an office of profit in it does not bring about a disqualification even if that local authority be under the control of the Government. The mere control of Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature. Therefore, the control exercised by the Government over the Board in this case does not make the Board an organ of the Government nor does it make the respondent a person holding an office under the Government.

In *Madhukar GE Pankakar v Jaswant Chobbildas Rajani*,[15] the Supreme Court, while holding that the appellant who was included in the list of doctors under the Employees State Insurance Scheme was not holding an office of profit under the government, observed:

> ...back to the issue of 'office of profit'. If the position of an insurance medical officer is an 'office,' it actually yields profit or at least probably may. In this very case the appellant was making sizeable income by way of capitation fee from the medical services, rendered to insured employees. The crucial question then is whether this species of medical officers are holding 'office' and that 'under Government'. There is a haphazard heap of case-law about these expressions but they strike different notes and our job is to orchestrate them in the setting of the statute. After all, all law is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under Government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the

14 [1975] 3 SCR 909, AIR 1975 SC 1053.
15 AIR 1976 SC 2283.

likelihood of influencing Government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory Government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time Government servants but as part time participants in people's projects sponsored by Government? For instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part time in the en-nobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists, and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative Government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of 'office of profit' to cast the net so wide that all our citizens with specialities and knowhow are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by Government or corporations controlled by the State may be detrimental to democracy itself. Even athletes may hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view, even if it involves 'judicious irreverence' to vintage precedents, is the wiser desideratum.

In *Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi*[16] also, the Supreme Court held that members of Parliament and state legislatures are not holding office of profit under the government as they are not appointed as such members by the government but are elected by the people. The part-time Chairman of the Andhra Pradesh Travel and Tourism Corporation Ltd, was also likewise held not to be holding an office of profit under the government as he was appointed by the Corporation and not the state government.[17] Likewise, the Director of Maharashtra Seeds Corporation elected from the Growers' constituency was held to be not holding an office under the government as he was elected and not appointed by the government; and the allowances, etc., paid to him, were also held to be in the form of reimbursement of expenses incurred by him.[18] The post of clerk in the Coal India

16 AIR 1986 SC 1534.
17 *Kona Prabhakara Rao v M Seshagiri Rao* AIR 1981 SC 658.
18 *Gajanan Samadhan Lande v Sanjay Shyam Rao Dhotre* 2012 (3) SCJ 24.

Ltd, a government company within the meaning of s 617 of the Companies Act, is not an office of profit under art 191(1)(a).

The *Upkulpati* (Vice-Chancellor) of the Kurukshetra University and the Vice-Chancellor of the Agra University were also similarly held not to be holding any office under the government, as their appointments were made by the Governors of the States concerned not as heads of the states but in their capacity as the chancellors of those universities.[19]

The Election Commission has also held that the Speaker or the Leader of Opposition in a House of Parliament or State Legislature is not holding an office under the government, as the appointment is made by the political party concerned and not by the government.[20]

A judge of the Supreme Court, after retirement, is not disqualified for election to Parliament on the ground that art 124(7) prohibits him from pleading or acting in any court or before any authority within the territory of India.[21]

Office of profit under government and under a government company or corporation—In *Guru Govinda Basu's* case,[22] the director of a government company was held to be holding an office of profit under the government, as he was appointed by the government, which had also the power to remove him and to fix his remuneration. But the position of the employees of the government companies and corporations who are appointed by their boards of directors or authorities subordinate to them is different in law. They have been held by the Supreme Court not to be holding office of profit under government. In *Aklu Ram Mahto v Rajendra Mahto*,[23] the Supreme Court has held that the *khalasis* and meter readers in Bokaro Steel Plant, a government company, are not holders of office of profit under the government. In *Manohar Nathusao Samarath v Marot Rao*,[24] the employees of the Life Insurance Corporation of India were not considered disqualified by the Supreme Court under art 191(1)(a). The Supreme Court held that though the employees of that Corporation might invite disciplinary action for contesting election in contravention of the regulation governing their conduct, such regulation could not render such employees as disqualified for contesting election under art

19 See Election Commission's opinion dated 27 November 1962 to Governor of Punjab in Re *Suraj Bhan* 51 ELR 202, *Joti Prasad Upadhya v Kalka Prasad Bhatnagar* AIR 1962 All 128.

20 See order dated 23 May 2013 of the Governor of Maharashtra based on the opinion of the Election Commission in re *Dilip Dattatraya Walse – Patil, Vinod Tawde and four others.*

21 See *Ananga Uday Singh Deo v Ranga Nath Mishra and Ors* EP No 1 of 1998 before the Orissa High Court decided on 4 August 2000; See also *Ananga Uday Singh Deo v Ranga Nath Mishra and Ors* AIR 2001 SC 2992.

22 AIR 1964 SC 254.

23 [1999] 2 LRI 543.

24 AIR 1979 SC 1084.

191(1)(a). In *Election Commission v State Bank of India Employees Association*,[25] the Supreme Court even went to the extent of laying down that the services of employees of the Life Insurance Corporation and the State Bank of India could not be utilised even for deployment on polling duties as they were not government employees and not subject to the control of the President.

But in the case of *Bihari Lal Dobray v Roshan Lal Dobray*[26] the Supreme Court held that an assistant teacher of a basic primary school run by the Uttar Pradesh Board of Basic Education under the Uttar Pradesh Basic Education Act was holding an office of profit under the state government. The Supreme Court observed that merely because the Board of Basic Education is a body corporate and the incorporation of a body corporate may suggest that the statute intended it to be a statutory corporation independent of the government, it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the government, but in substance it may be just the alter ego of the government itself. The true test of determination of the said question depends upon the degree of control the government has over it, the extent of control exercised by the several other bodies or committees over it and their composition, the degree of its dependence on government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of government. In view of art 45, the primary education in a state unlike higher education is the special responsibility of its government. The UP Basic Education Act was passed with the object of enabling the government to take over all basic schools which were being run by the local bodies in the state and to manage them and to administer all matters pertaining to the entire basic education in the state through the Board consisting mostly of officers appointed by the government. The functions of the employees of the Board are in connection with the affairs of the state. The expenditure of the Board is largely met out of the moneys contributed by the state government to its funds. The teachers and other employees are to be appointed in accordance with the rules by officers who are themselves appointed by the government. The disciplinary proceedings in respect of the employees are subject to the final decision of the state government or other government officers, as the case may be. On these facts, the Supreme Court held that the Board was not an authority which was truly independent of the government and that every employee of the Board was in fact holding his office under the government. The Supreme Court observed that this was not even a case of attempting to pierce the veil and trying to find out the true nature of something after uncovering it, but a case where its true nature, ie, the subordination of the Board and its employees to the government was writ large on the face of the Act and the rules made thereunder. The Supreme Court

25 AIR 1995 SC 1078.

26 AIR 1984 SC 385.

again expressed similar views in *Satrucharla Chandrasekhar Raju v Vyricherla Pradeep Kumar*,[27] that the incorporation of a body corporate may suggest that it is independent of the government, but that would not be conclusive of the fact, as, sometimes, the form may be that of body incorporate independent of the government, but, in substance, it may just be an alter ego of the government.

It may be pertinent to mention here that though the employees of government companies and corporations may not normally be considered as holders of offices of profit under the government, s 10 of the 1951 Act specifically lays down that a managing agent, manager or secretary of any company or corporation (other than a cooperative society) in the capital of which the appropriate government has not less than 25 percent share shall be disqualified for membership of Parliament or, as the case may be, of the state legislature concerned.

The Supreme Court held in *Pradyut Bordoloi v Swapan Roy*[28] that the post of clerk in the Coal India Ltd, a government company within the meaning of s 617 of the Companies Act, is not an office of profit under art 191(1)(a). The exercising of some supervisory function, occasionally in the absence of his senior officer on account of leave or absence, over his subordinates would not also make him a manager of the company so as to disqualify him under s 10 of the 1951 Act. A *khalasi* or meter reader holding a non-executive post in Bokaro Steel Plant, a government company, was also held not to be disqualified within the meaning of s 10 of the 1951 Act or art 191(1)(a) of the Constitution.[29] Employees of a cooperative society are also not employees of the government and thus not holding an office of profit under the government.[30] Anganwadi workers and lambardars too are not holding an office of profit under the government of Punjab[31], and are free to contest elections.[32] But Gramin Dak Sewaks in Punjab were held to be government servants.[33]

Referring to the provisions of art 191(1) and s 10 of the 1951 Act, the Supreme Court observed in *Kirpal Singh v Uttam Singh*:[34]

> The clear and undoubted object of art 191(1)(a)–(e) and the provisions of the Representation of the People Act (including s 10) is the preservation of the purity and integrity of the election process by preventing Government or State employees from taking part in the elections. But then s 10 appears to confine the disqualification, in so far as it relates to employees of Government Companies to the 'top-brass' only if such an uncouth expression may be

27 AIR 1992 SC 1959.
28 AIR 2001 SC 296.
29 *Aklu Ram Mahto v Rajendra Mahto* AIR 1999 SC 1259.
30 *Union of India and others v Ram Singh Thakur and others* 2011(6) SCJ 365.
31 *Anokh Singh v Punjab State Election Commission* 2011(1) SCJ 577.
32 *Secretary, State of Karnataka and Ors v Uma Devi and Ors* 2006(4) SCC 1.
33 *Chet Ram v Jit Singh and others* 2008(7) SCJ 913.
34 AIR 1986 SC 300.

> allowed to creep into the judgment of a Court. Nowadays the activities of the State are so manifold and prolific that the State has been forced, in the interests of better management and administration and in order to further the Directive Principles of State Policy, to set up various Corporations which are but mere instrumentalities of the State. Is the principle of art 191(1)(a) then to be extended to employees of State Corporations also by enacting appropriate laws under art 191(1)(e)? Or are employees of Public Corporations to be treated differently from employees of the Government? Are not some of them in a better position to exert undesirable pressure, than Government employees? On the other hand, are a tremendously large number of employees of Public Corporations to be denied the opportunity of being chosen, as representatives of the People? Do all the considerations applicable to Government Employees equally apply to employees of Public Sector undertakings? Is there no distinguishing feature? Are a large mass of highly or moderately literate people to be denied the right to speak for the people? Is the right to be elected, to be confined, without meaning any disrespect to anyone to the professional politicians only? These are some of the vital questions posed and which require to be answered. The answer should be best given by the elected representatives of the people themselves. We are not shirking the decision of these questions but our decision can only be confined to interpretation. Not so, Parliament which can decide upon the Policy. That is why, we recommended to the Government to have the matter examined by the Law Commission very early. When a suitable occasion arises in the future we will, of course, deal with the matter, probably helped by new legislation.

Office of profit under government and under a local authority—As observed by the Supreme Court in *Guru Govinda Basu v Shankari Prosad Ghosal*,[35] the Constitution has made a distinction between the 'the holder of an office of profit under the Government' and 'the holder of an office of profit under a local or other authority subject to the control of Government'. Under arts 102(1)(a) and 191(1)(a), only the holders of offices of profit under the Government of India or of a state are disqualified for membership of Parliament and state legislatures. The holders of offices of profit under a local authority subject to the control of government are, however, not so disqualified, though they are disqualified for offices of President and Vice-President of India under arts 58(2) and 66(4). Therefore, an accountant in the Agartala municipality, holding an office of profit under a local authority, was not considered to be disqualified under arts 102(1)(a) or 191(1)(a), as he was not holding an office under the government.[36] Following the above decision

35 AIR 1964 SC 254.
36 *Ashok Kumar Bhattacharya v Ajoy Biswas* AIR 1985 SC 211; *Srikant v Vasantrao and Ors* AIR 2006 SC 918.

of the Supreme Court, an employee of the Delhi Municipal Corporation was held by the returning officer as not disqualified for contesting election to the legislative assembly for the National Capital Territory of Delhi from Seemapuri assembly constituency at the general election held in November 1998.

Offices declared by law not to disqualify their holders—The Constitution makers envisaged that there may be certain offices under the government to which appointments may be made of persons having special qualifications, expertise or experience in certain fields and whose services as members of Parliament and state legislatures might also be of value in public interest. Therefore, they gave discretion to Parliament and state legislatures to exempt such offices from the purview of the disqualificatory provisions relating to their respective Houses [arts 102(1)(a) and 191(1)(a)]. As mentioned above, the Constitution makers considered it advisable to clarify in the Constitution itself, that a person holding an office of a minister either for the union or for any state shall not be deemed to be disqualified [explanations to arts 102(1) and 191(1)].

Which 'offices' should be excluded for the purpose of disqualification is a question that properly lies in the legislative domain and whether an office of profit is to be exempted is a matter to be considered by Parliament. The concern that certain offices or places held by an MP may be either incompatible with his duty as an elected representative of the people or affect his independence and thus weaken his loyalty to his constituency and, therefore, should disqualify the holder thereof, is a matter to be addressed by Parliament.[37]

In exercise of the above powers, Parliament and all state legislatures have enacted their own laws declaring several offices the holders whereof are not deemed to be disqualified for membership of their respective Houses, who but for such declaration might have been considered to be disqualified on the ground of holding an office of profit under the Government of India or of any state. Such exempted offices vary from state to state having regard to their own needs and are not necessarily uniform in all states. Sometimes, an office declared by Parliament not to disqualify its holder for membership of Parliament may not find place in the list of offices so declared by the state legislatures and vice versa.

Initially, Parliament enacted the Parliament (Prevention of Disqualification) Act 1950 exempting certain offices from the purview of disqualification under art 102(1)(a). The list of offices so declared was later on supplemented by the Parliament Prevention of Disqualification Act 1951 and the Prevention of Disqualification Act 1953. However, all these Acts were repealed in 1959 and Parliament enacted a new comprehensive law on the subject, called the Parliament

37 *Consumer Education and Research Society v Union of India and Ors* 2009(8) SCJ 257; see also decision dated 4 December 2007 of Supreme Court in *Mohd. Akram Ansari v Chief Electoral Officer and Ors* removing the disqualification of the Chairman of Delhi Wakf Board under the Delhi Wakf Act.

(Prevention of Disqualification) Act 1959. In this Act, Parliament has clarified that, apart from the ministers, the ministers of state and deputy ministers for the union or for any state, whether ex-officio or by name, shall also not be disqualified, as doubts often arose whether the ministers of state or deputy ministers were also covered under the exemption given in the Constitution to the ministers. Parliament has also declared the offices of Leader of the Opposition in Parliament, chief whip, deputy chief whip or whip in Parliament and parliamentary secretary as such exempted offices. In addition, Parliament has also listed out several statutory and non-statutory bodies under the central government and state governments whose chairmen, directors and members shall not be disqualified on the ground of their holding those offices, provided that they do not receive any remuneration other than the compensatory allowance. 'Compensatory allowance' has been defined in s 2(a) of that Act to mean any sum of money payable to the holder of an office by way of daily allowance (such allowance not exceeding the amount of daily allowance to which a member of Parliament is entitled under the Salaries and Allowances of Members of Parliament Act 1954), any conveyance allowance, house rent allowance or travelling allowance for the purpose of enabling him to recoup any expenditure incurred by him in performing the functions of that office.

Most of the state laws also follow the pattern of the above parliamentary law.

The Supreme Court has observed in *Bhagwan Das Sehgal v State of Haryana*,[38] that arts 102(1)(a) and 191(1)(a) give wide power to legislatures to declare by law what offices or offices of profit held under the government shall not disqualify the holders thereof from being chosen as, or for being, members of the legislature. Classification of such offices for the purpose of removing disqualification has been left primarily to legislative discretion. So long as the legislatures exercise this exemptive power reasonably and with due restraint, in a manner which does not drain out arts 102(1)(a) and 191(1)(a) of their real content, or disregard any constitutional guarantee or mandate, the courts will not interfere with it, the apex court observed.

Laws removing disqualification with retrospective effect—The Supreme Court has further held in *Kanta Kathuria (Smt) v M Manak Chand Surana*,[39] that Parliament and state legislatures can make laws in exercise of their above exemptive power to operate retrospectively. The Supreme Court observed that any law that may be made prospectively may be made with retrospective operation also; except that certain kinds of laws cannot operate retroactively, but the statutes enacted removing the

38 AIR 1974 SC 2355.

39 AIR 1970 SC 694; see also *Consumer Education and Research Society v Union of India and Ors* 2009(8) SCJ 257, AIR 2009 SC 1680; *Mohd. Akram Ansari v Chief Election Officers and Ors and Naved Yar Khan v Haroon Yusuf and Anr* (Civil Appeal Nos. 4981 and 5828 of 2006) before the Supreme Court decided on 4 December 2007.

disqualification retrospectively are not one of them. Articles 102(1)(a) and 191(1)(a) reserve the power to legislatures to make a declaration that the holder of an office shall not be disqualified and there is nothing in the words of these articles to indicate that such a declaration cannot be made with retrospective effect. No express or implied restriction has been placed on the power of the legislatures in this behalf. The apprehension that it may not be a healthy practice and this power might be abused in a particular case is no ground for limiting the power of the legislatures, the Supreme Court further observed. In this case, the Rajasthan High Court had set aside the election of Smt Kanta Kathuria on the ground that she was holding an office of profit under the state government as a special government pleader. While the appeal against the order of the high court was pending in the Supreme Court, the state legislature passed an Act declaring that the office of special government pleader shall not disqualify its holder for being a member of the Rajasthan legislative assembly and gave the Act retrospective effect removing the disqualification of Smt Kathuria from a back date. The Supreme Court upheld the validity of the Act giving a retrospective effect.

In another matter referred to the Election Commission for its opinion under art 192(2) relating to the alleged disqualification of 24 members of the Haryana legislative assembly on the ground that they were holding offices of profit as chairmen of several government bodies, the Haryana legislative assembly amended its state laws twice in 1980–81, so as to save those members from attracting disqualification under art 191(1)(a), and gave those laws retrospective effect during the pendency of the matter before the Election Commission.[40]

On 16 April 2006, the President disqualified, on the opinion of the Election Commission, Smt Jaya Bachchan, from continuing as member of Council of States on the ground that she was holding an office of profit under the government of Uttar Pradesh since July 2004 as Chairperson of the Uttar Pradesh Film Development Council. This virtually opened a flood gate of petitions to the President and Governors of several states from every corner of the country raising question of disqualification of hundreds of members of Parliament and state legislatures on the ground of holding of office of profit. By the middle of May 2006, the Election Commission received references from the President and Governors of several states seeking the Commission's opinions under arts 103(2) and 192(2) on the question of alleged disqualification of 46 members of Parliament and 229 members of state legislatures. While the questions raised in those petitions were under process of enquiry by the Election Commission, the Central Government and several political parties felt concerned as many more members of Parliament could lose their seats, if the Commission continued with its proceedings. After anxious confabulations with political parties, the Central Government decided to amend the

40 See the Election Commission's opinion dated 21 May 1981 to the Governor of Haryana in Re *Gaya Lal and 23 Ors.*

Parliament (Prevention of Disqualification) Act, 1959, so as to remove the disqualification in respect of the holders of various offices of profit, which were the subject matter of enquiry by the Election Commission. A Bill called the Parliament (Prevention of Disqualification) Amendment Bill, 2006 was accordingly introduced in the House of the People on 16 May 2006, so as to include 56 more offices in the exempted category of offices the holders whereof were proposed to be declared not attracting the disqualification under art 102(1)(a).[41] The Statement of Objects and Reasons appended to the Bill stated:

> Recently, it has become necessary to visit the issue of disqualification of Members of Parliament on the basis of holding an office of profit. This has been necessitated due to recent developments where approximately 40 or more members from both Houses of Parliament are holding offices of Chairman or members of various statutory and non-statutory bodies and are facing disqualification proceedings on the ground that they are holding an office of profit. If this state of affairs is allowed to continue then there is bound to be large-scale litigation and the likely vacation of seats in both the Houses of Parliament, which will necessitate the holding of bye-elections to fill up the resultant vacancies. This will be a wasteful expenditure and will enforce unnecessary financial burden upon the nation. In view thereof, it is proposed to include certain offices in the Parliament (Prevention of Disqualification) Act, 1959, so as to the exempt the holders of such offices from incurring disqualification.

Introducing the said Bill in the House of the People on 16 May 2006, the Union Minister for Law and Justice stated:

> The expression 'office of profit' has not been defined in the Constitution or in any other Act not because it is impossible to define it but because it is not easy to frame an all-inclusive definition covering all kinds of posts which exist under the Government and which might hereafter be created. The main provision in the Parliament (Prevention of Disqualification) Act, 1959 is contained in clauses (a) to (h) of section 3 which lists broadly 14 different categories of offices, the holding of which could not disqualify the holders thereof, or being chosen as and for being a Member of Parliament. Recently the issue to be re-visited on account of disqualification of Members of Parliament on the basis of holding an office of profit. It was brought to our notice that over 40 Members, from both the Houses, are being affected by

41 Further amended vide the Parliament (Prevention of Disqualification) Amendment Act, 2013. The amendment will exclude the Chairperson of the National Commission for the Scheduled Castes and the Chairperson of the National Commission for the Scheduled Tribes from incurring any disqualification from being an MP.

such cases of disqualification. With a view to include certain offices in Parliament (Prevention of Disqualification) Act, 1959, it is proposed to enact this legislation, so as to exempt the holders of such offices from incurring disqualification. This Bill includes those offices which firstly are in any statutory or non-statutory bodies specified in the table and secondly, the office of Chairperson or Trustee of any Trust, by whatever name called, whether public or private. They are exempted. The office of Chairman, President, Vice-President or Principal-Secretary or Secretary of the Governing Body of any society registered under the Societies Registration Act, 1860 has also been included. This will enable office-bearers to contribute for the promotion of literature, science or arts and make use of their useful knowledge for charitable purposes in such institutions, which all are aimed at securing and achieving public welfare. I commend this Bill for the consideration of this House.

The Bill was passed by the House of the People on the very day of its introduction and thereafter, it was passed by the Council of States also on the following day, ie, 17 May 2006. Significantly, the Bill proposed to give the amendments a retrospective effect from 1959 itself, so as to remove the disqualification in respect of the holders of those offices from the very date of their appointments to those offices. However, when presented to the President for his assent, the Bill was returned by the President on 30 May 2006 for reconsideration by Parliament. The President desired that Parliament should look into the legal propriety of the Bill's applicability with retrospective effect. He also wanted Parliament to study the implications of including the offices in relation to which petitions for disqualifications were then under progress by the Election Commission. He also observed that the Bill's focus should be on evolving a comprehensive criterion, which would be just, fair and reasonable, and applied across all states and union territories in a clear and transparent manner. In due deference to the above observations of the President, the Parliament reconsidered the aforesaid Bill in the Monsoon Session in July 2006. However, the Council of States and the House of the People again passed it, without any modification, on 26 July and 31 July 2006 respectively. The Parliament also decided to constitute a joint committee of both Houses to go into various issues and observations made by the President, while returning the Bill in May 2006. The President ultimately gave his assent to the Bill on 18 August 2006 and it was notified in the official gazette on the same day as the Parliament (Prevention of Disqualification) Amendment Act 2006 (No 31 of 2006).

The constitutional validity of the above amendments was questioned before the Supreme Court, but the apex court upheld the validity of the amendments in *Consumer Education and Research Society v Union of India and Ors*[42], holding that it is for Parliament to decide as to which offices should be exempted.

42 2009(8) SCJ 257, AIR 2009 SC 1680.

(ii) Unsoundness of Mind

A person shall also be disqualified for being chosen as, and for being, a member of Parliament or of a state legislature, if he is of unsound mind and stands so declared by a competent court [arts 102(1)(b) and 191(1)(b)]. It is apparent from this provision that a mere allegation that a person is of unsound mind is not sufficient to disqualify him for membership of Parliament or of a state legislature, but such person should stand so declared by a competent court under the law relating to lunacy (Indian Lunacy Act 1912). Even a certificate by a doctor or by a medical board that a person is of unsound mind will not by itself disqualify that person, but what is needed is a declaration by a competent court to that effect. Unless such a declaration of a competent court is produced before the returning officer, he should not go into the question of disqualification on this ground if raised in relation to the candidature of any person at an election.

(iii) Undischarged Insolvent

The Constitution has further laid down that an undischarged insolvent shall also be disqualified for membership of Parliament and of state legislatures [arts 102(1)(c) and 191(1)(c)].

But who is an undischarged insolvent within the meaning of arts 102(1)(c) and 191(1)(c)? This question arose for determination of the Election Commission on a reference made to it by the Governor of Uttar Pradesh for its opinion under art 192(2). It was alleged in that case that a then sitting member of the Uttar Pradesh legislative assembly had become insolvent for having committed the acts of insolvency by not paying back the loans she had obtained from the Uttar Pradesh Financial Corporation. The Election Commission opined that art 191(1)(c) comes into play only when a person is adjudged insolvent by a competent insolvency court under the provisions of the Provincial Insolvency Act 1920 and such adjudged insolvent has not been discharged from insolvency in accordance with the provisions of that Act.[43] The Commission held that an order of the insolvency court under s 27 of the said Act is a condition precedent for invoking the provisions of art 191(1)(c) and the mere commission of acts of insolvency cannot be held to be a ground for disqualification as the insolvency court has the power under the aforesaid Act not to adjudge a person as insolvent even for any acts of insolvency. Further, the disqualification on this account will also cease to be operative if the person adjudged as insolvent has been discharged from insolvency in accordance with the provisions of that Act.[44]

43 In the areas to which the Provincial Insolvency Act 1920 does not apply, the relevant law is the Presidency Towns Insolvency Act 1909.

44 See Election Commission's opinion dated 28 June 1984 to the Governer of Uttar Pradesh in Re *Smt Kishori Shukla*.

Any doubt on this point now stands conclusively settled by the Supreme Court in *Thamponoor Ravi v Charupara Ravi*.[45] The Supreme Court also held in this case that the disqualification under art 102(1)(c) and 191(1)(c) would be attracted only when a person is adjudged insolvent by the competent insolvency court.

(iv) Non-citizenship of India or Acknowledgement of Allegiance or Adherence to a Foreign State

Non-citizenship of India—The Constitution lays down the citizenship of India as a fundamental and essential qualification for membership of Parliament and state legislatures [arts 84(a) and 173(a)]. Additionally, the Constitution also lays down that a person shall be disqualified for being chosen as, and also for being, a member of Parliament or of a state legislature, if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign state, or is under any acknowledgement of allegiance or adherence to a foreign state [arts 102(1)(d) and 191(1)(d)].

Loss of citizenship, authority to decide—The laws governing the citizenship of India have already been discussed earlier in this chapter, while discussing the Constitutional Qualifications. Any question whether a person is a citizen of India or not has to be determined with reference to the relevant provisions of the Constitution and the Citizenship Act 1955, as discussed above. Basically, it is for the authorities prescribed under the said Act to decide such question. Specifically, when once a person is admitted or held to be a citizen of India, he has to be regarded as such citizen, unless there is a decision of the Central Government under s 9(2) of the Citizenship Act 1955 that he has acquired the citizenship of a foreign country. The Supreme Court has held in *Bhagwati Prashad Ghorewala Dixit v Rajiv Gandhi*[46] that if a question is raised in an election petition that certain person has acquired the citizenship of another country, the high court trying the election petition will have no jurisdiction to decide that question. Whatever may be the proceeding in which the question of loss of citizenship of a person arises for consideration, the decision in that proceeding on the said question should depend upon the decision of the authority constituted for determining the said question under s 9(2) of the Citizenship Act 1955 and it is only the declaration by such authority which, if produced, has to be given effect to.[47] But a constitution bench of the Supreme Court had earlier held in *Akbar Khan Alam Khan and Anor v Union of India and Ors*[48] that a question whether a person had never been an Indian citizen as distinguished from the question of any person having acquired citizenship of another country (and

45 AIR 1999 SC 3309, 1999(8) SCC 74.
46 AIR 1986 SC 1534.
47 *Bhagwati Prasad Dixit 'Ghorewala' v Rajiv Gandhi* AIR 1986 SC 1534.
48 [1962] 1 SCR 779.

consequent thereupon his Indian citizenship having been terminated) can be examined in a civil court.

Allegiance or adherence to a foreign state—It is not only the loss of Indian citizenship that will render a person disqualified and ineligible both for election as a member of Parliament or of a state legislature and also for continuing as such member, but acknowledgement of the allegiance or adherence to a foreign state shall also invite such disqualification. A person may be a citizen of India and continue to be regarded as such, he shall nevertheless be disqualified for membership of Parliament or of a state legislature, if he acknowledges the allegiance or adherence to a foreign state. A question arose before the Election Commission on a reference from the Governor of Tamil Nadu for its opinion under art 192(2), whether a then sitting member of the Tamil Nadu legislative assembly had become disqualified for continuing as such member on his having become the Honorary Consul General of Turkey in India at Madras. The Election Commission held that the member concerned had acknowledged the adherence to a foreign state, namely, Turkey, by accepting the appointment made by the Government of Turkey as its Honorary Consul at Madras and had thereby become disqualified to continue as member of the Tamil Nadu legislative assembly.[49] The Madras High Court, before whom the order of the Governor of Tamil Nadu based on the above opinion of the Commission was challenged, also upheld the view of the Election Commission and held the member concerned to be disqualified for being under an acknowledgement of adherence to a foreign state.[50]

A similar question against arose in 2007 before the Election Commission on a reference made by the President on a petition filed by one Shri P Rajan of Kerala. It was alleged that Smt. Sonia Gandhi had become subject to disqualification under art 102(1)(d) by reason of having accepted the title of Grand Officer of the Order of Leopold conferred by the Government of Belgium. Accepting the clarification furnished by the Government of Belgium that what was conferred on Smt. Sonia Gandhi was not a title but a decoration, the Election Commission held that Smt. Sonia Gandhi had not become disqualified under the said art 102(1)(d).[51] The Delhi High Court, before whom the order passed by the President on the opinion of the Election Commission was challenged by Dr. Subramanian Swamy, President, Janata Party, upheld the order of the President by observing that the Election Commission could not sit in appeal over the unambiguous clarification issued by the Government of Belgium in the form of a *note verbale* that Smt. Sonia Gandhi was conferred with a decoration and not a title.[52] The Delhi High Court also drew a distinction between

49 See the Election Commission's opinion dated 2 April 1981 to the Governor of Tamil Nadu in Re *KS Haja Sharief*.
50 *KS Haja Sharief v State of Tamil Nadu* AIR 1985 Mad 55.
51 Election Commission's opinion dated 13 April 2009 to the President of India.
52 *Subramanian Swamy v Election Commission of India* LAWS(DLH) 2009 (12) 218.

the case of Shri KS Haja Sharieff and the case of Smt. Sonia Gandhi, observing that 'being appointed to a post under a foreign State is not the same thing as being conferred an honour by a foreign State'.

Statutory Disqualifications

General

The Constitution provides that, apart from the disqualifications laid down by the Constitution itself, Parliament may prescribe such other disqualifications as deemed necessary. Parliament can prescribe such disqualifications for membership both of Parliament and also of all state legislatures [arts 102(1)(e) and 191(1)(e)]. These disqualifications have been presently prescribed by Parliament in ch III of Part II of the 1951 Act, containing ss 7 to 11 thereof. These disqualifications are:

(i) Disqualification on conviction for certain offences (s 8);
(ii) disqualification on ground of commission of corrupt practices (s 8A);
(iii) disqualification for dismissal from government service for corruption or disloyalty (s 9);
(iv) disqualification for contract with 'appropriate government' (s 9A);
(v) disqualification for holding office under government company (s 10); and
(vi) disqualification for failure to lodge account of election expenses (s 10A).

'Disqualification' is defined in s 7(b) to mean disqualification for being chosen as, and for being, a member of either House of Parliament or of the legislative assembly or legislative council of a state. Section 7(b) now also clarifies that a person shall be disqualified only if he is so disqualified under Chapter III of Part II, i.e., ss 8 to 10A, as explained hereafter. 'Appropriate government' is defined in s 7(a) to mean in relation to any disqualification for membership of Parliament, the Central Government, and in relation to any disqualification for membership of a state legislature, the government of the state concerned.

In the original 1951 Act, provisions relating to disqualifications were scattered over various chapters and parts of the Act. Section 7 enumerated various disqualifications, but they were subject to savings provided for in s 8. Certain interpretations and clarifications in regard thereto were made in s 9. Then there were further provisions for disqualifications in ss 139–146. These provisions came for further interpretation by the courts in various election petitions and election appeals which led to amendments in those provisions from time to time and this led to a lot of confusion. Such resultant confusion was removed to a large extent in 1966 when all these provisions relating to disqualifications were comprehensively revised and consolidated at one place in the aforementioned ch III of Part II of the 1951 Act, by the Representation of the People (Amendment) Act 1966.

(i) Disqualification on Conviction for Certain Offences

Object of the provision—Conviction for certain offences – electoral, economic or criminal – has been considered by Parliament a sufficient ground for disqualification of the convicted person for membership of Parliament and of state legislatures (s 8, 1951 Act). The Supreme Court has observed in *K Prabhakaran v P Jayarajan*[53] that the purpose of enacting disqualification under s 8:

> ...is to prevent criminalization of politics. Those who break the law should not make the law. Generally speaking, the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics and the House – a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred and have no reservation from indulging into criminality to win success at an election. Thus, section 8 seeks to promote freedom and fairness at elections, as also law and order being maintained while the elections are being held.

Classification of offences—Parliament has classified offences under s 8 into three categories having regard to the nature and gravity of those offences and their impact on the proper constitution of the legislatures.

The first category is of those offences where the mere conviction itself, without reference to any quantum of punishment therefor, attracts disqualification for a minimum period of six years from the date of conviction. The offences falling in this category are listed out in s 8(1) of the 1951 Act. The disqualification under this s 8(1) is for a period of six years from the date of conviction where the convicted person is sentenced to fine only. Where, however, the convicted person is sentenced to imprisonment for any period, he shall be disqualified from the date of conviction and shall continue to be disqualified for a further period of six years since his release.[54]

In the second category fall those offences where the conviction should result in a sentence of imprisonment for not less than six months to attract the disqualification. These offences are specified in s 8(2) and the resultant disqualification runs during the period of sentence of imprisonment and for a further period of six years from the release.

The third category in s 8(3) includes all other offences for which a person is convicted and sentenced to imprisonment for not less than two years. Here also, the disqualification is operative during the period of sentence of imprisonment and for a further period of six years from his release.

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53 AIR 2002 SC 3393.
54 Section 8(1) as amended by the Representation of the People (Amendment) Act 2002.

The first category of offences specified in s 8(1) which attract disqualification on mere conviction as mentioned above are:

(a) Section 153 A—(offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860);
(b) The Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of 'untouchability', and for the enforcement of any disability arising therefrom;
(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962);
(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967);
(e) The Foreign Exchange (Regulation) Act, 1973 (46 of 1973);
(f) The Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);
(g) Section 3 (offence of committing terrorist acts) or section 4 (offence of committing disrupting activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987);
(h) Section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988);
(i) Section 125(offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) or clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of the Representation of the People Act, 1951;
(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991;
(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971);.

(l) The Commission of Sati (Prevention) Act 1987 (3 of 1988);
(m) The Prevention of Corruption Act 1988 (49 of 1988);
(n) The Prevention of Terrorism Act 2002 (15 of 2002).

The second category of offences listed in s 8(2) where the conviction coupled with a sentence of imprisonment for not less than six months invites disqualification are:

Contravention of:

(a) Any law providing for the prevention of hoarding or profiteering;
(b) Any law relating to the adulteration of food or drugs;
(c) Any provisions of the Dowry Prohibition Act, 1961(28 of 1961).

The third category mentioned in s 8(3) covers all those other offences for which a person is convicted and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)].

Explanation to s 8 provides that in that section:

(a) 'law providing for the prevention of hoarding or profiteering' means any law, or any order, rule or notification having the force of law, providing for:
  (i) the regulation of production or manufacture of any essential commodity;
  (ii) the control of price at which any essential commodity may be bought or sold;
  (iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;
  (iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;
(b) 'drug' has the meaning assigned to it in the Drugs and Cosmetics Act 1940 (23 of 1940);
(c) 'essential commodity' has the meaning assigned to it in the Essential Commodities Act 1955 (10 of 1955);
(d) 'food' has the meaning assigned to it in the Prevention of Food Adulteration Act 1954 (37 of 1954).

Saving in the case of sitting members of Parliament and State Legislatures—The above provisions relating to disqualifications in ss 8(1), 8(2) and 8(3) were subject to an important exception in the matter of their application to sitting members of Parliament and State Legislatures. It was provided in s 8(4) that if the person convicted of any of the offences under ss 8(1), 8(2) or 8(3) was a sitting member of Parliament or of the Legislature of a State on the date of such conviction, the consequent disqualification shall not take effect in his case until three months have elapsed from the date of conviction and, if within that period of three months, an appeal or application for revision was brought in respect of the conviction or the sentence, the disqualification shall not be attracted until that appeal or application was disposed of by the court.

A view was taken by the Calcutta High Court in *Debranjan Mukhopadhaya (Dr) v Manik Chandra Mondal*,[55] that the operation of disqualification in relation to such a person shall remain stayed until the disposal of the appeal or application for revision and he shall not be disqualified to contest next election for constituting a new assembly on the dissolution of the assembly of which he was the sitting member, if his appeal or application for revision was still pending. This view was modified by the Supreme Court in *K Prabhakaran v P Jayarajan*[56] The apex court held that:

> ...sub-section (4) of section 8 of the RPA is an exception carved out from sub-section (1), (2) and (3). The saving from disqualification is preconditioned by the person convicted being a Member of a House on the date of the conviction. The benefit of such saving is available only so long as the House continues to exist and the person continues to be a Member of a House. The saving ceases to apply if the House is dissolved or the person ceases to be a Member of the House.

In other words, such a person was held to be disqualified for contesting any future election to the new House or any other House during the pendency of his appeal or application.

A contention was also made before the Supreme Court in the above case of *K Prabhakaran* that the protection against disqualification conferred by s 8(4) on the sitting members of Parliament and state legislatures was discriminatory and violative of art 14. The Supreme Court observed that a comparative reading of ss 8(3) and 8(4) would show that Parliament had chosen to classify candidates at an election into two classes for the purpose of enacting disqualification, ie, (1) a person who on the date of conviction is a Member of Parliament or legislature of a state, and (2) a person who is not such a member. The persons falling in the two groups are well-defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has a nexus with a public purpose sought to be achieved. If a member of the House was debarred from sitting in the House and participating in the proceedings, no sooner the conviction was pronounced followed by sentence of imprisonment, entailing forfeiture of his membership, then two consequences would follow. First, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted member may belong. The government in power may be surviving on a razor-edge thin majority where each member counts significantly and disqualification of even one member may have deleterious effect on the functioning of the government. Secondly, bye-election shall have to be held which exercise may prove to be futile, also resulting in complications

55 AIR 1998 Cal 244.

56 AIR 2005 SC 688.

in the event of the convicted member being acquitted by a superior criminal court. Such reasons seem to have persuaded Parliament to classify the sitting members of the House into a separate category.

The controversy on the above point, however, did not rest with the above decision of the Supreme Court in *K Prabhakaran's* case. In *Lily Thomas v Union of India and Ors*[57] it was contended that the Parliament had no power under arts 102(1)(e) and 191(1)(e) of the Constitution to enact s 8(4) postponing the effect of disqualification prescribed under ss 8(1), 8(2) and 8(3), as arts 101(3)(a) and 190(3)(a) mandate that a person's seat shall become vacant as soon as he incurs the disqualifications. A division bench of the Supreme Court has accepted the above contention and has held that, 'Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of section 8 of the Act and accordingly sub-section (4) of section 8 of the Act is *ultra vires* the Constitution'. However, the Supreme Court has observed in that case that 'sitting members of Parliament and state legislatures who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of section 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualification by virtue of sub-section (4) of section 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in this judgment. This is because the knowledge that sitting members of Parliament or state legislatures will no longer be protected by sub-section (4) of section 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this court.' The apex court has thus given a prospective effect to its judgment declaring s 8(4) of 1951-Act as *ultra vires* the Constitution.

The above judgment of the Supreme Court received wide acclaim from the public at large as a positive step in the direction of decriminalization of politics and electoral reforms. But it created a furor in political circles as some of the sitting members of Parliament and state legislatures saw an immediate and imminent danger of losing their seats if they got convicted in the cases pending against them and such conviction fell within the ambit of s 8(1), 8(2) or 8(3). The government filed a review petition before the Supreme Court, but the same was summarily rejected by the apex court on 4 September 2013. Simultaneously, the government also moved an amendment to the 1951-Act by introducing the Representation of the People (Second Amendment and Validation) Bill, 2013 in the Council of States on 30 August 2013. The amendment sought to allow a legislator to retain membership of the legislature even after conviction, if an appeal against the conviction was filed before a court (within 90 days) and the sentence was stayed by the court. The Bill also stated that the legislator can continue to take part in proceedings of the legislature; however, he will neither be entitled to vote nor draw

57 *Lily Thomas v Union of India and Ors* decided on 10 July 2013, 2013(5) SCJ 613, JT 2013 (9) SC 419.

salary or allowances until the appeal or revision is finally decided in court. If a stay is not obtained by the legislator within three months against the conviction, the legislator would stand disqualified. The Bill stands referred to the Parliamentary Standing Committee, whose report is awaited. But without waiting for the report of the standing committee, the government sought to give effect to the proposals in the said bill by promulgating an ordinance. The ordinance, called the Representation of the People (Amendment and Validation) Ordinance 2013, was referred to the President for his assent on 24 September 2013. The President, however, had some reservation in respect of the proposed provisions and consulted some legal luminaries and also invited the Union Law Minister to seek certain clarifications. Some of the prominent political parties also voiced their strong disapproval of the proposed move of the government. This set the government to have a rethink on the issue and, on reconsideration, decided to withdraw the ordinance from the President on 2 October 2013.

Resultantly, s 8(4) of the 1951 Act stands struck down at present. The first two members of Parliament to suffer the adverse consequence of losing their seats on the basis of the above verdict of the Supreme Court are Shri Lalu Prasad Yadav, member of the House of the People, and Shri Rasheed Masood, member of the Council of States, in the first week of October 2013.

Classification of offences held to be valid—It was contended before the Supreme Court that such classification of offences and provision of different periods of disqualification under s 8 was discriminatory and violative of art 14 of the Constitution. The Supreme Court, however, rejected that contention holding that classification of offences for certain purposes on the basis of the period of sentence is well-known method of classification and, therefore, the mode of classification adopted in different sub-sections of s 8 of the 1951 Act is well recognised mode of classification of offences and is not arbitrary. Prescription of period of disqualification for different classes of persons convicted of different offences is within the domain of legislative discretion and wisdom, and not open to judicial discretion.[58]

The Election Commission had pointed out[59] in July 1998 a serious anomaly in the above classification of offences. Under s 8(1), as it then stood, a person convicted of offence of rape under s 376, etc, of IPC was disqualified only for a period of six years from the date of his conviction. But if such a convicted person was sentenced to imprisonment for, say, ten years, then he was free to contest election while serving the sentence of the last four years of his imprisonment even when confined to prison. But, on the other hand, in the case of offences listed under s 8(2) and s 8(3),

58 *Raghbuvir Singh v Surjit Singh* (1994) 5 JT (SC) 311; (1994) Supp 3 SCC 162.

59 See Views and Proposals of the Election Commission on Electoral Reforms submitted to the government in July 1998.

the disqualification was to subsist not only during the whole period of imprisonment but would also continue to subsist for another six years from the date of release from prison. The Election Commission recommended that s 8 may be simplified and so amended that a conviction for any offence for which a person is sentenced to not less than six months' imprisonment should be visited with disqualification for whole of the period for which he is sentenced to imprisonment and for a further period of six years since his release. The anomaly pointed out by the Election Commission in relation to the provisions of s 8(1) of the 1951 Act vis-à-vis convictions under s 376, etc of IPC has since been removed by amending the said s 8(1) by the Representation of the People (Amendment) Act 2002, whereby the period of disqualification under that section has been enlarged so as to include the period of sentence of imprisonment and a further period of six years since the date of release.

The Election Commission had also recommended in 1998 that in order to prevent criminalisation of politics and to see that the law breakers do not become law makers, even the persons against whom charges have been framed by the competent courts in the cases of serious offences punishable with imprisonment for more than five years, like, murder, rape, dacoity, robbery, extortion, etc, should be disqualified even during the pendency of trial in those cases. The logic behind this recommendation appeared to be that such persons charged with serious offences are criminals in the eye of the public, though in strict criminal jurisprudence they may not be regarded as such unless convicted. The Election Commission has reiterated its above proposal in July 2004 and again from time to time.

The Law Commission also made a similar recommendation in its 170th Report submitted in May, 1999. It recommended that a person against whom charge has been framed under ss 153A, 171E, 171F, 171G, 171H, 171-I, 376(1), 376(2), 505(2), or 505(3) of the India Penal Code, or ss 10 to 12 of the Unlawful Activities (Prevention) Act, 1967, or the penal provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (except s 27 thereof), or ss 125, 135, 135A or 136(2) of the 1951 Act, or of any other offence punishable with imprisonment for life or death under any law should be disqualified for period of five years from the date of framing the charge, provided he is not acquitted of the said charge before the date of scrutiny of nominations.

The substantive recommendation made by the Election Commission, and also by the Law Commission, mentioned above relating to disqualification of persons facing trial charged with heinous offences, however, did not find favour with the Standing Committee of Parliament on Ministry of Law and Justice, etc., to whom that recommendation was referred for consideration. That Committee, in its 18th Report submitted on 15 March 2007, observed that under the jurisprudence followed in Indian judicial system a person was presumed to be innocent until convicted, and that it was not difficult to implicate a person in a false case and get the charges framed against him. Countering the above observations of the Standing Committee, the Election Commission has stated that if a person facing trial as an accused even in

a non-serious or compoundable offence could be lodged in prison pending trial and denied even some of his most basic fundamental rights, like, right to live freely at the place of his choice with his family, to follow his own profession and earn livelihood, etc., why his right to contest an election, which is only a statutory right, could not be temporarily kept suspended during the pendency of his trial. The Election Commission also observed that the Indian judicial system could also not be decried by saying that persons could be implicated in false accusations lightly. This view of the Commission has found support in many quarters but the controversy still remains unresolved.

Meaning of date of conviction and computation of period of imprisonment—What is meant by date of conviction under s 8 of the 1951 Act has been clarified by the Supreme Court in *BR Kapur v State of Tamil Nadu and Anor.*[60] In order to remove any ambiguity, the apex court has laid down that in those cases where the sentence is imposed on a date later than the date of pronouncement of conviction, the disqualification under s 8 would be attracted on the date on which the sentence was imposed, because only then would a person be both convicted of the offence and sentenced to imprisonment which is cumulatively requisite to attract the disqualification under that section.

The question of meaning to be assigned to the expression 'sentenced to imprisonment for not less than two years' occurring in s 8(3) of the 1951 Act came to be considered by Supreme Court in *K Prabhakaran v P Jayarajan.*[61] The Supreme Court observed that in a trial a person may be charged for several offences and, if held guilty, may be sentenced to different terms of imprisonment for such different offences. Individually, the term of imprisonment may be less than two years for each of the offences, but collectively or taken together or added to each other the total term of imprisonment may exceed two years. Whether the applicability of s 8(3) would be attracted to such a situation was the question before the Supreme Court. In that case, the respondent had been sentenced to various terms of imprisonment for different offences tried in a single trial and the sentences of imprisonment were to run *consecutively* and the total period of such sentences of imprisonment exceeded two years. The Supreme Court held that:

> In the case of consecutive sentences the aggregate period of imprisonment awarded as punishment for the several offences and in the case of punishment consisting of several terms of imprisonment made to run concurrently, the longest of the several terms of imprisonment would be relevant to be taken into consideration for the purpose of deciding whether the sentence of imprisonment is for less than two years or not.

60 AIR 2001 SC 3435, (2001) 7 SCC 231.
61 AIR 2005 SC 688.

The Supreme Court further clarified that for the purpose of attracting applicability of disqualification under s 8(3) 'what has to be seen is the total length of time for which a person has been ordered to remain in prison consequent upon the conviction and sentence pronounced at a trial'. Thus, the respondent was found to be disqualified under s 8(3) though the periods of sentences of imprisonment were individually for a period of less than two years in each sentence but were cumulatively for more than two years and were to run consecutively.

Effect of remission of sentence—If a person is convicted and sentenced to imprisonment for the period specified in ss 8(2) or 8(3), but the convicted person is granted remission for any reason reducing the period of his imprisonment to less than the period specified in the said sections, such remission has no effect on his disqualification and he remains disqualified under the law. The order of remission does not have the effect of reducing the sentence in the same way in which an order of an appellate or revisional court has the effect of reducing the sentence passed by the trial court to the extent indicated in the order of the appellate or revisional court. It affects only the execution of the sentence passed by the court and gives him a premature freedom, but does not remove his disqualification.[62] It may, however, have the effect of reduction of the overall period of his disqualification as the same will run for a period of six years from the date of his premature release.

Meaning of release from prison—For the purposes of reckoning the period of disqualification of six years from the date of release from prison, the 'release' will mean legal release and not the actual release from the prison. If the release from prison is delayed for any reason, the period of disqualification will not get prolonged so as to be counted from the date of actual release. In *MV Ramana Reddy (Dr) v Election Commission and Ors,*[63] Shri Ramana was held by the Andhra Pradesh High Court to be entitled to be released from prison from a date much earlier than the date on which he was actually released because of the remission to which he was held entitled under a government order. The high court directed that the period of his six years' disqualification should be reckoned from the date on which he was legally entitled to be released and not from the date of his actual release which was much later.

Meaning of conviction, whether by trial court or by appellate court finally, effect of bail—There was some confusion as to when the disqualification is visited on a person convicted of an offence specified in s 8 of the 1951 Act; that is to say, whether the disqualification is incurred on the date of conviction by the trial court or on the date on which the appeal or application for revision brought against the conviction or the sentence is finally disposed of by the appellate or revisional court,

62 *Sarat Chandra v Khagendranath Nath* AIR 1961 SC 334.
63 1997 (6) ALD 191 (DB).

particularly where the convicted person is released on bail during the pendency of the appeal or application for revision. Up to August 1997, the general view was that a convicted person released on bail was not disqualified for contesting election to Parliament or State Legislatures and many of such convicted persons were in fact contesting these elections and some of them even got elected. In August 1997, the Election Commission, however, took a view to the contrary and considered such persons to be disqualified.[64] In the Election Commission's opinion, the disqualification became operative from the date of the order of the trial court itself. In coming to this view, the Commission took note of the decisions to the same effect of the Madhya Pradesh High Court in *Purushottamlal Kaushik v Vidya Charan Shukla*[65] of the Allahabad High Court in *Sachindra Nath Tripathi v Doodnath*[66] and of the Himachal Pradesh High Court in *Vikram Anand v Rakesh Singha*.[67] In *Vidya Charan Shukla's* case Shri Shukla was convicted and sentenced to imprisonment for two years in a criminal case, commonly known as '*Kissa Kursi Ka*' case. He was released on bail during the pendency of his appeal and during such period, he contested election to the House of the People and got elected. An election petition was filed challenging his election. On his appeal in the criminal case, his conviction was set aside by the appellate court before the pronouncement of judgement by the high court in the election petition pending against him. But the high court held in the election petition that the nomination of Shri Shukla was improperly accepted by the returning officer as on the date of scrutiny of nominations, Shri Shukla stood disqualified under s 8 on his conviction by the trial court. Considering the effect of bail granted to Shri Shukla, pending disposal of his appeal in the criminal case, the high court observed that the grant of bail only suspended the execution of the sentence of imprisonment and such suspension did not wipe out the conviction and the sentence awarded. The Court further observed that there is no indication in s 8 of the 1951 Act that the disqualification thereunder remains in abeyance during the pendency of appeal against conviction, except as expressly provided therein in the case of sitting members of Parliament and State Legislatures. The Allahabad High Court in *Doodnath's* case above, also held that 'the disqualification (under s 8), which is an automatic effect of conviction, springs up right at the time of pronouncement of conviction', and that 'grant of bail does not interfere with the finding of conviction and that cannot render the disqualification, automatically emerging from conviction, inoperative'. A similar view was taken by the Himachal

64 See the Election Commission's order No 509/Disqln/97-JSI dated 28 August 1997, published in the *Hand Books for Candidates and Returning Officers* (1999 Reprint). Direction issued by the Election Commission dated 28 August 1997 to operationalise s 8 was held by the Madras High Court to be binding on its subordinates in *S Janakiraman v Union of India* AIR 2001 Mad 5.

65 66 ELR 110.

66 84 ELR 46.

67 AIR 1995 HP 130.

Pradesh High Court in *Rakesh Singha's* case.The Bombay High Court also took a similar view in *Bhanubhai M Raval v Union of India and others.*[68]

It is significant to note that in *Rakesh Singha's* case two appeals were filed before the Supreme Court—one challenging the order of conviction in the criminal case against Shri Singha, and the other challenging the decision of the Himachal Pradesh High Court in the election petition declaring Shri Singha's election to the state legislative assembly as void, on the ground of his disqualification on conviction. The Supreme Court dismissed Shri Singha's appeal in the criminal case and then also dismissed his election appeal against the order of the High Court in the election petition, holding that Shri Singha was disqualified ab initio for contesting election under s 8 of the 1951 Act.[69]

But in the case of the appeal filed by Shri Vidya Charan Shukla,[70] the Supreme Court took the view that the setting aside of the conviction of Shri Shukla by the appellate court and his acquittal on appeal had the effect of his disqualification under s 8 being annulled and rendered *non est* with the retroactive force from its very inception and the challenge to his election on the ground that he was disqualified was no longer sustainable in the election petition before the high court, as before the pronouncement of the judgement in that petition, Shri Shukla's conviction had already been set aside. The Supreme Court, therefore, upheld the election of Shri Shukla reversing the order of the high court, following a similar view taken by the Supreme Court earlier in *Manni Lal v Parmai Lal.*[71] The Supreme Court further observed that the returning officer had to examine the question of disqualification at the time of the scrutiny of nominations, but the high court had to decide this question on the date of its decision in the election petition. The Supreme Court, however, did not consider the question as to what would have been the position, if the appellate court had not decided the criminal appeal by the time the high court decided the election petition. But the Supreme Court observed that difficult and anomalous situation may arise if the rule in *Manni Lal v Parmai Lal* was applied to a converse hypothetical case, in which the nomination of a candidate is rejected on account of his disqualification, but his conviction is subsequently set aside which will have the effect of obliterating his disqualification with retroactive force. The Supreme Court, however, thought it unnecessary to indulge in any hypothetical and academic exercise as such a case was not before it in *Vidya Charan Shukla's* case.

68 AIR 1991 Bom 91.

69 See decision dated 9 April 1996 of the Supreme Court in *Rakesh Singha v Vikram Anand and Ors* Civil Appeal Nos 6303-5 of 1994, AIR 1996 SC 3173, (1996) 9 SCC 89. See decision dated 9 April 1996 of the Supreme Court in *Rakesh Singha v Vikram Anand and Ors* Civil Appeal Nos 6303-5 of 1994, AIR 1996 SC 3173, (1996) 9 SCC 89.

70 *Vidya Charan Shukla v Purshottam Lal Kaushik* AIR 1981 SC 547.

71 (1970) 2 SCC 462.

Some doubts were expressed in certain quarters about the correctness of the view taken by the Election Commission that the disqualification under s 8 is attracted right from the date of conviction by the trial court. It was still felt by those who had reservations in accepting the view of the Election Commission that the disqualification under the said s 8 stood suspended if the convicted person was released on bail during the pendency of his appeal or application for revision.

But all the above questions, namely, (1) when the disqualification on conviction under s 8 starts to run, (2) whether the grant of bail suspends the operation of disqualification, and (3) what would be the effect of the decision of the appellate court exonerating a convicted person subsequent to the date of the scrutiny of nominations, have now been finally answered and conclusively settled by the Supreme Court in the cases of *BR Kapur v State of Tamil Nadu and Anor*[72] and *K Prabhakaran v P Jayarajan*.[73]

In respect of the first and second questions, the Supreme Court has categorically held in both the above cases that the disqualification on conviction under ss 8(1), 8(2) and 8(3) commences from the date of conviction by the trial court, whether or not the person has been taken into custody to undergo the sentence of imprisonment or granted bail. The convicted person cannot escape the effect of disqualification merely because he has not been taken into custody for the reason that he was granted bail or was absconding. In the case of *BR Kapur*, the question before the Supreme Court was whether Km J Jayalalithaa was disqualified to be appointed as the Chief Minister of Tamil Nadu by reason of her disqualification to be elected as member of the Tamil Nadu Legislative Assembly under s 8(3) of the 1951 Act. Km. J Jayalalithaa had been convicted in a case under the Prevention of Corruption Act 1988 and sentenced to imprisonment for three years. On appeal, she was granted bail by the Madras High Court, but her petition for stay of the judgement of the trial court was dismissed, during the pendency of her appeal. The Supreme Court held:

> When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates and accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. If the appeal of the accused succeeds the conviction is wiped out as clearly as if it had never existed and sentence is set aside. A successful appeal means that the stigma of the offence is altogether erased. But that is not to say that the presumption of innocence continues after the conviction by the trial court. The conviction and sentence it carries operate against the accused in all their rigour until set aside in appeal, and disqualification that attaches to the conviction and sentence

72 AIR 2001 SC 3435, (2001) 7 SCC 231.
73 AIR 2005 SC 688.

> applies as well. The conviction and sentence stand, pending the decision in the appeal, and for purposes of a provision such as s 8 are determinative of the disqualifications provided for therein.

Km J Jayalalithaa was accordingly held to be disqualified under s 8(3) for being elected as a member of the Tamil Nadu Legislative Assembly and, consequently, also disqualified to be appointed as Chief Minister of Tamil Nadu. In the case of *K Prabhakaran*, above, also, the Supreme Court affirmed its above view that the disqualification under s 8 becomes operative from the date of conviction by the trial court and the grant of bail during the pendency of the appeal is of no avail to the convicted person in the matter of his disqualification.

The third issue relating to the effect of the decision of the appellate court exonerating a convicted person subsequent to the date of the scrutiny of nominations was examined in all its aspects and discussed threadbare by the Supreme Court in the case of *K Prabhakaran*. The apex court answered all the questions which remained unanswered in the cases of *Mani Lal* and *Vidya Charan Shukla*. The apex court held the view taken earlier in the above cases of *Mani Lal* and *Vidya Charan Shukla* to be erroneous and, overruling the judgments in both the cases, it was held:

> The question of qualification or disqualification of a returned candidate within the meaning of Section 100(1)(a) of the Representation of the People Act 1951 (RPA, for short) has to be determined by reference to the date of his election which date, as defined in Section 67A of the Act, shall be the date on which the candidate is declared by the returning officer to be elected. Whether a nomination was improperly accepted shall have to be determined for the purpose of Section 100(1)(d)(i) by reference to the date fixed for the scrutiny of nomination, the expression, as occurring in Section 36(2)(a) of the Act. Such dates are the focal point for the purpose of determining whether the candidate is not qualified or is disqualified for being chosen to fill the seat in a House. It is by reference to such focal point dates that the question of disqualification under sub-sections (1), (2) and (3) of Section 8 shall have to be determined. The factum of pendency of an appeal against conviction is irrelevant and inconsequential. So also a subsequent decision in appeal or revision setting side the conviction or sentence or reduction in sentence would not have the effect of wiping out the disqualification which did exit on the focal point dates referred to hereinabove. The decisive dates are the date of election and the date of scrutiny of nomination and not the date of judgment in an election petition or in appeal there against.

Stay of conviction, effect of—But the legal position will be quite otherwise where the appellate or revisional court stays the conviction also, during the pendency of the appeal or application for revision, where it feels that the damage done may otherwise

not be undone.[74] In such a case, though rare, the very foundation of disqualification will get eclipsed in view of the stay order, and on the analogy of the stay order granted in favour of a person found guilty of corrupt practice, he too should not incur disqualification so long as the stay order staying the conviction and sentence is in force.[75]

In *Navjot Singh Sidhu v State of Punjab*[76] the Supreme Court stayed the conviction of Shri Sidhu and by virtue of such stay order, Shri Sidhu contested the bye-election to the House of the People from Amritsar Parliamentary Constituency which had been necessitated by his own resignation on his conviction in a criminal matter, notwithstanding that he could have availed of the saving then available to him under s 8(4).

Affidavit by candidates regarding their conviction—In accordance with the view taken by the Election Commission in August 1997 that the disqualification under ss 8(1), 8(2) and 8(3) of the 1951 Act commences from the date of conviction by the trial court, regardless of whether the person is out on bail or not [except in the case of persons covered by the then available exemption under s 8(4)], the Election Commission instructed the returning officers that they should decide about the validity or otherwise of the nominations of candidates keeping in view the above position of law. To bring this instruction into operation, the Commission devised a proforma in which all candidates had to furnish information with regard to their convictions, if any, falling under the purview of ss 8(1), 8(2) and 8(3), at the time of filing of their nomination papers and in any event, before the commencement of the scrutiny of nominations.[77] The information in the proforma was to be verified and supported by an affidavit sworn before a magistrate of the first class or an oath commissioner or a notary public by each candidate. The Election Commission had further clarified that if any candidate failed to furnish the requisite information in the said proforma and the affidavit, the returning officers would be justified in drawing an adverse inference against the person concerned in regard to his disqualification on the ground of conviction.[78]

Dealing with the question of validity of the above direction of the Election Commission, the Supreme Court observed in *Shaligram Shrivastava v Naresh Singh Patel*:[79]

74 See *Ram Narang v Ramesh Narang and Ors* (1995) 2 SCC 513; See also *KC Sareen v CBI, Chandigarh* LAWS(SC)-2001 (8) 150, JT 2001 (6) 59.

75 See *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 1590.

76 AIR 2007 SC 1003.

77 See the *Handbook for Returning Officers*, 1998 edn, pp 214–19, published by the Election Commission.

78 See Election Commission Circular No 576/3/98/ Jud-II, dated 3 February 1998.

79 AIR 2003 SCW 144.

> At the time of scrutiny the returning officer is entitled to satisfy himself that a candidate is qualified and not disqualified. Sub-section (2) of s 36 authorizes him to hold an enquiry on his own motions, though summary in nature. The returning officer furnished a proforma to the candidates to be filled on affidavit and filed on or before the date and time fixed for scrutiny of the nomination paper. Therefore providing a proforma, eliciting necessary and relevant information in the light of s 8 of the Act to enquire as to whether the person is qualified and not disqualified, is an act or function fully covered under sub-section (2) of s 36 of the Act. The returning officer is authorised to seek such information to be furnished at the time or before scrutiny. If the candidate fails to furnish such information and also absents himself at the time of the scrutiny of the nomination papers, is obviously avoiding a statutory enquiry being conducted by the returning officer under sub-section (2) of s 36 of the Act relating to his being not qualified or disqualified in the light of s 8 of the Act. It is bound to result in defect of a substantial character in the nomination.

Filing of such a separate affidavit by the candidates under the instructions of the Election Commission is presently no longer required in view of the fact that they are now required to furnish the above information with regard to their convictions, if any, in their nomination papers themselves.[80] Further, all candidates are now under an obligation to furnish details of the criminal cases pending against them under the directions of the Supreme Court in *People's Union of Civil Liberties v Union of India and Ors*[81] and in the revised Form 26 which have been explained in greater detail in subsequent ch 10 under the heading 'Right to information of electors'.

(ii) Disqualification on Ground of Commission of Corrupt Practices

Commission of corrupt practice, disqualification only if President so orders—If a person commits a corrupt practice at an election, it can be called in question in an election petition filed before the High Court of the state concerned in accordance with the provisions of art 329(b) r/w Part VI of the 1951 Act. If the high court in the trial of the election petition, or the Supreme Court on appeal, finds a person guilty of commission of corrupt practice, it names him so by an order under s 99 of the 1951 Act. Such guilty person may invite disqualification for contesting elections in future to Parliament and state legislatures [s 8A(1), 1951 Act]. The maximum period for which he can be so disqualified is six years from the date the order of the court, finding him guilty takes effect [proviso to s 8A(1)].

80 See Forms 2A to 2E, 1961 Rules, as amended by the Conduct of Elections (Amendment) Rules 2002 wef 3 September 2002.

81 (2003) 4 SCC 399.

The person so found guilty of commission of corrupt practice under s 99 may not necessarily be a candidate at the election. He can even be a third person.[82] If a definite finding has been recorded against a person of having committed corrupt practice in the judgment of the high court, even if there is no separate order naming him under s 99, he shall be deemed to have been so named and will fall within the purview of s 8A.

But the disqualification under s 8A is no longer automatic. The question whether such a person should be disqualified and, if so, for what period, is determined by the President. Before giving his decision in the matter, the President is required to obtain the opinion of the Election Commission and he is bound to act according to such opinion [s 8A(3) ibid].[83]

The above question whether a person found guilty of commission of corrupt practice should be disqualified or not is required to be referred first to the President by the Secretary of the House of Parliament or state legislature concerned. It was observed in certain cases that such references to the President by the Secretaries of the Houses concerned were quite delayed with the result that the period of disqualification which could be imposed also got curtailed by such delayed references. In order to avoid such delays, it has now been provided by amending s 8A by the Representation of the People (Amendment) Act, 2009 (with effect from 1 February 2010) that the Secretary of the concerned House shall refer the matter to the President 'as soon as may be within a period of three months from the date such order (of the court finding him guilty) takes effect'.

Prior to 1975, every person found guilty of corrupt practice by a high court or the Supreme Court, as the case may be, was automatically disqualified for a period of six years from the date the order of the court took effect. But this provision relating to automatic disqualification for a fixed period of six years was amended in 1975 by the Election Laws (Amendment) Act 1975, as it was felt that the period of disqualification should have a nexus to the nature and gravity of the corrupt practice committed and should not be automatic and uniform in all cases. The Goswami Committee on Electoral Reforms recommended in 1990 that the law might again be amended so as to restore the position as was prior to 1975. But the Election Commission differs with this recommendation of the Goswami Committee and wants the present position to continue, so that there is flexibility in the quantum of punishment to be imposed upon the person committing a corrupt practice depending upon its nature, gravity and magnitude.[84] Considering such questions referred to it, the Commission has in certain cases, recommended the maximum

82 See *Balasaheb Thackeray*'s case AIR 1996 SC 113.

83 See also ch 5—under the heading 'Other Functions of the Election Commission'.

84 See the Election Commission's views on electoral reforms as communicated to the Government in July 1998.

period of disqualification for six years,[85] and in some other cases has recommended far lesser punishment for just one year.[86] In the former case, the speech containing objectionable remarks against a particular community which formed the basis of the concurrent finding of the Bombay High Court and Supreme Court regarding the commission of the corrupt practice was considered by the Election Commission as sullying the purity of the electoral process so seriously that it should, in the Commission's opinion, be visited with the maximum penalty, whereas in the latter case, the appeal on the ground of religion by means of some posters exhibited only in a few places was considered not so obnoxious by the Commission and it felt that a disqualification for one year only would meet the ends of justice. In Re *Puthunainar Athithan* also, the Commission recommended disqualification only for one year as the person concerned was found to have incurred only about Rs 4,525 in excess of the prescribed limit of Rs 50,000 as his election expenses.[87] PC Thomas, who was found by the Kerala High Court and the Supreme Court to have committed corrupt practices under s 123(3) and 123(5) while contesting election to the House of the People in 2006, was disqualified only for a period of three years.

By the aforesaid amendment of 1975, the President was also empowered to remove or reduce the period of disqualification from which any body was then suffering under the pre-amended law for commission of a corrupt practice [s 8A(2)]. Here also, he was to go by the opinion of the Election Commission in the matter.

Meaning of corrupt practice—The term 'corrupt practice' here means only the corrupt practices as defined in s 123 of the 1951 Act, and not any other irregularity or malpractice at an election.[88] At the general election to the Haryana legislative assembly in 1987, the returned candidate in Tosham assembly constituency was found by the Supreme Court to have committed serious malpractices during the process of counting and to have even threatened the returning officer to decide about the disputed ballot papers in his favour. The Supreme Court set aside his election, but observed that he had not committed any corrupt practice. Consequently, the Election Commission opined that the said candidate could not be disqualified by the President under s 8A(1).[89]

Effect of stay order on the disqualification—If the high court finds in the trial of an election petition that a person is guilty of a corrupt practice, the finding of the high court may be stayed either by the high court itself, so as to allow the person concerned to move the Supreme Court in appeal, or by the Supreme Court on

85 See the Election Commission's opinion dated 22 September 1998 in Re *Balasaheb Thackeray*.

86 See the Election Commission's opinion dated 25 March 1996 in Re *K Mohan Rao*.

87 See the Election Commission's opinion dated 17 March 1997 to the President.

88 *SB Adityan v S Kandaswami* AIR 1958 SC 857.

89 See the Election Commission's opinion dated 6 June 1996 to the President in Re *Dharam Vir*.

appeal. Once a stay order is granted, the finding of the high court shall get eclipsed and the consequent action to disqualify the person concerned under s 8A shall also be kept in abeyance till the disposal of the appeal or the vacation of the stay order, whichever is earlier.[90] Thus, in such a case, the period of disqualification shall be reckoned from the date of the order of the appellate court and not from the date of the order of the high court finding the person concerned guilty of corrupt practice.[91]

(iii) Disqualification for Dismissal from Government Service for Corruption or Disloyalty

Dismissal for corruption or disloyalty—If any person is holding an office or post under the Government of India or under the government of any state and is dismissed from the service of the government for corruption or for disloyalty to the state, he shall be disqualified for membership of Parliament or of any state legislature for a period of five years from the date of such dismissal [s 9(1), 1951 Act]. The words 'corruption' and 'disloyalty to the state' have not been defined in the 1951 Act, and these words will have to take their respective meanings from other relevant laws, like the Prevention of Corruption Act 1988 and the Indian Penal Code 1860.

Certificate by Election Commission—It will be observed from the above that the disqualification for dismissal from government service arises only if the dismissal is for corruption or disloyalty to the state and is operative for a period of five years from the date of dismissal. If during the period of five years since dismissal, any dismissed government servant wishes to contest an election, he has to produce a certificate from the Election Commission that he has not been dismissed for corruption or disloyalty to the state and such certificate by the Election Commission shall be conclusive of the fact [s 9(2), 1951 Act]. Such certificate has to be annexed to the nomination paper itself and in the absence of such certificate accompanying a nomination paper, the candidate shall not be deemed to be duly nominated and his nomination shall be liable to be rejected on this ground alone [s 33(3), 1951 Act].

Where the Election Commission is of the opinion that the person concerned has been dismissed for corruption or disloyalty to the state, the Commission shall not issue any such certificate without giving the said person an opportunity of being heard [proviso to s 9(2) ibid]. But it is not necessary to hear a person where the Commission is satisfied on the basis of the records produced that the dismissal was not for corruption or disloyalty. The Commission issued on 19 August 1999, such a certificate to one Smt Sumitra Paswan who was dismissed from the service of the Government of Bihar, for committing some acts of indiscipline and administrative lapse.

90 See *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 1590.
91 See *Rahim Khan v Election Commission of India* 66 ELR 26.

(iv) Disqualification for Contracts with Government

Disqualification for contracts, underlying object—A contract by a person with the government may also disqualify him for membership of Parliament and of state legislatures. The underlying intention here also is to ensure that there is no conflict between public duty and private interests.[92] The Supreme Court further observed in *Konappa Rudrappa Nadgouda v Vishwanath Reddy*,[93] that it is of the essence of the law of elections that candidates must be free to perform their duties without any personal motives being attributed to them and that after election they may not be in a position to get concessions from the government in the performance of their contracts. That they may not do so is not relevant, as with the possibility being there, the law regards it necessary to keep them out of elections altogether.

Contracts which disqualify—But it is not every contract with the government which attracts disqualification. Only specified types of contracts entail disqualification. Originally, it was provided that if any person, whether by himself or by any other person or body of persons in trust for him or for his benefit or on his account, had any share or interest in a contract for the supply of goods to, or for the execution of any works or the performance of any services undertaken by, the appropriate government, he shall be disqualified for membership of Parliament and state legislatures [s 7(d), 1951 Act]. But such disqualification was not incurred where the share or interest in the contract devolved on the person concerned by inheritance or succession or as a legatee, executor or administrator and a period of six months had not expired after it so devolved on him [s 8(c), ibid]. Further, such person was also not disqualified by reason of his having a share or interest in a contract entered into between the appropriate government and a public company of which he was a share holder but was neither a director holding an office of profit under the company, nor a managing agent [s 8(d), ibid]. In view of the above provisions, several doubts arose with regard to the contracts, particularly those which were entered into by the Hindu undivided families and with regard to the interests of members of such families in those contracts. In *Chattanatha Karayalar v Ramachandra Iyer*,[94] a father had a contract for felling trees in government forests and transporting them for delivery at specified places, and the question arose whether the son was disqualified on the ground that the contract was by the joint Hindu family. The facts were so controversial, that the Supreme Court had to remit the case to the election tribunal for further trial and re-appraisal of the evidence. The law then underwent a significant change in 1958 by the Representation of the People (Amendment) Act 1958.

92 *N Satyanathan v K Subramanyan* AIR 1955 SC 459.
93 AIR 1969 SC 447.
94 AIR 1955 SC 799.

Under the amended law, it was provided that a person shall be disqualified if there subsisted a contract entered into in the course of his trade or business with the appropriate government for the supply of goods to, or for the execution of any works undertaken by, that government [s 7(d), 1951 Act]. Under this amendment, the provision relating to contracts for the performance of any services undertaken by the appropriate government was also omitted.

The law was further amended in 1966 by the Representation of the People (Amendment) Act 1966, and the provisions relating to disqualification for contracts with government were incorporated in s 9A of the 1951 Act, which are still applicable. The law so amended now provides that a person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate government for the supply of goods to, or for the execution of any works undertaken by that government. Further, an explanation has also been added to s 9A to clarify that where a contract has been fully performed by the person by whom it has been entered into with the appropriate government, the contract shall be deemed not to subsist by reason only of the fact that the government has not performed its part of the contract either wholly or in part. This explanation was added by Parliament in view of the decision of the Supreme Court that a contract subsists till it is fully discharged by performance on both sides.[95] In this case, the contractor had supplied the goods ordered by the government, but the government had not made the payment and the contract was held to be subsisting till the government made the payment. A similar view was again taken by the Supreme Court in *Laliteshwar Prasad Sahi v Bateshwar Prasad*.[96] However, the Parliament thought that the subsistence of contract in such contingencies should not disqualify the contractor if he had performed his part of the contract and there was delay in the payment to him by the government. Hence, Parliament provided the above explanation to s 9A and removed the disqualification in the case of such subsistence of the contract.

Thus, under the present law, a person shall be disqualified by reason of a contract with the government if: (a) the contract has been entered into by him in the course of his trade or business; (b) the contract is for the supply of goods to, or for the execution of any works undertaken by, the government; (c) the contract is with the appropriate government; and (d) the contract is still subsisting.

Meaning of contract—The first and the foremost question to be considered under s 9A is what meaning is to be ascribed to the word 'contract' in that section. Is it any

95 *Chatturbhuj Vithaldas Jasani v Moreshwar Parashram* AIR 1954 SC 236.
96 AIR 1966 SC 580.

contract or a contract which is enforceable against the government? Contract to be enforceable against the government is to be executed in the manner prescribed in art 299. Any such contract by the Central Government has to be expressed in the name of the President and executed by such person and in such manner as the President may direct or authorise. Similarly, all contracts by a state government are to be executed on behalf of the governor of the state concerned by the authorised state government officers. If a person enters into a contract with the government, but the same is not drawn up and executed in the manner prescribed in art 299, does he attract disqualification under s 9A on account of such contract? This question came to be considered by the Supreme Court for the first time in *Chatturbhuj Vithaldas Jasani v Moreshwar Parashram*.[1] The Supreme Court held that s 7(d) (which later on became the present s 9A with some modifications) did not require that the contracts which came within its purview should be enforceable against the government and even though a contract did not comply with art 299, it would still be covered by s 7(d) so as to disqualify the contractor. But the Supreme Court took a contrary view in *Laliteshwar Prasad Sahi v Bateshwar Prasad*.[2] The Supreme Court held that a contract in contravention of art 299 was a mere agreement not enforceable against the government and it could not be called a contract with the government unless ratified by it, and such agreement did not attract disqualification under s 9A. But the controversy on the point was not resolved by the decision in *Laliteshwar Prasad Sahi's* case. In *Abdul Rahiman Khan v Sadasiva Tripathi*,[3] the Supreme Court held that though for breach of the terms of a contract not executed in the manner prescribed by art 299 a suit for relief in a civil court would not lie, but on that account it could not be said that a contract for execution of works undertaken by a person under such contract would not operate as a disqualification if both the parties to the contract treated it as binding on them. Similar view was reiterated by the Supreme Court in *Konappa Rudrappa Nadgouda v Vishwanath Reddy*.[4] In this case, a contract for construction of roads and buildings was signed on behalf of the government by an executive engineer and not by the secretary to the government, and thus it did not comply with art 299, but it was nevertheless held operative against the contractor in so far as his disqualification under s 9A was concerned.

The Supreme Court observed in *Ram Padarath Mahto v Mishri Singh*,[5] that it may sound technical, but in dealing with a statutory provision like s 9A of the 1951 Act, which imposes a disqualification on a citizen, it would be unreasonable to take merely a broad and general view and ignore the essential points of distinction on the ground that they are technical.

1 AIR 1954 SC 236.
2 AIR 1966 SC 580.
3 AIR 1969 SC 302.
4 AIR 1969 SC 447.
5 [1961] 2 SCR 470, AIR 1961 SC 480.

Contract in the course of trade or business—The contract which disqualifies a person should be entered into by himself and not by others. Further, it should be in the course of his trade or business. Prior to the amendment in 1958, the scope of the provision relating to this disqualification was much wider and included any contract entered into for the benefit of a person or on his own account or a contract in which he had any share or interest. But the amended provision has clearly narrowed the area of this disqualification.[6] A contract entered into by the *mukhiya* of a village *panchayat* on behalf of the *panchayat* with the government for certain development programme was held to be not disqualifying the *mukhiya*, as it was not executed in his personal capacity, but as the *mukhiya* of the village *panchayat*.[7] Similarly, contracts by the chairman of an electric supply company and the chairman of a cooperative society with the government were held not to be contracts by the said chairmen in the course of their trade or business, as they were entered into on behalf of the company and the cooperative society, which were separate legal entities.[8]

Contracts with partnership firms—A contract by the government with a partnership firm will disqualify the partners of the firm. If there is a private dissolution of the partnership without any notice to the government, it will not absolve the partners of such dissolved firm of their liability under the contract to the government and the partners will continue to be regarded as disqualified by reason of the contract with the government.[9] But in *D Gopalareddy v S Bai Talpalikar*,[10] the Supreme Court held that the contract by the government with one of the partners of a partnership firm which had been previously dissolved did not bind the other partners and they were not disqualified as the contract was entered into by the government with the individual and not with the partnership firm.

Contracts for supply of goods or execution of works—At present, only two types of contracts attract disqualification. Such contracts should be: (a) either for supply of goods to the government; or (b) for the execution of any works undertaken by it. As mentioned above, a contract for the performance of any services undertaken by the government is no longer a disqualification. A contract with a person who had taken loan from the government for studies and who had undertaken an obligation to serve the government for seven years was held by the Supreme Court not to be a contract contemplated under s 9A.[11]

6 *Laliteshwar Prasad Sahi v Bateshwar Prasad* AIR 1966 SC 580.
7 *Bhagwan Singh v Rameshwar Prasad Shastri* AIR 1959 SC 876.
8 *Mangilal v Krishnaji Rao Pawar* AIR 1971 SC 1943; *Shivamurthy Swami Inamdar v Agadi Sanganna Andanappa* (1971) 3 SCC 870.
9 *Konappa Rudrappa Nadgouda v Vishwanath Reddy* AIR 1969 SC 447.
10 39 ELR 305.
11 *Chandulal v Ramdas* 41 ELR 214.

Contracts for supply of goods, types of—The first type of contract attracting disqualification is for the 'supply of goods' to the government. In *CVK Rao v Dantu Bhaskara Rao*,[12] a candidate elected to the Andhra Pradesh legislative assembly had obtained a mining lease from the Government of Andhra Pradesh. One of the covenants of the lease was that the state government had a right of pre-emption of the minerals lying in or upon the land demised or elsewhere under the control of the lessee, if the government gave a notice in writing to that effect. The question arose whether the said candidate stood disqualified on the date he filed his nomination paper when he had not begun the mining operations under the aforesaid lease. The Supreme Court held that the above-mentioned covenant did not create any obligation on the part of the government to buy nor was there any compulsion on the part of the lessee to sell goods unless asked by the government. The covenant did no more than to keep intact a right of the government to obtain minerals from the lessee in preference to others. Therefore, it could not be said that a contract for the sale of goods subsisted between the lessee and the government, because a contract requires an offer and its acceptance and not mere reservation of a right. In *Chatturbhuj Vithaldas Jasani v Moreshwar Parashram*,[13] a running arrangement for supply of *bidis* to the canteen department of the Ministry of Defence was held to be a contract for the supply of goods to the government. The contract in this case also required replacement of defective goods so supplied and this part of the contract was also held to be one for the supply of goods which were sent as replacements.

Contracts for execution of works, types of—The only other type of contract which now attracts disqualification is for the 'execution of any works' undertaken by the government. The word 'works' has been used in s 9A in plural and this is not without significance. The Supreme Court has held in *Dewan Joynal Abedin v Abdul Wazed*[14] that the word 'works' has been used in the expression 'execution of any works' in the sense of 'projects', 'schemes', 'plants', such as building works, irrigation works, defence works, etc. It is used in the same sense as the word 'works' is used in Entry 35 of List II of the Seventh Schedule to the Constitution. A similar view was taken by the Supreme Court in *Kartar Singh Bhadana v Hari Singh Nalwa*,[15] that it is only when the appropriate government has undertaken works, such as the laying of a road, the erection of a building or the construction of a dam, and has entered into a contract for the execution of such works that the contractor is disqualified under s 9A. In this case, the Punjab and Haryana High Court had taken a view that a mining lease granted and demised by the Government of Haryana to a partnership firm of which the appellant was a partner, was a contract for the execution of works

12 AIR 1965 SC 93.
13 AIR 1954 SC 236.
14 (1988) Supp SCC 580.
15 AIR 2001 SC 1556, (2001) 4 SCC 661.

on behalf of the state government within the meaning of the said s 9A. The Supreme Court, however, did not agree with that view of the high court and reversed its decision, holding that the mining lease in question did not operate to disqualify the lessee, despite a covenant therein to the effect that if the lessee did not carry out its obligations under the covenants the lessor may cause the same to be carried out and performed and the lessee shall pay the lessor all expenses in this behalf. The obligation of the Central Government under s 18 of the Mines and Minerals (Development and Regulation) Act 1957 is to take steps for the systematic development of minerals in India and for such purpose to make rules; there is no obligation caused upon the government to exploit minerals and the obligation is to ensure that such exploitation as takes place is systematic.

In the case of *Dewan Joynal* above, it was held that the person acquiring the right to collect toll at a public ferry under the Northern India Ferries Act could not be said to be performing a contract for execution of works undertaken by the government. Even the obligation on the part of the contractor under the contract to mark buoys or places where there were any submerged obstructions or dangerous rocks within half a mile of the landing *ghats* was not considered as execution of works undertaken by the government in this case.

The Supreme Court, in *Ranjeet Singh v Harmohinder Singh Pradhan*,[16] was concerned with a case where the returned candidate had a subsisting contract, in partnership with others, with the appropriate government for the sale of liquor. The apex court, relying upon *Dewan Joynal's* case, held that the returned candidate had not incurred the disqualification. The court observed that s 9A was a statutory provision which imposed a disqualification on a citizen and it was, therefore, unreasonable to take a general or broad view, ignoring the essentials of the section and the intention of the legislature.

Similarly, a stockist of cement and foodgrains on behalf of the government was not considered to be holding a contract for execution of works undertaken by the government.[17] So was held by the Allahabad High Court in *Ram Raj Tewari v Vijaiya Laxmi*,[18] in the case of a liquor vendor selling liquor under a permit from the government. That high court also held in *Brahma Dutt v Paripurna Nand Family and Ors*,[19] that the printing of advertisements on behalf of a government organisation in the newspaper did not amount to execution of works of that government.

Likewise, a dealer under the public distribution system was held by the Supreme Court as not being a contractor within the meaning of s 9A.[20]

16 (1999) 4 SCC 517, AIR 1999 SCW 1646, AIR 1999 SC 1960.
17 *Deochandra Jha v Ramchandra Mishra* AIR 1964 Pat 111.
18 AIR 1986 All 325.
19 AIR 1972 All 340.
20 *Somnath Rath v Bikram K Arukh* AIR 1999 SC 3417.

Contract with appropriate government, meaning of appropriate government—As mentioned above, 'appropriate government' has been defined in s 7(a) of the 1951 Act. For membership of Parliament, it will be a contract with the Central Government which will invite disqualification under s 9A, and not with any state government. Likewise, only a contract with the state government concerned will attract disqualification for membership of the legislature of that state.

The word 'government' here means the government and any of its departments, but not any government company or corporation. A contract with the Bihar State Electricity Board was not considered to be a contract with the government within the meaning of s 9A, as the Board is a separate statutory body.[21] A municipal council was also not considered to be government for the purposes of s 9A by the Rajasthan High Court.[22]

The word 'government' also does not include a local authority or other authorities under the control of state government for purposes of disqualification under s 9A. In *Srikant v Vasantrao and Ors*,[23] the appellant had entered into three contracts with government of Maharashtra for certain construction works. Subsequently, the government of Maharashtra created Godawari Marathwada Irrigation Development Corporation and Maharashtra Jeevan Pradhikaran under two state acts, and transferred the said contracts of the appellant to those newly created authorities. The Supreme Court held that, on such transfer of the contracts to the said authorities, the appellant could not be said to be holding a subsisting contract with the government of Maharashtra and thus he could not be considered to be disqualified under s 9A.

Contract to be subsisting, meaning of—Under s 9A as amended in 1966, a person shall be disqualified if, and for so long as, there subsists a contract between him and the government. So, the disqualification under that section for entering into a contract with the government continues so long as the contract continues to subsist and is thus co-terminus with the termination of the contract. A contract is said to be in subsistence till it is fully discharged by the performance on both sides. But the Explanation to the said s 9A, as inserted in 1966 in the wake of the judgments of the Supreme Court in the *Chatturbhuj Vithaldas Jasani* case and the *Laliteshwar Prasad Sahi* case discussed above, makes an important exception to this general rule and provides that where a contract has been fully performed by the person by whom it has been entered into with the appropriate government, the contract shall be deemed not to subsist by reason only of the fact that the government has not performed its part of the contract either wholly or in part.

21 *Sadaquat Hussain Khan v Ram Sewak Singh* 52 ELR 299.
22 See (1989) 1 Raj LR 941.
23 AIR 2006 SC 918.

Interpreting this explanation to s 9A, the Supreme Court held in *Abdul Rahiman Khan v Sadasiva Tripathi*[24] that the explanation contemplates a case where the contract has been fully performed by the contractor but not by the government, but where the contract has not been wholly performed or completed by the contractor, he cannot claim that there was no subsisting contract, unless he shows that the contract had been determined by mutual consent. But the Supreme Court subsequently held that a contract could be determined and put to an end by unilateral action also on the part of the contractor. It was held in *S Munishamappa v B Venkatarayappa*,[25] that where there is intentional breach of contract or refusal to work by the contractor, with due notice to the government, the contract cannot be said to subsist after such breach or refusal. It was also held in this case that the fact that the completion certificate was not issued in favour of the contractor or that his security was not returned, was not conclusive of the fact that the contract still subsisted. Similar was the view reiterated by the Supreme Court in *Ashling v LS John*,[26] that where a contractor unilaterally terminates a contract under intimation to the government and puts an end to the contract by breach, the contract will not disqualify such contractor, as the contract can be terminated by breach also. In such a case, letter of acceptance from the government of the termination of the contract is not necessary. Although, such breach may give rise to cause of action against the contractor for damages, but it would not invite disqualification under s 9A. But where a contractor never intended nor in fact put an end to the contract but continued with the same through the proxy of his real brother, the contract was held to be subsisting with the original contractor and he was found to be disqualified under s 9A by the Supreme Court in *Sewa Ram v Sobaran Singh*.[27] However, in *Prakash Khandre v Vijaya Kumar Khandre*,[28] the Supreme Court held that once a contract with the contractor has been terminated by the government, a statement made by the contractor in an affidavit indicating that if the substitute contractor failed to execute the work, the earlier contractor would take the full responsibility of getting it completed on the same rate, terms and conditions, would not mean that any new contract for getting the works to be carried out was executed between the government and the earlier contractor. The name of the earlier contractor in the measurement books kept by some officers of the government after the termination of the contract would also not mean that the contract was still subsisting after the same had been terminated by the government. Further, the fact that the contract with the substitute contractor who was the brother of the candidate was granted without

24 AIR 1969 SC 302.
25 AIR 1981 SC 1177.
26 AIR 1984 SC 988.
27 *Sewa Ram v Sobaran Singh* AIR 1993 SC 212.
28 AIR 2002 SC 2345.

following the proper procedure would hardly be a ground for holding that the contract with the candidate still subsisted.

In *Konappa Rudrappa Nadgouda v Vishwanath Reddy*,[29] the construction work under the contract with the government had been substantially done by the contractor, but a liability on his part to repair the faulty work still remained. The Supreme Court held that if some part of the construction work was found defective and had to be redone, the contract of execution as such was still to be fully performed and no execution could be said to be proper or complete till it was properly executed. Therefore, the contract was held to be still subsisting and the contractor was found to be disqualified under s 9A. In *Rajeshekar Basavaraj Patil v Subhash Kallur and Ors*,[30] the returned candidate averred that he had unilaterally brought the contract to termination by notice to the government. But the evidence showed that there was no such unilateral termination of the contract and that ten percent of the work awarded to him still remained to be completed. He was held to be disqualified and his election was set aside.

It was alleged in *PH Paul Manoj Pandian v P P Veldurai*[31] that the returned candidate had three contracts subsisting with the government of Tamil Nadu on the date of filing of his nomination paper. The returned candidate contended that his contracts were terminated by the Divisional Engineer and the same was ratified by the Superintending Engineer before the date of scrutiny. The Supreme Court, however, held that, as per a government order issued on 16 November 1951, it was only the Chief Engineer and neither the Divisional Engineer nor the Superintending Engineer was competent to cancel the contracts. The returned candidate was accordingly held to be holding subsisting contracts with the state government on the date of the scrutiny of nominations and was declared as disqualified under s 9A and his election was declared void.

(v) Disqualification for Holding Office under Government Company

Only specified offices to attract disqualification—The various offices of profit under the Government of India or of a state, the holders whereof are disqualified for membership of Parliament or of a state legislature, have been discussed in detail above under the heading 'Constitutional Disqualifications'. It has been mentioned therein that, according to the tests laid down by the Supreme Court for determining the question whether an office shall entail disqualification, the employees of government companies, corporations and undertakings shall normally not attract the disqualification for the purpose under the Constitution. However, it is provided by Parliament that if a person is holding the office of a: (i) managing agent; (ii) manager; or (iii) secretary of any company or corporation (other than a cooperative

29 AIR 1969 SC 447.
30 AIR 2002 SC 3524.
31 2011(3) SCJ 925.

society) in the capital of which the appropriate government has not less than 25 percent shares, such person shall also be disqualified (s 10, 1951 Act). It, however, deserves to be noted that the disqualification shall be attracted only by the persons holding the above-mentioned offices and not by the other employees of such government companies or corporations. Further, all cooperative societies also fall outside the purview of this disqualificatory provision. No definition of managing agent, manager or secretary has been provided in the 1951 Act, and these offices may derive their meanings from the Companies Act 1956.

The Supreme Court held in *Pradyut Bordoloi v Swapan Roy*[32] that the post of clerk in the Coal India Ltd, a government company within the meaning of s 617 of the Companies Act, is not an office of profit under art 191(1)(a). The exercising of some supervisory function, occasionally in the absence of his senior officer on account of leave or absence, over his subordinates would not also make him a manager of the company so as to disqualify him under s 10 of the 1951 Act. A *khalasi* or meter reader holding a non-executive post in Bokaro Steel Plant, a government company, was also held not to be disqualified within the meaning of s 10 of the 1951 Act or art 191(1)(a) of the Constitution.[33] Employees of a cooperative society are not employees of government and thus do not hold an office of profit under the government.[34]

Meaning of appropriate government—The appropriate government here shall have the same meaning as has been explained above in the context of contracts with the government. In other words, a person holding any of the above-mentioned offices in a company or corporation in which the Central Government has at least 25 percent shares, shall be disqualified for membership of Parliament only, and not for the membership of any state legislature. Likewise, a person holding the above office in a company or corporation in which a state government holds at least 25 percent shares shall be disqualified for membership of the legislature of that state alone, and not of any other state legislature or Parliament.

(vi) Disqualification for Failure to Lodge Account of Election Expenses

Disqualification for failure without good reason or justification—Every candidate at an election to the House of the People or to a state legislative assembly has to keep and maintain a separate account of his election expenses incurred or authorised by him or by his election agent between the date on which he has been nominated as such candidate and the date of declaration of result of the election, both dates

32 AIR 2001 SC 296.

33 *Aklu Ram Mehto v Rajendra Mehto* AIR 1999 SC 1259.

34 *Union of India and others v Ram Singh Thakur and others* 2011(6) SCJ 365.

inclusive [s 77(1), 1951 Act].[35] The law further requires that every contesting candidate shall lodge a true copy of the account of his election expenses with the district election officer of the district in which his constituency falls, within a period of 30 days from the date of declaration of result of the election (s 78, ibid). Even in the case of a union territory, such account is now to be lodged with the district election officer as district election officers are now appointed even in union territories.[36]

Rule 86 of the 1961 Rules prescribes that the account should be maintained from day to day and should show the particulars mentioned in that rule. In order to ensure that the candidates maintain their accounts in the manner required, the Election Commission has now devised a register in which such account is to be maintained by every candidate. It is supplied by the returning officer to each candidate as soon as he files his nomination paper. After the election, this very register is now required to be submitted by the candidate to the district election officer, along with some abstract statements showing the details of his expenditure under various heads and sub-heads.[37] The account of expenditure may be maintained in English, Hindi or any local language in which the electoral roll is printed.[38]

If a candidate fails to lodge the account of his election expenses within the time and in the manner required, he shall be disqualified by the Election Commission, if he has no good reason or justification for his failure (s 10A, ibid). Such disqualification shall be operative for a period of three years from the date of order of the Election Commission so disqualifying him. The order of the Election Commission is required to be published in the Official Gazette, but the disqualification is attracted from the date on which the Election Commission issues the order though it may have been published in the Official Gazette at a later date. The High Court of Punjab and Haryana has observed that the Election Commission need not state the reasons for disqualifying a person under s 10A in the disqualification order as such reasons are inbuilt in that section itself.[39]

Originally, the return of election expenses could be filed by a candidate within 45 days of the declaration of result of election and the period for which a candidate was disqualified for his failure to lodge his account of election expenses was five years from the date by which his return ought to have been lodged [s 7(c), 1951 Act]. But such disqualification took effect only on the expiration of two months from the aforesaid date by which the return ought to have been lodged [s 8(c) ibid], and

35 See also the discussions under the heading 'Corrupt Practices—Corrupt Practice of Incurring or Authorising Election Expenditure in Excess of Prescribed Limit' in ch 16.

36 Section 78 of the 1951 Act, as amended by the Representation of the People (Second Amendment) Act 2003 (Act 2 of 2004)].

37 See the *Handbook for Candidates* published by the Election Commission.

38 See the Election Commission's order No. 76/95/JS-II, dated 10 April 1995.

39 *Capt Chanan Singh Sidhu v Election Commission of India and Ors* AIR 1992 P&H 183.

during this period the candidate could lodge his return of election expenses and the Election Commission could remove his disqualification [s 144, ibid]. However, this proved to be a cumbersome procedure. In 1956, the law on the subject was amended by the Representation of the People (Amendment) Act 1956. First, the period of disqualification was reduced from five years to three years. Then, it was provided that a candidate shall be disqualified only when the Election Commission decided that he had failed to lodge his return within the time and the manner prescribed and such disqualification took effect after two months of the Commission's decision. Again, during this period of two months, the disqualification could be removed by the Election Commission, if the account was lodged. This revised procedure also was equally cumbersome. Therefore, it was further revised in 1966, to provide that a candidate shall be disqualified only when the Commission so orders after giving him an opportunity of complying with the law and explaining the reason for his failure, in the manner explained below.

Procedure for imposing disqualification—It may be noted that at present a candidate is not disqualified by the Election Commission for his mere failure to submit his account of election expenses, but shall be disqualified if he has no good reason or justification for such failure. Therefore, the rules prescribe that every defaulting candidate must be given a notice by the Election Commission to show cause why he should not be disqualified under s 10A for the above failure [r 89(5), 1961 Rules]. The Allahabad High Court has observed that the power of the Election Commission to proceed under r 89 (5) is not dependent on the report of the district election officer under r 89. If the report of district election officer is a pre-condition for Election Commission to act under s 10A and r 89(5), the Commission's powers and jurisdiction shall be fettered by the opinion of the district election officer and, if there is no adverse report from the district election officer, the Commission cannot be held to be powerless to take any action under s 10A.[40] Such candidate may thereupon submit his account of election expenses to the district election officer within 20 days of the receipt of the notice from the Election Commission and also a representation explaining the reason for his earlier failure. If the candidate again fails to respond to the notice and does not submit his account of election expenses within the said period of 20 days, the Election Commission disqualifies him. The Election Commission may also disqualify him, if he fails to furnish a good reason or justification for his earlier failure, though he may have submitted his account of election expenses in response to the Commission's notice. But the Commission is normally reluctant to disqualify a person who submits his account in response to the Commission's show cause notice.

40 *Umlesh Yadav v Election Commission of India and others* Writ Petition No. 63965 of 2011-decided on 3 May 2013.

Time limit for imposition of disqualification—There is no time limit fixed under the law within which the Election Commission may take a decision with regard to the disqualification of a candidate for his failure to submit his account of election expenses. However, the Karnataka High Court observed on 26 July 1999 in *Guinness Hote Paksha Rangaswamy v Chief Election Commissioner,*[41] that the Commission should dispose of such cases with reasonable promptitude and within a reasonable time. The high court, in this case, quashed the order of the Election Commission whereby it had disqualified the petitioner on 7 December 1998 for his failure to lodge the account of his election expenses in connection with the general election to the Karnataka legislative assembly held in 1994, holding that there was unreasonable delay in the disposal of the case of the petitioner by the Election Commission. The high court observed that when a power is conferred on an authority to effectuate a purpose, it has to be exercised in a reasonable manner and exercise of power in a reasonable manner inheres the concept of its exercise within a reasonable time.

Correctness or falsity of return—Another point to be noticed in this context is that the Election Commission can disqualify a candidate for his failure to lodge the account of his election expenses within the time and in the manner prescribed by law. A view was earlier taken by the Election Commission that the question of filing an incorrect account suppressing or undervaluing any item of his election expenditure did not fall for its scrutiny within the purview of s 10A and that such a question could be raised only before the high court in an election petition. In other words, in the view of the Election Commission, the correctness of the account of election expenses could not be gone into by the Election Commission. The Commission took this view in the light of the decision of the Supreme Court in *Sucheta Kriplani v SS Dulat,*[42] that such matter can be enquired into by the high court in an election petition and not by the Election Commission.

However, the one thing that needs to be noted here is that at the time of the decision in the *Sucheta Kriplani* case, the filing of an incorrect or false account was a minor corrupt practice under s 124(4) of the 1951 Act which could be agitated in an election petition. But this provision was dispensed with by the Representation of the People (Amendment) Act 1956, and now only the exceeding of the prescribed limit of election expenses is a corrupt practice under s 123(6). Even if a person files a false return, he shall not be deemed to have committed a corrupt practice unless it is proved that he has spent beyond the prescribed ceiling on his election expenses. Thus, in view of the above decision in *Sucheta Kriplani's* case, any candidate could lodge an incorrect or false return and go scot free, unless it was further proved in an election petition that his election expenditure exceeded the prescribed ceiling.

41 AIR 2000 Kant 117.
42 AIR 1955 SC 758.

Taking note of the amended provisions of the law relating to corrupt practice of exceeding the prescribed limit of election expenses under s 123(6) of the 1951 Act, the Supreme Court has now held in *LR Shivaramagowda v TM Chandrashekar*,[43] that the question of correctness or falsity of the return of election expenses lodged by a candidate can be raised before the Election Commission and if an account is found to be incorrect or untrue by the Commission after enquiry under r 89 of the 1961 Rules, it could be held that the candidate had failed to lodge his account within the meaning of s 10A and the Commission may disqualify the said person. The Supreme Court observed in that case:

> In our opinion, sub-section (a) of Section 10 (A) takes care of the situation inasmuch as it provides for lodging an account of election expenses in the manner required by or under the Act. Section 77 (2) provides that the accounts shall contain such particulars as may be prescribed. Rule 86 of the Conduct of Election Rules provides for the particulars to be set out in the account. The said Rule prescribes that a voucher shall be obtained for every item of expenditure and for lodging all vouchers along with the account of election expenses. Rule 89 provides that the District Election Officer shall report to the Election Commission, the name of each contesting candidate, whether such candidate has lodged his account of election expenses and if so the date on which such account has been lodged and whether in his opinion such account has been lodged within the time and in the manner required by the Act and the Rules. That Rule enables the Election Commission to decide whether a contesting candidate has failed to lodge his account of election expenses within the time and in the manner required by the Act after adopting the procedure mentioned therein. If an account is found to be incorrect or untrue by the Election Commission after enquiry under Rule 89, it could be held that the candidate had failed to lodge his account within the meaning of Section 10 (A) and the Election Commission may disqualify the said person.

Taking a cue from the above observation of the Supreme Court, certain complaints were made to the Election Commission in November-December, 2009 that a large number of newspaper articles had appeared in some newspapers having a wide circulation in the district of Nanded during September-October, 2009 eulogizing Shri Ashok Chavan, the then Chief Minister of Maharashtra. It was alleged by the complainants that the said newspaper articles, etc., were in fact 'paid news' in connection with his election to the Maharashtra Legislative Assembly held in September-October, 2009 from 85-Bhokar Assembly Constituency, for which the expenditure had been incurred or authorized by Shri Ashok Chavan. It was further alleged that the huge expenditure so incurred or authorized by Shri Ashok Chavan

43 AIR 1999 SC 252, (1999) 1 SCC 666.

was not shown in his account of election expenses and, thus, he had not filed a true and correct account of his election expenses. The Election Commission issued a notice to Shri Chavan requiring him to show cause as to why he may not be disqualified under s 10A for filing an incorrect account of his election expenses. In reply, the contention of Shri Ashok Chavan was that the Commission had no power to go into the correctness of the account submitted by him and that the Commission had only the limited power to see whether the account had been lodged in the manner by filing a day to day account supported by the relevant vouchers. The Election Commission did not agree with the contention of Shri Ashok Chavan and passed a speaking order dated 2nd April, 2011, on this preliminary issue, as insisted upon by Shri Ashok Chavan, holding that the Commission possessed the power to go into the correctness of his account of election expenses under s 10A, mainly relying upon the decision of the Supreme Court in *Shivarama Gowda* case (supra). The Delhi High Court, before which the above order of the Election Commission was questioned by Shri Chavan, upheld the impugned order by its order dated 30 September 2011[44]. The matter was further agitated by Shri Ashok Chavan before the Supreme Court (SLP No.29882 of 2011). At first, the Supreme Court passed a preliminary direction on 3 November 2011 staying the operation of the impugned order of the Election Commission and the order of the Delhi High Court. Subsequently, by another interim order dated 2 May 2012, the Supreme Court permitted the Election Commission to proceed with the enquiry against Shri Ashok Chavan, but not to pass the final order till the disposal of the matter by that court. The Election Commission, however, considered it desirable to wait for the final order of the Supreme Court before proceeding further, if necessary, in the enquiry against Shri Ashok Chavan. The final verdict of the Supreme Court has not yet been pronounced in the matter. Alongside the matter of Shri Ashok Chavan, another similar matter in which the Election Commission issued a similar notice to Shri Madhu Koda, former Chief Minister of Jharkhand, for not filing a true account of his election expenses, has also been tagged by the Supreme Court. In the case of Shri Madhu Koda, the impugned orders of the Election Commission and Delhi High Court, have been absolutely stayed till the pending of his appeal before the Supreme Court (SLP No. 14209 of 2012).

Simultaneously with the processing of the cases of *Ashok Chavan and Madhu Koda*, the Election Commission was also enquiring into another case of lodging an incorrect return of election expenses by Smt Umlesh Yadav, who had contested the general election to the Uttar Pradesh Legislative Assembly in 2007 from Bisauli assembly constituency. In this case, the Press Council of India had found that Smt Umlesh Yadav and her party had issued some advertisements in two newspapers which appeared to the Council as 'paid news'. After notice to Smt Umlesh Yadav

44 *Ashok Shankarrao Chavan v Madhavrao Kinhalkar & Ors* (DLH) 2011 (9) 161; ILRDLH 2011(21) 4378.

and giving her a hearing, the Commission disqualified her on 20 October, 2011 under s 10A for not lodging a true account of her election expenses, as the expenditure on the said paid news was not shown in her above account. The Allahabad High Court, before which she challenged the Commission's order, dismissed her petition on 3 May 2013, upholding the Commission's decision. The High Court held that the Commission has the power under s 10A to look into the correctness or truthfulness of the account of election expenses maintained by a candidate under s 77 and copy thereof filed under s 78. Smt. Yadav has also taken the matter to the Supreme Court which has been tagged with the case of Shri Ashok Chavan as well.

Removal or Reduction of Period of Disqualification

The foregoing discussions will show that Parliament has prescribed various disqualifications for membership of Parliament and state legislatures in ss 8, 8A, 9, 9A, 10 and 10A of the 1951 Act, and has also prescribed the periods for which such disqualifications will run or subsist under those provisions. But Parliament has also simultaneously empowered the Election Commission to remove any such disqualification or reduce the period of such disqualification, except the disqualification under s 8A for commission of corrupt practices (s 11, 1951 Act). Power to remove disqualification under s 8A has not been conferred on the Election Commission because the very imposition of disqualification under that section and the period of such disqualification is determined by the President on the opinion of the Commission itself.

The Election Commission can exercise the above power where it considers that the disqualification imposed upon or incurred by any person is either not warranted, or is too excessive in the facts and circumstances of that case, and that it should either be removed altogether or its period may be reduced. The Election Commission has to record its reasons for removing or reducing the period of any disqualification, so that it does not act arbitrarily and without good cause or justification.

Normally, the Election Commission does not act suo motu in such cases, and invokes its extraordinary jurisdiction only where it is moved by the person concerned providing full justification in this behalf. The person concerned is also given normally an opportunity of being heard by the Commission before it takes any decision in the matter, though it is not a prescribed requirement under s 11.

The majority of the cases where the Election Commission has exercised its power to remove or reduce the period of disqualification of any person are those where it itself disqualified certain candidates under s 10A for their failure to lodge their accounts of election expenses. Only rarely has it used its power in the case of other disqualifications. In one such rare case, the Election Commission removed the

disqualification of a person convicted of murder and further removed his disqualification with retrospective effect which had the effect of saving his election to the Uttar Pradesh legislative assembly. In this case, the person concerned was convicted of murder and sentenced to life imprisonment. But part of his sentence was remitted and he was released prematurely from prison. Under the then existing provisions of s 8, he was disqualified for a further period of five years since his release. But only after a lapse of about two-and-a-half years since his release, he contested election to the Uttar Pradesh legislative assembly in 1977 from Pharenda assembly constituency and got elected. The Commission somehow considered it to be a fit case for removal of his disqualification for the remaining period of about two-and-a-half years and removed his disqualification from a back date which was prior to the date of filing his nomination paper at the aforesaid election, so that he could not be deemed to be disqualified on the date of scrutiny of nominations.[45]

Disqualification on Ground of Defection

General

In the Constitution, as originally framed, there was no mention about the political parties and no reference to their existence. But their existence was implicit in the nature of democratic form of Government which India had adopted under the Constitution.[46] Therefore, from the very beginning, elections to Parliament and state legislatures have been contested on party lines and voters have always been influenced by appeals of political parties based on their policies and programmes. It may not be far from truth if it is said that, in majority of the cases, they have been voting for political parties rather than the candidates. But in the mid-sixties, the country saw a very unsavoury political phenomenon. Many of the elected representatives of the people left the parties on whose ticket they were elected and joined those very opponent parties whose candidates they had defeated at the hustings and which were rejected by the electorates. In most of these cases, such political defections were taking place by the lure of office rather than on the basis of honest political dissent. In some of the cases, the conscience of the nation was rudely jolted when some legislators defected from their original party in the morning to join the opponent party and returned the same evening to their original fold. This led to introduction of a new jargon of '*Aaya Ram Gaya Ram*' in the political parlance. Parliament also took serious note of this disturbing political development and resolved on 8 December 1967, to set up a high level committee consisting of representatives of political parties and constitutional experts 'to consider the problem of legislators changing their allegiance from one party to another and their frequent

45 See the Election Commission's order dated 26 July 1977 in Re *Shyam Narain Tewari*.

46 *Kanhiya Lal Omar v RK Trivedi and Ors* AIR 1986 SC 111.

crossing of the floor in all its aspects and make recommendations in this regard'. The committee so set up under the chairmanship of (late) Shri YB Chavan, known as 'Committee on Defections', observed in its Report dated 7 January 1969 that compared to roughly 542 cases of defections in the entire period of 15 years between the first and the fourth general elections, at least 438 defections had occurred in the 12 months between March 1967 and February 1968. The Committee further observed that the lure of office played a dominant part in the decisions of the legislators to defect as majority of them were included in the council of ministers, which they helped to bring into being by defections. That Committee recommended, inter alia, that a defector should be debarred from appointment as a minister for a period of one year or till such time as he resigned his seat and got himself re-elected. To give effect to this recommendation, a Bill, called the Constitution (Thirty-second Amendment) Bill 1973 was introduced in the House of the People on 16 May 1973. But the Bill lapsed without being passed on the dissolution of that House in 1977. Again, another Bill, called the Constitution (Forty-eighth Amendment) Bill 1979 was introduced in the House of the People, but that too lapsed and nothing was done by the House of the People which functioned from 1979 to 1984. It was ultimately in 1985 that the Constitution was amended by the Constitution (Fifty-second Amendment) Act 1985 to ban political defections. The Statement of Objects and Reasons appended to the Bill introduced in this behalf stated that:

> 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. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.

In *Kihota Hollohon v Zachilhu and Ors*,[47] the Supreme Court observed that the 'object of anti-defection Act is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy'.

By the aforesaid Constitution (Fifty-second Amendment) Act 1985, arts 102 and 191, laying down the disqualifications for membership of Parliament and state legislatures were amended by the inclusion of a new cl (2) in those articles to provide that a person shall be disqualified for being (that is to say, for continuing as) a member of Parliament or of a state legislature, if he is so disqualified under the Tenth Schedule to the Constitution, which was also newly added to the

47 AIR 1993 SC 412.

Constitution by the same amendment. Detailed provisions have been made for disqualification on the ground of defection in the said Tenth Schedule.

Grounds for Disqualification

It is mainly provided in para 2(1) of that Schedule that a member of Parliament or state legislature belonging to any political party shall be disqualified for continuing as such member, if he: (i) has voluntarily given up his membership of such political party; or (ii) votes or abstains from voting in the House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within 15 days from the date of such voting or abstention.

For voluntarily giving up the membership of a political party, it is not necessary that a person should tender his resignation. These words have a wider connotation, and inference can be drawn from the conduct of the person that he has voluntarily left the party even where he has not formally resigned the membership.[48]

The Supreme Court held in *G Viswanathan v Hon'ble Speaker Tamil Nadu Legislative Assembly and another* [1996 (2) SCC 353] that expulsion of member from the party by which he was set up for election and his joining another party amounts to his voluntary abandonment of the membership of such political party which had set him up for election and that, if he, on his own volition, joined another political party he must be taken to have acquired membership of the other political party by abandoning the political party to which he belonged. However, in *Amar Singh v Union of India*[49] the Supreme Court felt that its decision in *G Viswanathan's case* (supra) as regards such expelled members merits reconsideration, as they would be left completely vulnerable to the whims and fancies of the leaders of their parties, and hence referred the matter to larger Bench for decision as to what would be the status of expelled members.

While dealing with the question of expulsion of sitting members of Parliament and state legislatures, the Supreme Court observed in *Amarinder Singh v Special Committee, Punjab Vidhan Sabha and others*[50] that if such member is found guilty of committing any statutory offence, disqualification can be imposed as a consequence as per the provisions of the 1951 Act. Such member can be said to have committed breach of privilege only if his act is connected with his duties, role or functions as legislator.

48 *Ravi Naik* v *Union of India* AIR 1994 SC 1558.

49 *Amar Singh v Union of India* 2011(1) SCJ 639 decided on 15.11.2010. The decision of the larger Bench has not yet been pronounced. Meanwhile, such expelled members are now being called "unattached members".

50 2010(5) SCJ 218.

It is also provided in para 2(2) that if a member elected as an independent candidate joins any political party after his election, he shall also stand so disqualified.[51] However, if an independent MLA extends outside support to government or even he becomes a minister in the Council of Ministers, but is treated differently from members of the ruling party, he cannot be disqualified on ground of having sacrificed his independent identity as an independent MLA.[52]

A nominated member, however, is given an option, if he is not a member of any political party on the date of his nomination, to join any political party within six months of his taking his seat in the House, but if he does not do so within that period, he shall stand disqualified on joining any political party thereafter [Explanation (b) to para 2(1)].

An elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member [Explanation (a) to para 2(1)]. The expression 'political party' is not defined in the said Schedule, but it shall, by necessary implication, mean a party which is registered as a political party with the Election Commission under the provisions of s 29A of the 1951 Act, as under the scheme of that Act only a candidate set up by a party registered with the Commission is considered to be a political party candidate and the rest are treated as independent candidates.

Exception in the case of 'split' in the party—Paragraph 3 of that Schedule, as originally enacted in 1985, made an exception in the case of defection of members on the ground of split in the party to which they belonged, provided their strength was not less than one-third of the members of their legislature party in the House. According to the Supreme Court in *Kihota Hollohon's* case, the legislature envisaged the need to provide for such floor-crossing on the basis of honest dissent. The Court observed that a particular course of conduct which commended itself to a number of elected representatives, might, in itself, lend credence and reassurance to a presumption of bona fides. The Supreme Court, therefore, upheld the distinction made in the Tenth Schedule between 'defection' and 'split'. The burden of proof that there was a split in the party lay on the person who claimed so.[53]

But the Supreme Court had also observed in *Kihoto Hollohan's* case that defections undermine the cherished values of democracy and the Tenth Schedule was added to the Constitution to combat this evil. To further strengthen the law in this direction, as the existing provisions of the Tenth Schedule were not able to achieve the desired goal of checking defections, the Constitution has been amended by the Constitution (Ninety-first Amendment) Act 2003, so as to omit para 3 altogether from the Tenth Schedule. The statement of objects and reasons appended

51 *Jagjit Singh v State of Haryana and Others* AIR 2007 SC 590.
52 *D Sudhakar v DN Jeevaraju* 2011(5) SCJ 763; 2012 (2) SCJ 984.
53 Ibid.

to the Bill which ultimately was enacted as the Constitution (Ninety-first Amendment) Act 2003 stated that demands were made from time to time in certain quarters for strengthening and amending the anti-defection law as contained in the Tenth Schedule to the Constitution on the ground that these provisions had not been able to achieve the desired goals of checking defections. The Tenth Schedule was also criticised on the ground that it allowed bulk defections while declaring individual defections as illegal. The provisions for exemption from disqualification in case of splits as provided in para 3 of the Tenth Schedule had, in particular, come under severe criticism on account of its destabilising effect on the government.

In the view of the Supreme Court in *Rameshwar Prasad and Ors v Union of India and Anor*,[54] defection has now been made more difficult by deletion of provision relating to split in the party and disallowing any mass shifting of loyalty by one-third members, which was earlier treated as defection, and by making the defection altogether impermissible and only permitting merger of the parties in the manner provided in para 4 of the Tenth Schedule.

In this context, the Supreme Court has also observed in *Rameshwar Prasad* that:

> ...the well recognised position in law is that purity in the electorate process and the conduct of the elected representative cannot be isolated from the constitutional requirement. "Democracy" and "Free and Fair Election" are inseparable twins. There is almost an inseverable umbilical cord joining them. In a democracy the little man – voter, has overwhelming importance and cannot be hijacked from the course of free and fair elections. His freedom to elect a candidate of his choice is the foundation of a free and fair election. But after getting elected, if the elected candidate deviates from the course of fairness and purity and becomes a "Purchasable commodity" he not only betrays the electorate, but also pollutes the pure stream of democracy.

Exception in the case of 'merger' of parties—The disqualification on the ground of defection is not attracted in the case of merger of a political party with another political party (para 4 ibid). A party shall be deemed to have merged with another party if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger. If such merger takes place, those who do not agree to such merger and opt to function as a separate group in the House are also saved from incurring disqualification, whatever may be their numerical strength.

Exception in the case of presiding officers of Houses—The disqualificatory provisions of the Tenth Schedule also do not apply to the speakers and deputy speakers of lower Houses of Parliament and state legislatures and to the chairman and deputy chairman of upper Houses of Parliament and state legislatures (para 5,

54 (2006) 2 SCC 1, AIR 2006 SC 980 (popularly known as Bihar Legislative Assembly dissolution case).

ibid), if they resign from their party on being elected to the said offices. Such exception has been considered laudable so as to maintain the propriety of the high office and sustain the image of impartiality of the presiding officer of the House. But in *Luis Proto Barbosa (Dr) v Union of India*,[55] the Speaker of the Goa legislative assembly was held by the Supreme Court to be disqualified, as he resigned from the membership of his original political party, while still functioning as the Speaker, to form a new party with some other members of the legislative assembly.

Authority to Decide Question of Disqualification

If any question arises as to whether a member of a House has become subject to disqualification under the Tenth Schedule, the question shall be referred for the decision of the chairman or, as the case may be, the speaker of the House concerned, and his decision shall be final (para 6 ibid). The Supreme Court has held in *Speaker, Orissa Legislative Assembly v Utkal Keshari Parida*[56] that not only a member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact that a member of the House had incurred disqualification under the Tenth Schedule of the Constitution.

Judicial Review of Decision

Paragraph 7 of the Tenth Schedule sought to bar the jurisdiction of all courts in respect of any matter connected with the disqualification of a member of a House under that Schedule. But the Supreme Court struck down that paragraph as unconstitutional in the *Kihota Hollohon* case (above), on the ground that it affected the powers of the Supreme Court and High Courts of judicial review under arts 136, 226 and 227 and as the Constitution (Fifty-second Amendment) Act 1985 was not ratified by a majority of the states as required under art 368, which prescribes the procedure for amendments to the Constitution relating, inter alia, to the powers of those courts. However, by a majority decision in that case, the Supreme Court upheld the validity of the remaining paras of the Tenth Schedule holding them to be severable from the provisions of para 7 and also holding that the same did not require the aforesaid ratification by the states under art 368.

Powers to Frame Rules

To operationalise the provisions of the Tenth Schedule, each House has been empowered to lay down its own rules (para 8 ibid). Pursuant thereto, each House of Parliament and of state legislatures has made its own separate rules in this behalf.

55 AIR 1992 SC 1812.

56 AIR 2013 SC 1183.

Efficacy of Tenth Schedule

However, serious doubts are still being raised in several quarters about the efficacy of the provisions of the Tenth Schedule, as the same have not been able to put an end to, or to curb to the extent envisaged, the malady of political defections. Political defections are still being engineered by formation of groups of two-third members of legislature parties of established political parties so as to save the disqualification and defections are continuing in the garb of mergers instead of splits. In many cases, even the decisions given by the speakers of certain Houses have come in for criticism on the ground of lack of objectivity and have been the subject matter of controversy before the courts.[57] In one of such cases, the decision rendered by the speaker of the Uttar Pradesh legislative assembly holding that some members elected at the general election in 2002 had not become disqualified was challenged before the Allahabad High Court, which reversed the decision of the Speaker after prolonged hearings sometime in November 2005. The Supreme Court also maintained the order of the High Court and held the said members to be disqualified on 14 February 2007.[58]

QUALIFICATIONS AND DISQUALIFICATIONS FOR MEMBERSHIP OF JAMMU AND KASHMIR STATE LEGISLATURE

Qualifications

The qualifications for membership of Jammu and Kashmir state legislature are prescribed in the Constitution of Jammu and Kashmir and in the Jammu and Kashmir Representation of the People Act 1957.

A person shall not be qualified to be chosen to fill a seat in that state legislature, unless he:

(a) Is a permanent resident[59] of the state [s 51(a), Jammu and Kashmir Constitution];

(b) Makes and subscribes before some person authorised[60] in that behalf by the Election Commission of India, an oath or affirmation according to Form C(I) in the Fifth Schedule to the State Constitution [s 51(a) ibid];

(c) Is, in the case of a seat in the legislative assembly:

(i) not less than 25 years of age [s 51(b), ibid];

57 See, for example, *Luis Proto Barbosa (Dr) v Union of India* AIR 1992 SC 1812; *Ravi Naik v Union of India* AIR 1994 SC 1558; *Kihota Hollohon v Zachilhu and Ors* AIR 1993 SC 412.

58 *Rajendra Singh Rana v Swami Prasad Maurya* AIR 2007 SC 1305.

59 Permanent residents are defined in s 6 of the Constitution of Jammu and Kashmir—for more details, see under the heading 'Jammu and Kashmir State Legislature' in ch 3.

60 See Election Commission's Notification No 3/4/J&K/68, dated 18 March 1968. The persons authorised by the Election Commission in this Notification are the same as those who have been authorised for the purposes of elections to Parliament and other state legislatures.

(ii) a member of any of the Scheduled Castes of the state, if he is contesting an election from an assembly constituency reserved for those castes, and is a registered elector in any assembly constituency in the state [s 22(a), Jammu and Kashmir Representation of the People Act 1957]; and

(iii) a registered elector in any assembly constituency in the state, if he is contesting election from a general assembly constituency [s 22(b) ibid];

(d) Is, in the case of a seat in the legislative council:

(i) not less than 30 years of age [s 51(b), Jammu and Kashmir Constitution]; and

(ii) a registered elector in any assembly constituency in the state [s 23(1), Jammu and Kashmir Representation of the People Act 1957].

Disqualifications

The disqualifications for membership of Jammu and Kashmir state legislature are laid down in s 69 of the Constitution of Jammu and Kashmir and Part VI of the Jammu and Kashmir Representation of the People Act 1957 (ss 24 to 24F). The provisions of s 69 of the Jammu and Kashmir Constitution are almost similar to those of art 191 of the Constitution of India, which have been discussed above in detail. Some of the provisions of ss 24 to 24F of the Jammu and Kashmir Representation of the People Act 1957 are also on the lines of the provisions of ss 8 to 10A of the Representation of the People Act 1951, but the Jammu and Kashmir Act contains some further provisions also relating to disqualification which are not to be found in the Central Act.

Under the above constitutional provisions of Jammu and Kashmir, a person shall be disqualified for being chosen as, and for being, a member of the legislative assembly or legislative council of that state, if he:

(a) holds any office of profit under the Government of India or the state government of Jammu and Kashmir or any other state government within the Union of India, other than an office declared by the Jammu and Kashmir state legislature by law not to disqualify its holder [s 69(a), Jammu and Kashmir Constitution];

(b) is of unsound mind and stands so declared by a competent court [s 69(b) ibid];

(c) is an undischarged insolvent [s 69(c) ibid];

(d) is not a permanent resident of the state or has voluntarily acquired the citizenship of a foreign state, or is under any acknowledgement of allegiance or adherence to a foreign state [s 69(d) ibid];

(e) is so disqualified by or under any law made by the Jammu and Kashmir state legislature [s 69(e) ibid].

These statutory disqualifications envisaged in s 69(e) of the Jammu and Kashmir Constitution are, as aforesaid, contained in ss 24 to 24F of the Jammu and Kashmir Representation of the People Act 1957.

Section 24 of the above Act corresponds to s 8 of the 1951 Act. Under s 24(1), a person convicted of an offence punishable under s 153-A or ss 171-E or 171-F or sub-ss (2) or (3) of s 505 of the Ranbir Penal Code 1989, or under ss 10 or 11 or 12 or sub-s (1) or (2) of s 13 of the Unlawful Activities (Prevention) Act 1967 or under ss 132-A or 132-B or 142 or cl (a) of sub-s (2) of s 143 of the Jammu and Kashmir Representation of the People Act 1957, shall be disqualified for a period of six years from the date of such conviction.

Sub-section (2) of s 24 provides that a person convicted by a court in the state or anywhere outside the state in India for any offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of five years since his release. However, if a person is convicted for the contravention of any law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs and sentenced to imprisonment for not less than six months, he shall also be disqualified from the date of such conviction and shall continue to be disqualified for a further period of five years since his release.

Section 24(3) is in the nature of an exception to the aforesaid provisions of ss 24(1) and ss 24(2). It provides that notwithstanding anything in sub-ss (1) and (2) of s 24, a disqualification under either section shall not in the case of a person who on the date of the conviction is a member of the legislature of the 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 the conviction or the sentence, until that appeal or application is disposed of by the court.

The explanation to section 24 provides that in that section:

(a) 'law providing for the prevention of hoarding or profiteering' means any law, or any order, rule or notification having the force of law, providing for:

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be bought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition or the withholding from sale of any essential commodity ordinarily kept for sale;

(b) 'drug' has the meaning assigned to it in the Jammu and Kashmir Drugs Act, Samvat 2000;

(c) 'essential commodity' has the meaning assigned to it in any law relating to essential commodities for the time being in force in the state;
(d) 'food' has the meaning assigned to it in the Jammu and Kashmir Prevention of Food Adulteration Act 1958.

Section 24-A corresponds to s 8A of the 1951 Act, but it is somewhat on the lines of the latter section as it stood prior to its amendment in 1975. Section 24-A provides that a person found guilty of a corrupt practice, by an order under s 107 of the 1957 Act, may be disqualified by the high court for a period which may extend to six years from the date on which that order takes effect.

Section 24-AA is a totally new provision which is not to be found in the Central 1951 Act. Under this section, a person who is a member of an association which has been declared unlawful under the Unlawful Activities (Prevention) Act 1967, shall be disqualified for so long as the declaration in respect of the said association remains in operation under that Act, or so long as the person continues to be a member of such association, whichever is earlier.

Section 24-B is exactly on the lines of s 9 of the 1951 Act. Under this section, a person who having held an office under the Government of India or under the government of any state in India including the State of Jammu and Kashmir, has been dismissed for corruption or disloyalty to the state, shall be disqualified for a period of five years from the date of such dismissal. For this purpose, a certificate issued by the Election Commission to the effect that he has or has not been dismissed for corruption or disloyalty to the state shall be conclusive proof of that fact. No certificate to the effect that a person has been dismissed for corruption or for disloyalty to the state shall be issued by the Election Commission unless an opportunity of being heard has been given to the said person. Further, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by the aforesaid certificate from the Election Commission, if he contests an election within a period of five years from the date of his dismissal [s 44(3), Jammu and Kashmir Representation of People Act 1957].

Section 24-C corresponds exactly to s 9A of the 1951 Act and provides that a person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the Government of Jammu and Kashmir for the supply of goods to, or for the execution of any works undertaken by, the government. But, where a contract has been fully performed by the person by whom it has been entered into with the government, it shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.

Section 24-D is on the lines of s 10 of the 1951 Act and provides that a person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the state government has not less than 25 percent shares.

Section 24-E makes provisions corresponding to those of s 10A of the 1951 Act relating to disqualification for failure to lodge account of election expenses. But, unlike s 10A of the 1951 Act, the disqualification under s 24-E for the above failure is not uniformly for three years in each case and the Election Commission has the discretion to fix even a lesser period of disqualification. This section provides that if the Election Commission is satisfied that a person:

(a) has failed to lodge an account of election expenses within the time and in the manner required by or under the 1957 Act, and
(b) has no good reason or justification for the failure, the Election Commission shall, by order published in the Government Gazette, declare him to be disqualified and any such person shall be liable to be disqualified for a period which may extend to three years from the date of the order.

It is Pertinent to point out here that in the corresponding provision in s 10A ofthe1951 Act, the period of disqualification for failure to lodge the account within time and in the required manner is three years, under the J&K 1957-Act the Election Commissioon has the discretion to impose disqualification for a period lesser than three years.

Further, the Election Commission is also empowered by s 26 to remove or reduce the period of disqualification imposed by it on any person under the said s 24-E.

Section 24-F also prescribes an altogether new disqualification not to be found in the 1951 Act. Under this section, where a person has been found:

(a) by any civil or criminal court, or
(b) by any tribunal, board or commission set up under any statute, to have illegally or by corrupt means or by otherwise abusing or misusing:
  (i) the position held by him as a member of either House of the state legislature or of Parliament, or
  (ii) the office held by him by virtue of being such member, obtained for himself or for any of his relatives any valuable thing or pecuniary advantage, he may be disqualified by such court, tribunal, board or commission for a period which may extend to 10 years from the date of order:

Provided that such person had the opportunity of being heard in the proceedings held by such court, tribunal, board or commission:

Provided further that such tribunal, board or commission was presided over by a person who is or has been a Judge of the Supreme Court of India.

Qualifications and Disqualifications for Membership of the Legislative Assembly of the National Capital Territory of Delhi

Qualifications

The basic qualifications for election to the Legislative Assembly of the National Capital Territory of Delhi are prescribed not under the Constitution but under the Government of National Capital Territory of Delhi Act 1991. Under s 4 of that Act, a person shall not be qualified to be chosen to fill a seat in the Delhi legislative assembly, unless he:

(a) is a citizen of India;
(b) makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Schedule to that Act;
(c) is not less than 25 years of age; and
(d) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

The parliamentary law referred to in cl (d) above will mean the 1951 Act, as the provisions of that Act have been made applicable to elections to the Delhi legislative assembly by s 40(3) of the said 1991 Act, as they apply in relation to elections to the legislative assemblies of the states. Thus, the qualifications discussed above for elections to the state legislative assemblies (other than the Jammu and Kashmir Legislature Assembly) apply in relation to elections to the Delhi legislative assembly as well.

Disqualifications

The disqualifications for membership of the Delhi legislative assembly are prescribed in ss 15 and 16 of the Government of National Capital Territory of Delhi Act 1991.

It is provided under s 15(1) that a person shall be disqualified for being chosen as, and for being, a member of the Delhi legislative assembly:

(a) if he holds any office of profit under the Government of India or the government of any state or the government of any union territory, other than an office declared by law made by Parliament or by the legislature of any state or by the Delhi legislative assembly or by the legislative assembly of any other union territory, not to disqualify its holder; or
(b) if he is for the time being disqualified for being chosen as, and for being, a member of either House of Parliament under the provisions of sub-cl (b), (c) or (d) of cl (1) of art 102 or of any law made in pursuance of that article.

By virtue of the above s 15(1)(b), the provisions made by Parliament under art 102(1)(e) relating to disqualifications for membership of Parliament, namely, provisions of ss 8 to 10A of the 1951 Act, shall apply in relation to membership of the Delhi Legislative Assembly as well. The Delhi Legislative Assembly amended the Wakf Act 1995 (Central Act) by inserting s 31A therein by the Wakf (Delhi Amendment) Act 2006 removing the disqualification of the Chairman of the Delhi Wakf Board with retrospective effect. Such amendment by the state assembly to the central Act was upheld both by the Delhi High Court and also by the Supreme Court.[61]

Section 16 of the 1991 Act provides for disqualification on ground of defection and makes the provisions of the Tenth Schedule to the Constitution applicable to the members of the Delhi legislative assembly as they apply in relation to members of the other state legislative assemblies.

These provisions have already been discussed in detail above.

Qualifications and Disqualifications for Membership of the Legislative Assembly of the Union Territory of Pondicherry

Qualifications

Like the National Capital Territory of Delhi, the qualifications for contesting elections to the Legislative Assembly of the Union territory of Pondicherry are also prescribed separately in s 4 of the Government of Union Territories Act 1963. These qualifications are the same as those prescribed for elections to the Delhi legislative assembly, as mentioned above, except that the oath or affirmation is to be made here in the form set out for the purpose in the First Schedule to the said 1963 Act.

Disqualifications

The disqualifications for membership of the Legislative Assembly of the Union territory of Pondicherry are contained in s 14 and s 14A of the Government of Union Territories Act 1963. They are similar to the provisions of ss 15 and 16 of the Government of National Capital Territory of Delhi Act 1991 and they have already been discussed in detail above.

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61 *Mohd. Akram Ansari v Chief Election Officers and Ors* and *Naved Yar Khan v Haroon Yusuf and Anr* (Civil Appeal Nos. 4981 and 5828 of 2006) before the Supreme Court decided on 4 December 2007.

CHAPTER 16

Electoral Corrupt Practices and Electoral Offences

SYNOPSIS

INTRODUCTION

General

For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative vote of process of elimination based on comparative demerits of the candidates.

This is how the Indian polity was advised and reminded by the Supreme Court in *Gadakh Yashwantrao Kankarrao v EV alias Balasaheb Vikhe Patil*.[1] To ensure that elections are held in a free and fair manner enabling men of high moral and ethical values to win, the law has laid down certain rules of electoral morality and prohibited certain acts of commission and omission which sully the purity of elections and have corrupting influence and vitiating effect on the outcome of elections. Some of these acts have been branded as 'corrupt practices', while the others have been termed as 'electoral offences'. The Supreme Court has, however, observed in *Azhar Hussain v Rajiv Gandhi*,[2] that the expression 'corrupt practice' employed in the 1951 Act appears to be rather repulsive and offensive, and suggested that it might perhaps be replaced by a neutral and unoffensive expression such as 'disapproved' practices.

Purity of elections can be maintained by political parties and candidates only by scrupulously observing the rules of electoral morality, by neither indulging, nor allowing the enthusiastic workers and supporters to indulge, in any corrupt practices and electoral offences, and by maintaining high standards of election campaigns. But experience has shown that sometimes the election propaganda and the not-so-fair means adopted by candidates, and at times even by important leaders of political parties, degenerate into vilification campaigns of low order. In one such case which came to the notice of the Supreme Court in the case of *Gadakh Yashwantrao Kankarrao*[3] the Supreme Court advised:

> The duty at the top echelons of leadership at the state and national level of all political parties is to set the trend for giving the needed information to the electorate by adopting desirable standards so that it percolates to the lower levels and provides a congenial atmosphere for a free and fair poll. A contrary trend of speeches by the top leaders tends to degenerate the election campaign as it descends to the lower levels and at times promotes even violence leading

1 AIR 1994 SC 678.
2 AIR 1986 SC 1253.
3 AIR 1994 SC 678.

> to criminalisation of politics. The growth of this unhealthy trend is a cause for serious concern for the proper functioning of the democracy and it is the duty of the top leaders of all political parties to reverse this trend to enable movement of the functioning democracy in the proper direction.

The Supreme Court, however, clarified in *S. Subramaniam Balaji*[4] that the corrupt practices under the 1951 Act can be committed by candidates and individuals, but not by the political parties.

DISTINCTION BETWEEN CORRUPT PRACTICES AND ELECTORAL OFFENCES

As mentioned above, the law frowns upon the resort to certain acts called the electoral corrupt practices and the others called the electoral offences. 'Corrupt practices' at elections are presently specified in s 123 of the 1951 Act. 'Electoral offences', on the other hand, are laid down both in the IPC (ch IXA) and in the 1951 Act (ch III of Part VII). Whereas the electoral offences under the IPC are criminal acts of general nature, relatable to all elections held under any law to any elective body in the country, the corrupt practices and electoral offences under the 1951 Act are specifically relatable only to elections held under that Act to Parliament and state legislatures, and not to other elections including the elections to the offices of the President and Vice-President of India.

The fundamental distinction between these two classes of prohibited acts is that when a corrupt practice is committed by a candidate, or by someone else with his consent, it has the effect of vitiating the whole election and will result in the election of the candidate being declared void, the commission of an electoral offence does not have such fatal bearing on the election result. In the former, the whole constituency suffers inasmuch as the candidate loses his seat and the constituency goes without representation in the legislature, till another election is held to replace the unseated member; in the latter, only the persons committing the electoral offences suffer for their criminal liability. The further noteworthy point here is that any grievance relating to the commission of a corrupt practice can be agitated only after the election is over and only in the election petition filed in accordance with the provisions of art 329(b) and Part VI of the 1951 Act; but the commission of an electoral offence can be taken cognisance of as soon as it is committed and the process of law set in motion immediately thereafter, in the same manner in which any other criminal activity is investigated and tried under the provisions of the Criminal Procedure Code 1973. In the next place, committing a corrupt practice entails only certain civil disabilities, like, disqualification for voting and for contesting elections for certain period; but any electoral offence if committed will be visited with criminal liability and may result in imprisonment or with fine or with

4 *S. Subramaniam Balaji v The Government of Tamil Nadu & Ors* decided on 5 July 2013.

both, apart from attracting the civil disabilities of voting and contesting elections in the case of certain specified electoral offences as will be explained later.

But one thing is common in relation to both, namely, the standard of proof. An allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities does not apply to corrupt practices envisaged by the 1951 Act, because if this test is not applied, a very serious prejudice would be caused to the elected candidate who would not only lose his seat, but may also be disqualified for a period of six years from fighting any election.[5]

Prior to 1975, any person found guilty of committing a corrupt practice, at the trial of an election petition or in election appeal, got automatically disqualified by operation of law under s 8A for contesting elections to Parliament and state legislatures, and for voting, for a period of six years from the date the order of the court took effect. However, from 1975, the question whether such person should be disqualified, and if so for what period, is now determined by the President on the opinion of the Election Commission under the amended s 8A. These matters have been fully discussed in ch 8 dealing with qualifications and disqualifications for the membership of Parliament and state legislatures.

CORRUPT PRACTICES

General

The object underlying the provisions relating to corrupt practices was explained by the Supreme Court in *Patangrao Kadam v Prithviraj Sayajirao Yadav Deshmukh*,[6] as follows:

> Fair and free elections are essential requisites to maintain the purity of election and to sustain the faith of the people in election itself in a democratic set up. Clean, efficient and benevolent administration are the essential features of good governance which in turn depends upon persons of competence and good character. Hence those indulging in corrupt practices at an election cannot be spared and allowed to pollute the election process and this purpose is sought to be achieved by the provisions contained in the Representation of the People Act 1951.

Classification of Corrupt Practices

In the original 1951 Act, various malpractices which were considered as having an obnoxious and vitiating effect on the conduct of free and fair elections were classified

5 *Manmohan Kalia v Shri Yash* AIR 1984 SC 1161; *Surinder Singh v Hardial Singh* AIR 1985 SC 89; *Manohar Joshi v Damodar Tatyaba* (1991) 2 SCC 342.

6 AIR 2001 SC 1121.

into 'major corrupt practices', 'minor corrupt practices' and 'illegal practices'. Such classification was based on the gravity of those malpractices, and the commission thereof was visited with different penalties.

There were eight types of acts of omission and commission which were classified as major corrupt practices under s 123 of the original 1951 Act. These were:

(1) giving of bribe; (2) undue influence; (3) bogus voting by personation; (4) unauthorised removal of ballot paper from a polling station; (5) publication of a false statement relating to a candidate; (6) free conveyance of voters; (7) incurring of election expenditure in excess of the prescribed limit; and (8) seeking the assistance of government servants. Any of the above acts were considered to be major corrupt practices if done by any candidate or by his agent, or by any person with the 'connivance' of a candidate or his agent.

Doing any of the above acts by a person, other than a candidate or his agent, or a person acting with the connivance of a candidate or his agent, was considered to be a minor corrupt practice under s 124(1). In addition: (1) personation at an election; (2) receipt of bribe; (3) filing of false return of election expenses; and (4) systematic appeal on grounds of religion, caste, etc, were also minor corrupt practices under sub-ss (2)-(5) of s 124 respectively.

Furthermore, the following three acts were considered to be illegal practices under s 125: (1) incurring or authorising of any election expenditure, without the written authorisation of the candidate concerned; (2) the hiring, using or letting, as a committee room or for any public meeting, of any building, room or other place where intoxicating liquor is sold to the public; and (3) issuing any election poster, etc, without indicating the name and address of the printer and publisher thereof.

The commission of any major corrupt practice or minor corrupt practice or illegal practice could be challenged in an election petition questioning the election of the returned candidate, and, if proved, could result in some specified contingencies in the avoidance of the election of the returned candidate under s 100 of the 1951 Act. Any person found guilty of committing major or minor corrupt practice stood disqualified for a period of six years, both for contesting elections to Parliament and state legislatures and for voting in such elections. A person committing an illegal practice also incurred similar disqualification, but for a period of four years (ss 140–142, 1951 Act, as originally enacted).

Re-classification of Corrupt Practices in 1956

After the first general elections in 1951–52, a Bill called the Representation of the People (Second Amendment) Bill 1955, was moved in the House of the People on 3 August 1955, which sought to make certain changes in the election law in the light of the experience of those elections. The Bill was referred to a Select Committee under the Chairmanship of Pandit Thakur Das Bhargava, and the Select Committee was authorised to consider even the matters other than those dealt with in that Bill

but relating to the matters dealt with in the Representation of the People Acts 1950 and 1951. In its report submitted on 15 February 1956, the Select Committee observed that the provisions relating to major and minor corrupt practices and illegal practices in ss 123, 124 and 125 of the 1951 Act were rather complicated and should be simplified. The Committee recommended that:

> ...illegal practices should be done away with, that the classification of corrupt practices between major and minor should be abolished, that there should be only one class of corrupt practices to be called 'corrupt practices' simpliciter and clauses (3) and (4) of existing section 123 should not be corrupt practices at all; and that of the various items in existing section 124, item (5) only should be regarded as a corrupt practice and items (2), (3) and (4) should not be corrupt practices at all.

In accordance with the above recommendations of the Select Committee, the provisions of ss 123 to 125 were recast and enacted by the Representation of the People (Second Amendment) Act 1956. By that amending Act, only s 123 was retained containing provisions relating to corrupt practices, all classified in one category. Sections 124 and 125 were omitted altogether. Under s 123, so recast in 1956, seven classes of acts of commission and omission were considered as corrupt practices, namely; (1) bribery; (2) undue influence; (3) systematic appeal on the ground of religion, caste, etc; (4) publication of false statement relating to a candidate; (5) free conveyance of voters; (6) incurring of election expenditure in excess of the prescribed limit; and (7) seeking assistance of government servants.

Subsequently, to these seven heads of corrupt practices, three more corrupt practices relating to (1) creation of feelings of hatred or enmity between different classes of Indian citizens; (2) propagation or glorification of '*sati*'; and (3) booth capturing, were added in 1961, 1988 and 1989 respectively.

The Supreme Court has held in *SB Adityan v S Kandaswami*[7] that the corrupt practices for the purposes of the 1951-Act mean only the 'corrupt practices' specified in s 123 of that Act, and not any other malpractices or irregularities. All the aforesaid corrupt practices have been discussed in detail in the succeeding paragraphs in this chapter.

Meaning of 'Candidate' in Relation to Corrupt Practices

As the subsequent discussions in this chapter will show, a candidate is liable to punishment for a corrupt practice committed by him or by any of his agents or by any other person with his consent or with the consent of his election agent. Thus, the basic question is—what is the meaning of a 'candidate' who is to be held liable for commission of any corrupt practice. The law originally regarded any person as a

7 AIR 1958 SC 857.

candidate who had been or claimed to have been duly nominated as a candidate at any election, and any such person was to be deemed to have been a candidate as from the date when, with the election in prospect, he began to hold himself out as a prospective candidate [s 79(b), 1951 Act, as originally enacted]. This definition of a candidate was mainly borrowed from the English law. But it suffered from ambiguity and vagueness, as it was a question of disputed fact in every case as to when an election became in prospect and from when a person started holding himself out to be a candidate. The law does not prevent a person from declaring at any time that he would contest the next election from a particular constituency, sometimes many months in advance of the notification calling the election which formally sets the electoral process in motion. In such a case, he could be held answerable for any act regarded as a corrupt practice committed at any time after his declaration to the above effect. In *Raj Narain v Indira Nehru Gandhi*,[8] the Allahabad High Court held that Smt Indira Nehru Gandhi had started holding herself out as a candidate from the Rae Bareli parliamentary constituency from 29 December 1970, when she was stated to have said in answer to a question at a press conference that she would contest election from the above constituency, whereas the formal notification calling the election was issued much later on 27 January 1971.

In order to remove any uncertainty and vagueness in the law on this point, the definition of a candidate was amended in 1975 after the above decision of the Allahabad High Court in the *Smt Indira Nehru Gandhi*'s case.[9] The amended definition regarded only such person as a candidate who had been or claimed to have been duly nominated as a candidate at an election, dropping the latter portion of the provision as to the holding out of the candidature from any earlier date. Further, this amendment was given retrospective effect.[10] The Supreme Court upheld the above change in the definition of candidate and also the retrospective operation given thereto, holding it to be 'within the unquestionable powers of Parliament to legislate, either prospectively or retrospectively with regard to election matters'.[11] Applying the amended provisions of the law, the Supreme Court observed that the person referred to as a candidate in the revised s 79(b) should be a person who had been or claimed to have been duly nominated as a candidate at an election, and not the one who was yet to be nominated, and accordingly held that Smt Indira Nehru Gandhi became a candidate at that election on 1 February 1971 when she filed her nomination paper.

The Supreme Court also held in the above case that a corrupt practice as defined under the law could not be committed by a person before there was a candidate for an election. The Supreme Court further clarified in *Harjit Singh Mann v Umrao*

8 57 ELR 49.

9 Ibid.

10 Section 79(b), as amended by the Election Laws (Amendment) Act 1975.

11 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.

Singh[12] that even if an act was proved to have been committed by a candidate which otherwise constituted a corrupt practice, it would not, however, be regarded as a corrupt practice, if such act was committed at a time when the person was not yet nominated as a candidate at the election. In other words, a candidate can be held liable, whether directly or vicariously, for any act constituting a corrupt practice, if such wrong is committed on or after the date on which he has been nominated at an election by filing his nomination paper.

Meaning of 'Agent'

The act amounting to a corrupt practice must be done by 'a candidate or his agent or by any other person with the consent of a candidate or his election agent'. The word 'agent' has been defined by Explanation (1) to s 123 of the 1951 Act to mean an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate. Obviously, the election agent and the polling agent here, mean the persons appointed by the candidate as his election agent under s 40 and polling agent under s 46.[13]

What is the meaning of the expression 'any person who is held to have acted as an agent in connection with the election with the consent of the candidate' has been explained by the Supreme Court in *Chandrakanta Goyal v Sohan Singh Jodh Singh Kohli*.[14] The apex court has observed that an agent is ordinarily a person authorised by a candidate to act on his behalf on a general authority conferred on him by the candidate; ordinarily, the agent is the understudy of the candidate and has to act under the instructions given to him, being under his control. A leader of a political party is not necessarily an agent of every candidate of that party; he does not act under instructions of a candidate nor is he under the candidate's control. The candidate is held to be bound by the acts of his agent because of the authority given by the candidate to perform the act on his behalf. There is no such relationship between the candidate and the leader, in the abstract merely because he is the leader of that party. The consent of the candidate cannot be implied from the mere fact that the act was done by the leader of his political party. The same view has been reiterated by the Supreme Court in *Ramesh Yeshwant Prabhoo(Dr) v Prabhakar Kashinath Kunte and Ors*[15] and a catena of other cases.

The Karnataka High Court held in *Vijayakumar Khandre v Prakash Khandre*[16] that the father of the candidate, who was the leader of the party to which the candidate belonged, could not be said to be the agent of the candidate and one could

12 AIR 1980 SC 701.

13 For further details relating to the appointment of election agents and polling agents, see chs 12 and 13 respectively.

14 (1996) 1 SCC 378.

15 (1996) 1 SCC 130.

16 AIR 2002 Kant 145.

not impute knowledge or consent of the candidate to the promises made by the father to the electorate.

The government, whether at the Centre or in a state, can also not be regarded as an agent of a candidate. In *HV Kamath v Ch Nitiraj Singh*,[17] the chief minister of a state recounted at an election meeting of his party nominee, the steps taken by the state government to ameliorate the conditions of agriculturists, and Class III and IV employees of the state government, by granting certain exemptions in the case of the former and increasing the dearness allowance in the case of the latter. The Supreme Court held that the chief minister or the state government was not an agent of the candidate and that he did not commit any corrupt practice.

Meaning of 'Consent'

A corrupt practice may be committed either by the candidate himself or his agent, or by any other person with the 'consent' of the candidate or his election agent. It needs to be specially noted here that the consent to such an act by a third person must be either of the candidate himself or of his election agent and not of any other agent. The law recognises the election agent as an alter ego of the candidate and attributes every act done by the former to the latter.

The consent may be either express or implied. The question of consent, whether express or implied, is a question of fact and not a mixed question of law and fact.[18] Seeking assistance may also amount to consent because when a person does something on request for assistance made by another person, he will be doing it with consent of the person on whose asking he committed that act or omission.[19]

The consent of the candidate or his election agent to an act constituting a corrupt practice may not be capable of being established easily as direct evidence of such consent may seldom be available. In most of the cases, it may have to be inferred or gathered from circumstantial evidence or conduct of the parties. If a person trusts another and leaves the matter in the latter's hand, he cannot then turn round and say that some act of latter was without his consent, provided other circumstances point to the fact that this consent must have been in some way forthcoming. If a candidate has entrusted the conduct of his election to an agent and that agent publishes a poster containing matter defamatory of the personal character of his rival and the candidate sees such poster but does not disown or refute it, that would be sufficient to attribute to him his consent to the publication of such poster.[20] And the fact of even having paid the printing charges for such a defamatory poster would further strengthen the inference that he consented to the publication of such offending

17 AIR 1970 SC 211.

18 *Sarat Chandra Rabha v Khagendranath Nath* AIR 1961 SC 334.

19 *Col Inder Singh v Rangila Ram Rao and Ors* AIR 2005 HP 11.

20 *Lalroukung v Maokho Lal Thangjom* 41 ELR 35.

poster[21] It may be difficult to draw an inference of consent by the candidate in relation to some stray act; but where certain activity was spread over several days and the agents and workers of the candidate were involved, the inference of consent by the candidate was held to be reasonable in *Sheopat Singh v Harish Chandra*.[22] In this case, there was regular transportation of voters by the candidate's agents to polling stations on several days of poll and the candidate did not prohibit it, though it came to his knowledge.

Consent is the life-line to link up the candidate with the action of other persons.[23] But the requisite consent of the candidate cannot be assumed merely from the fact that the candidate belongs to the same political party of which the wrongdoer was a leader, since there can be no presumption in law that there is consent of every candidate of the political party for every act done by every acknowledged leader of that party.[24] The leader of a political party is not an agent of the candidate and the consent of the candidate must be proved for any wrong act committed by the leader of his political party. Such consent can, however, be implied more readily from circumstances such as the personal presence of the candidate at the time and place where an offending speech is made by the party leader and without any protest from the candidate.[25]

In *Surinder Singh*'s case[26] the question was whether to extend protection to a supporter for some wrong committed by him could be construed as consent on the part of the candidate. The Supreme Court observed that to extend protection to a supporter is normal human conduct and even the fact that a quarrel was raised with the police to protect the supporter and his family would not lead to a backward presumption of the consent of the candidate for the acts of the supporter.

Meaning of 'Electoral right'

'Electoral right' has been defined in the 1951 Act, and also in the Indian Penal Code, to mean the right of a person to stand or not to stand as a candidate, or to withdraw or not to withdraw from being a candidate, or to vote or refrain from voting at an election [s 79(d), 1951 Act; s 171A(b), IPC]. The Supreme Court has clarified in *People's Union for Civil Liberties v Union of India*[27] that the aforesaid right includes the right to remain neutral or even cast a negative vote, for which purpose suitable provision should be made in the ballot papers and voting machines by

21 *Ram Kishan v Jai Singh* 37 ELR 217.
22 16 ELR 435 (SC).
23 *Surinder Singh v Hardial Singh* AIR 1985 SC 89.
24 *Ramakant Mayekar v Celine D'Silva* (1996) 1 SCC 399.
25 *Chandrakanta Goyal v Sohan Singh Jodh Singh Kohli* (1996) 1 SCC 378.
26 AIR 1985 SC 89.
27 Writ Petition (Civil) No. 161 of 2004 decided on 27 September 2013

providing an additional panel and/or additional button for indicating such choice by the voter, as has been explained in greater detail in chapter 13.

Bribery

Bribery, Both Corrupt Practice and Electoral Offence

Bribery may be described, in lay man's language, as any inducement to a person, by wrong means, to do or not to do a thing which he may otherwise have not done or done. In elections also, bribery is the most common and rampant form of corrupt practice vitiating and sullying the purity of the electoral process. Even in the original 1951 Act, 'bribery' was considered as a major corrupt practice and given a prime place in the list of major and minor corrupt and illegal practices by being numbered as the first major corrupt practice. When the distinction between the major and minor corrupt practices and illegal practices was done away with in 1956, bribery continued to be the first concern among the prohibited practices which had a corrupting influence on elections.

The corrupt practice of 'bribery' is presently defined in s 123(1) of the 1951 Act as follows: '*Bribery*', that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing:
  (a) a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate at an election, or
  (b) an elector to vote or refrain from voting at an election, or as a reward to:
    (i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or
    (ii) an elector for having voted or refrained from voting;
(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward:
  (a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or
  (b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation—For the purposes of this clause, the term 'gratification' is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses *bona fide* incurred at, or for the

purpose of, any election and duly entered in the account of election expenses referred to in section 78.

Apart from being a corrupt practice under the 1951 Act, bribery is also an electoral offence under s 171B of the Indian Penal Code 1872. Bribery as an electoral offence is defined in s 171B, as follows:

171B. **Bribery**—(1) Whoever:

(i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,commits the offence of bribery:

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

It is a non-cognisable offence under the Code of Criminal Procedure 1973 and is punishable with imprisonment of either description up to one year or with fine, or with both.[28] But bribery by treating, which means that form of bribery where the gratification consists in food, drink, entertainment, or provision, is punishable with fine only. The Election Commission has repeatedly observed that the object of making bribery an electoral offence is being defeated and frustrated by providing that it is a non-cognizable offence, as the enforcement agencies are not able to prosecute the offender on-the-spot which is the only effective way to curb the menace,

The Supreme Court observed in *Rajendra Prasad Jain v Sheel Bhadra Yajee*[29] that:

> ...when considering the scope of words 'offer of bribery' in the election law, we should not place a narrow construction on that expression. In fact, the scope of that expression should be extended in order to ensure that elections are held in an atmosphere of absolute purity, and a wide meaning should be given to the expression 'offer of bribery'.

28 The Indian Penal Code 1872, s 171E.

29 AIR 1967 SC 1445.

Bribery, even to a single person, can render the election void.[30] But any such act of bribery must be committed after a candidate has been nominated. If an act is committed which would otherwise constitute bribery but is committed at a time when the candidate was not yet nominated, it would not fall within the ambit of the corrupt practice under s 123(1).[31]

The Supreme Court has further clarified[32] that the promises in the election manifestos of political parties cannot be read into s 123 for declaring it to be a corrupt practice and that contents of a manifesto, by itself, cannot be a corrupt practice committed by a candidate of that party.

Analysis of Provision

The present definition of corrupt practice of bribery in s 123(1) consists of two parts, (A) and (B). The first part, (A), relates to the giver of bribe, and the second part (B), to the recipient of the bribe. In the original 1951 Act, the giving of a bribe was a major corrupt practice under s 123(1) and the receipt of bribe was a minor corrupt practice under s 124(3). When the corrupt practice of bribery was re-defined in 1956 on the abolition of the distinction between major and minor corrupt practices, the giving of bribe alone was termed as a corrupt practice under s 123(1), and the recipient of the bribe did not fall within the mischief of the newly defined corrupt practice. The Supreme Court held in *SB Adityan v S Kandaswami*,[33] that though a gift (in the form of a bribe) contemplated both the giving of it and also its acceptance, it was open to the legislature in enacting s 123(1) to provide that the making, that is to say, the giving of a gift, alone should be a corrupt practice and that was what the legislature had done; it had not made the receipt of a gift a corrupt practice. This led to the amendment of s 123(1) by the Representation of the People (Amendment) Act 1958, whereby, the receipt of a bribe was also made a corrupt practice by adding part (B) thereto.

Analytically dissected, bribery, on the part of the giver, in the context of elections as covered by part (A) of s 123(1) will mean (i) any gift, offer or promise of any gratification to any person whomsoever, (ii) by a candidate or his agent, or by any other person with the consent of the candidate or his election agent,—

Either (a) with the object, directly or indirectly of, (i) inducing a person to stand as a candidate or not to stand as a candidate or to withdraw or not to withdraw from being a candidate at an election, or (ii) inducing an elector to vote at an election or refrain from voting, that is to say, not to vote at the election;

30 *Harisingh Pratapsingh Chawda v Popatlal Mulshanker Joshi* AIR 1976 SC 271.

31 *Harjit Singh Mann v Umrao Singh* AIR 1980 SC 701.

32 *S. Subramaniam Balaji v The Government of Tamil Nadu & Ors* decided on 5 July 2013.

33 AIR 1958 SC 857.

Or (b) as a reward to a person for having stood as a candidate or for having not stood as a candidate, or for having withdrawn his candidature or for not having withdrawn his candidature;

Or (c) as a reward to an elector for having voted or refrained from voting at the election.

Similar analysis of the provision in part (B) of s 123(1) relating to bribery, on the part of recipient thereof, will mean the receipt of any gratification or agreement to receive any gratification:

(i) Whether as a motive or reward, by a person for standing as a candidate or for not standing as a candidate or for withdrawing his candidature, or for not withdrawing his candidature at an election; or

(ii) Whether as a motive or reward, by any person whomsoever, either (a) for himself for voting or refraining from voting, or (b) for any other person for voting or refraining from voting; or

(iv) Whether as a motive or reward, by any person whomsoever, for inducing or attempting to induce any elector to vote or refrain from voting; or

(v) Whether as a motive or reward, by any person whomsoever, for inducing or attempting to induce any candidate, to withdraw his candidature or not to withdraw his candidature at an election.

In *Mohd Yunus Saleem v Shiv Kumar Shastri*,[34] the Supreme Court took the view that a gratification paid to a candidate for withdrawing from the contest even after the last date for the withdrawal of candidatures under s 37 of the 1951-Act came within the purview of s 123(1). However, that view was reversed by the Supreme Court in *Umed v Raj Singh*,[35] and it was held that the provisions of s 123(1) would be attracted only upto the stage of withdrawal of candidatures under s 37, and not thereafter.

In *Rajendra Prasad Jain v Sheel Bhadra Yajee*,[36] the Supreme Court observed that while considering the question whether it was probable that a candidate would offer bribes or give bribes to secure his election, the fact that the candidate had no political background in the state and that he was a man of means would be a relevant consideration. Obviously, a person who had no means at all could not possibly offer bribes or give bribes inducing voters to vote for him, and the fact that a candidate had no political background and had means could easily be the reason for resorting to the corrupt practice of bribery for securing votes. Taking these factors and the other proven facts into consideration, the Supreme Court held the appellant in this case guilty of commission of corrupt practice of bribery under s 123(1).

34 AIR 1974 SC 1218.
35 AIR 1975 SC 43.
36 AIR 1967 SC 1445.

Meaning of 'Gratification'

Meaning of the term 'gratification' is sought to be explained by the explanation to s 123(1). It is, however, not an exhaustive but an inclusive definition which shows that the term 'gratification' is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward. But it does not include the payment of any expenses bona fide incurred at the election or for the purposes of election and duly entered in the account of election expenses maintained by the candidate and lodged with the prescribed election authority under s 78 of the 1951 Act.

The Supreme Court held in *Kalya Singh v Genda Lal*,[37] that the payment of any gratification to any person to work or canvass at an election is outside the ambit of the definition of gratification under s 123(1). It will make little difference if the worker or the canvasser on payment of gratification promises or indulges in tall-talk of securing or procuring some votes for a particular candidate. The Supreme Court had earlier laid down in *Onkar Singh v Ghasiram Majhi*,[38] that any payment to a worker whether for his expenses or his salary so that he can wield his influence with the electors cannot amount to bribery within the meaning of s 123(1). The apex court pointed out that the difference lay in the canvasser carrying out the work of propaganda on behalf of the candidate and putting forward his efforts to persuade electors to vote for that candidate and that the candidate paid the money not for securing the vote of the worker but thinking of the benefit to accrue to him by the powers of persuasion of the worker. The law on the point was more clearly stated in *Harisingh Pratapsingh Chawda v Popatlal Mulshanker Joshi*.[39] The apex court observed that if a gift or offer to a person asking him to work for him with the incidental result that that person might vote for him was not permissible under s 123(1), then it would be impossible for persons standing for election to get any persons who are voters to work for them in the constituency.

Explaining the meaning of 'gratification' in s 123(1), the Supreme Court observed in *Mohan Singh v Bhanwarlal*,[40] that the gratification in its ordinary connotation means satisfaction. In the context in which the expression is used in s 123(1), and its delimitation by the explanation thereto, it must mean something valuable which is calculated to satisfy a person's aim, object or desire, whether or not that thing is estimable in terms of money. But the court held that a mere offer to help in securing employment to a person with a named or unnamed employer would not amount to gratification within the meaning of s 123(1).

37 AIR 1975 SC 1634.
38 39 ELR 477.
39 AIR 1976 SC 271.
40 AIR 1964 SC 1366.

The apex court further observed in *Iqbal Singh v Gurdas Singh*,[41] that the word 'gratification' should be deemed to refer only to cases where a gift is made of something which gives material advantage to its recipient and not the gratification of his sense of importance. The court held that the grant of a gun license to the voter would not amount to gratification within the meaning of s 123(1) as its possession gives no material advantage to its possessor. Likewise, the court observed, the conferment of an honour like Padma Bhushan may not amount to gratification within the meaning of s 123(1).

Inducement, May be Direct or Indirect

Any inducement to an elector to vote or refrain from voting or to a candidate to stand or not to stand, or to withdraw or not to withdraw his candidature, may either be direct or indirect. But it should be by the candidate or his agent or by any other person with the consent of the candidate or his election agent.

As was observed by the Supreme Court in *Kalya Singh v Genda Lal*,[42] the dictionary meaning of the word 'induce' is 'to prevail on, persuade' and the gratification offered or promise as inducement must have some connection or reflection, direct or indirect, in persuading the voter to vote or refrain from voting. Where, however, the inducement to a voter is not direct but indirect through a third person, such inducement will be considered as a corrupt practice if the gratification paid to the third person is in the knowledge of the voter. The voter may not be a direct party in the bargain but must be shown to have an indirect interest in it.

In Rajendra Prasad Jain v Sheel Bhadra Yajee,[43] the appellant had said to one of the voters who was a sitting member of the Bihar legislative assembly that 'Ki apka bhi to election men kharch burch hua hoga. Isliye ham apki kuchh seva karna chahte hain. Ap hamare madad Kijiye' (You must also have made some expenditure on your election. We want to help you. You should help us). The court held that though in the above words there was no direct offer of giving money to the voter, the language used clearly indicated that the appellant was offering his services in the form of contribution towards the expenditure which the said voter had incurred in his election to the Bihar legislative assembly. The appellant was held guilty of bribing that voter and committing a corrupt practice under s 123(1) in the election to the Council of States by the members of the Bihar legislative assembly in 1964. The Supreme Court further held that it is not necessary that a specific amount should be mentioned while making the offer of bribery. The court observed that if the mention of specific amount was to be an essential ingredient of the corrupt practice, it would lay the field open for corruption in such a manner as to make the provision totally

41 AIR 1976 SC 27.
42 AIR 1975 SC 1634.
43 AIR 1967 SC 1445.

ineffective. A candidate wanting to secure a vote by bribery can always go and first ask the voter whether he is prepared to accept money as a bribe and need offer a specific sum only after the voter has signified his assent. The mere fact that a candidate goes and offers some money is enough to show that he has already made his offer to corrupt the voter and secure his vote, though there may still be a possibility that, if subsequently the negotiations as to the precise amount to be paid as bribe fail, he may not actually succeed in his objective. The Supreme Court further clarified in Ziauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra[44] that an offer of bribe is enough to constitute the corrupt practice, irrespective of whether it is accepted or not. If the corrupt practice is committed on the gift, offer or promise of gratification being accepted by the electors by assuring to vote in favour of the candidate making such offer, etc, then the provisions of s 123(1)(A)(b) shall become redundant and shall have to be read as a pious wish of the framers of the Act to eliminate the role of bribery in the elections.[45]

Explaining the meaning of direct and indirect inducement, the Supreme Court further laid down in *Harisingh Pratapsingh Chawda v Popatlal Mulshanker Joshi*,[46] that where the gratification is paid to a person in order that he may induce the other persons to vote for the bribe giver, it is not bribery on the part of the bribe giver, but it is bribery on the part of the bribe taker, even when he takes it in order to induce an elector to vote for the bribe giver. And where the payment of bribe to such third person comes to the knowledge of the voters, and they are thereby induced to vote for the bribe giver, it will amount to corrupt practice by the bribe giver as well.

Bribery, Only When There is an Element of Bargain

But it should be clearly borne in mind that it is not every gift, offer or promise of gratification to voters which may attract the provisions of s 123(1). In such gift, offer or promise, there should be an element of bargaining for votes. In other words, any such gift, offer or promise of gratification should be made asking for the votes in return. The Supreme Court held in *Ghasi Ram v Dal Singh*,[47] that an offer or promise not made to any particular voter or voters but to the general body or residents, without distinguishing between those who were favourably inclined and those who were not, was not a corrupt practice. The gist of the corrupt practice lay in attempting to do something for those who were opposed to the candidate with a view to changing their votes, and as a bargain for votes. The apex court reiterated this view in *Om Prabha Jain v Abnash Chand*,[48] and *Dev Raj v Bhagwan Das*,[49] and

44 AIR 1975 SC 1788.
45 *C Narayana Swamy v CK Jaffer Sharief* (1994) Supp 3 SCC 170.
46 AIR 1976 SC 271.
47 AIR 1968 SC 1191.
48 AIR 1968 SC 1083.
49 AIR 1971 SC 241.

this view still holds. But a bargain for the purposes of s 123(1) does not mean that the candidate makes an offer and the voter accepts it in the sense that he promises to vote. It is enough if the candidate or his agent makes the gift, offer or promise on that condition. If a candidate or his agent pays money to a voter saying that he wants him to vote for him, it is a bargain for the purposes of s 123(1). It is not necessary that the voter should say that he would vote and thereafter the candidate or his agent should pay the money. Even in such a case, the voter after receiving the money might or might not vote for him; the corrupt practice shall be deemed to have been committed.[50]

A mass feeding was arranged allegedly by one of the candidates 'in the memory of Rajiv who died for the country'. It could be taken as gratification to the voters in the light of the explanation to s 123(1), but it was not shown that the candidate or any person on his behalf requested the persons participating in the mass feeding to vote in favour of the candidate who was alleged to have arranged it. Against the background of the assassination of Shri Rajiv Gandhi in which the mass feeding was held, the Supreme Court did not consider it to be a corrupt practice under s 123(1).[51]

Election Eve Grants and Promises

As discussed above, element of bargain for votes is an essential ingredient of the corrupt practice of bribery under s 123(1). Therefore, general promises of public action by candidates, and even by ministers, do not fall within the mischief of s 123(1). The Supreme Court observed in *Rajagopala Rao v Appayya Dora Hanumanthu,*[52] that the provisions of s 123 have to be interpreted, keeping in mind that the dictates of common sense require that those provisions could never have been intended to treat normal election promises made in election manifestos or usual election speeches by members of various political parties aspiring to power and by different candidates aspiring to get elected as corrupt practices. A promise made by the Prime Minister that if the candidate set up by her party was elected the constituency would be developed, was not held to be a corrupt practice in *Dhartipakar Madan Lal Agarwal v Rajiv Gandhi.*[53] It was held to be a legitimate promise as the Prime Minister, being the leader of the party, was entitled to appeal to electors to vote for the party candidate. Similarly, the speeding up of developmental activity, and the construction and completion of railway station in the constituency during the election period, was held in the above case as not amounting to any gift or promise to voters within the meaning of s 123(1). In

50 *Iqbal Singh v Gurdas Singh* AIR 1976 SC 27.
51 *C Narayana Swamy v CK Jaffer Sharief* (1994) Supp 3 SCC 170.
52 AIR 1990 SC 1889.
53 AIR 1987 SC 1577.

Thakur Sen Negi v Dev Raj Negi,[54] it was held that no objection could be taken to the chief minister of a state canvassing for his party's candidate and highlighting the promises made in his party's manifesto and proposed developmental programmes, if the party came to power. But the court added that if he tried to intimidate people for their failure to vote for his candidate or even threatens to shut down developmental programmes and schemes for the area, that would be a different matter, and courts would frown at such attempts.

The Supreme Court had earlier observed in *Ghasi Ram*'s case,[55] that the position of a minister, who was a candidate at the election, was difficult:

> It is obvious that he cannot cease to function when his election is due. He must of necessity attend to the grievances, otherwise he must fail. He must improve the image of his administration before the public. If everyone of his official acts done *bona fide* is to be construed against him and an ulterior motive spelled out of them, the administration must necessarily come to a stand-still.

The discretionary grants made by the minister in this case to some *gram panchayats* for public utility works were held to be falling outside the mischief of s 123(1). The Supreme Court observed that the money so granted was to be used for the good of those for and those against the candidate, and, that though it had the effect of pushing forward his claims, that was inevitable even if no money was spent, as good administration changed the people's condition.

But the Supreme Court nevertheless cautioned in the above case of *Ghasi Ram* that:

> Although we have held in this case that the action of the first respondent cannot be characterised as not innocent, we are constrained to say that the attitude of Government is far from laudable. Election is something which must be conducted fairly. To arrange to spend money on the eve of elections in different constituencies, although for general public good, is when all is said and done an evil practice, even if it may not be corrupt practice. The dividing line between an evil practice and corrupt practice is a very thin one. It should be understood that energy to do public good should be used not on the eve of elections but much earlier and that even slight evidence might change this evil practice into corrupt practice. Payments from discretionary grants on the eve of elections should be avoided.

A similar word of caution was earlier given by the Supreme Court in *S Khadar Sheriff v Munnuswami Gounder:*[56]

54 AIR 1994 SC 2526.
55 AIR 1968 SC 1191.
56 AIR 1955 SC 775.

It has been frequently pointed out that while it is meritorious to make a donation for charitable purposes, if that is made at the time or on the eve of an election, it is open to the charge that its real object was to induce the electors to vote in favour of the particular candidate.

In the wake of the above observations of the Supreme Court in *Ghasi Ram's* case,[57] the Union Ministry of Home Affairs advised all ministries of the government of India to evolve a convention that for a period of three months immediately prior to the polling in a general election or bye-election in any constituency no expenditure should ordinarily be incurred from a minister's discretionary grant, except in a case where it became absolutely necessary to do so on compassionate grounds.[58]

Similarly, the redressal of public grievances and amelioration of the condition of voters was also held to be non-objectionable from the point of view of attracting the provisions of s 123(1). In *Surinder Singh v Hardial Singh*,[59] a long pending grievance of an elector of an overhead live electric wire above his house was redressed by the candidate by getting that wire shifted quickly before election. It was not held to be an act of corrupt practice under s 123(1).

Undue Influence

Undue Influence, Both Corrupt Practice and Electoral Offence

Undue influence has also been considered as a major corrupt practice from the very beginning under s 123(2) of the 1951 Act as originally enacted. After the revamping of the provisions relating to major and minor corrupt practices in 1956, it was defined as a corrupt practice under s 123(2). The present definition of undue influence in s 123(2) is as follows:

...

Any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right:

Provided that

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who:

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

57 AIR 1968 SC 1191.

58 Ministry of Home Affairs letter No 50/3/68-Poll III dated 28 October 1969.

59 AIR 1985 SC 89.

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,shall be deemed to interfere with the free exercise of the electoral right of such candidate of elector within the meaning of this clause.

As explained earlier, 'Electoral right' in the above provision means the right of a person to stand or not to stand as a candidate, or to withdraw or not to withdraw from being a candidate, or to vote or refrain from voting at an election [s 79(d), 1951 Act].

Undue influence is also an electoral offence under s 171C of the IPC,[60] as defined by that section in the following terms:

171C. ***Undue influence at elections.***—(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever:

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this action.

Here also, the electoral right has the same meaning as defined under the 1951 Act [see s 171A(b), IPC].

The above offence under s 171C is punishable with imprisonment of either description extending upto one year, or with fine or with both under s 171F of the IPC The Supreme Court has observed in *Baburao Patel v Dr Zakir Hussain*,[61] that the provisions of s 123(2) of the 1951 Act are wider than those of s 171C of the

60 Forcing or intimidating a member of a scheduled caste or scheduled tribe not to vote or to vote for a particular candidate or to vote in a manner other than that provided by law is also an offence under s 3(1)(vii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and is punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

61 AIR 1968 SC 904.

IPC, inasmuch as any indirect interference with the exercise of the electoral right is also a corrupt practice under the former section.

Scope of the Provision

Free and fair election is the basic tenet of any democratic election. For an election to be free and fair, exercise of the electoral right by every elector according to his own free will is a basic postulate. But it does not mean that the voter should remain totally uninfluenced. The Supreme Court held in *Shiv Kripal Singh v VV Giri*,[62] that the expression:

> ...free exercise of electoral right' does not mean that the voter is not to be influenced. This expression has to be read in the context of an election in a democratic society, and the candidates and their supporters must naturally be allowed to canvass support by all legitimate and legal means. This exercise of the right by a candidate does not interfere or attempt to interfere with the free exercise of the electoral right by the voter. What amounts to interference with the exercise of an electoral right is 'tyranny over the mind'.

Thus, what is prohibited under the law is not any kind of influence but only 'undue influence'. The distinction between due influence and undue influence has been explained by the Supreme Court in *Bachan Singh v Prithvi Singh*,[63] in the following terms:

> Doubtless the definition of 'undue influence' in sub section (2) of section 123 is couched in very wide terms, and on first flush seems to cover every conceivable act which directly or indirectly interferes or attempts to interfere with the free exercise of electoral right. In one sense even election propaganda carried on vigorously, blaringly and systematically through chrismal leaders or through various media in favour of a candidate by recounting the glories and achievements of that candidate or his political party in administrative or political field, does meddle with and mould the independent volition of electors, having poor reason and little education, in the exercise of their franchise. That such a wide construction would not be in consonance with the intendment of the legislature is discernible from Proviso to this Clause. The Proviso illustrates that ordinarily interference with the free exercise of electoral right involves either violence or threat of injury of any kind to any candidate or an elector or inducement or attempt to induce a candidate or elector to believe that he will become an object of divine displeasure or spiritual censure. The prefix 'undue' indicates that there must be some abuse of influence.

62 AIR 1970 SC 2097.
63 AIR 1975 SC 926.

'Undue influence' is used in contra distinction to 'proper influence.' Construed in the light of the Proviso, Clause (2) of s 123 does not bar or penalise legitimate canvassing or appeals to reason and judgment of the voters or other lawful means of persuading voters to vote or not to vote for a candidate. Indeed such proper and peaceful persuasion is the motive force of our democratic process.

Undue influence as defined in s 123(2), applies to pre-voting stage and not the post-voting stage. In *Dharam Vir v Amar Singh*,[64] it was proved that certain ballot papers were double-marked in the counting hall during the counting process by the counting agents of a candidate and the returning officer was forced to reject them. Though the manner in which the electors had exercised their franchise was distorted and their votes nullified by the above illegal act, the Supreme Court held that the candidate could not be held guilty of commission of corrupt practice under s 123(2), as the provision of that section applied to pre-voting stage and not at the stage of counting of votes.

The question as to when the undue influence on an elector can be brought about during the pre-voting stage was considered at length and answered by the Supreme Court in *Shiv Kripal Singh, etc v VV Giri*.[65] The Supreme Court held that undue influence could be exercised even at the stage when the elector goes through the mental process of weighing the merits or demerits of candidates and makes his choice, and not necessarily at the time of voting. But no undue influence is caused by disturbing a public meeting of a candidate, though such meetings may help voters in judging the relative merits and demerits of candidates in the field. Disturbing a public meeting is an electoral offence under s 127, but not a corrupt practice under s 123(2).[66] Using a red light on top of a private vehicle by a candidate during his election campaign does not amount to corrupt practice of undue influence.[67]

Undue Influence by Threats of Injury, Meaning of Injury

The most common form of undue influence is to force a voter to vote or not for a particular candidate, or not to vote in an election at all, by making threats of physical injury in case of any defiance of such dictate. Hurling of bombs at a polling station when the polling process was on and thereby scaring away the voters, was held to be committing a corrupt practice of undue influence under s 123(2).[68] Two ladies were allegedly beaten by two persons, one of whom was later on appointed by

64 AIR 1996 SC 2314.
65 AIR 1970 SC 2097.
66 *Surinder Singh v Hardial Singh* AIR 1985 SC 89.
67 *Col Inder Singh v Rangila Ram Rao and Ors* AIR 2005 HP 11.
68 *Ram Sharan Yadav v Thakur Muneshwar Nath Singh* AIR 1985 SC 24.

the returned candidate as one of his counting agents. The Supreme Court held[69] that by such appointment it could not be inferred that the candidate was in the knowledge of the said incident and that he had condoned the act of his counting agent and thereby owned responsibility of violence committed by him.

Such threats of physical injury may not be confined only to the voter concerned but may also be directed against a third person in whom the voter may be interested, like, the members of his family or any relatives or friends. Similar threats may also be made to persons who intend to contest an election or who are contesting election as candidates and forcing them not to contest election. However, it is not necessary that there must be actual threat of physical compulsion, but the method of threat must convey to the person concerned that the threat may result in injury to him or a person in whom he may be interested; some fear of injury as a result of non-compliance of what is desired by such threat is essential ingredient of undue influence.[70]

The corrupt practice or electoral offence of undue influence is committed not by threats of physical injury alone; the threat may be of injury of any kind. Such injury may include social ostracism or excommunication or expulsion from any caste or community. Man is a social animal and threat of his social ostracism or excommunication or expulsion from society will create as strong a fear in his mind as the threat of physical injury.

Undue Influence, by Threat of Divine Displeasure or Spiritual Censure

In a country like India where the vast majority of the people are religious minded and have strong religious beliefs, undue influence may be caused not merely by threats of injury but also by inducing or attempting to induce electors to believe that they would become object of divine displeasure or spiritual censure. An appeal to voters that it would be a religious act to vote in a certain manner, and, that the failure to vote in that manner would be against religion and thus create a fear in their mind of divine displeasure or spiritual censure, would not only be an appeal on grounds of religion as prohibited under s 123(3), but also the corrupt practice of undue influence under s 123(2). For certain tribes or *adivasis*, the cock forms a very important and integral part of religious ceremonies. A candidate whose election symbol was cock, distributed leaflets urging voters to vote for the cock, failing which they may incur the wrath of deities. It was held to be a corrupt practice both under ss 123(3) and s 123(2) by the Supreme Court in *Shubnath Deogam v Ram Narain Prasad*.[71]

69 *Jeet Mohinder Singh v Harminder Singh Jassi* AIR 2000 SC 256.
70 *Col Inder Singh v Rangila Ram Rao and Ors* AIR 2005 HP 11.
71 AIR 1960 SC 148.

A *kirtankar* of repute and well-known lecturer on Hindu religion told the audience, consisting mostly of illiterate and orthodox Hindus of rural areas, *adivasis* and *rabaris* belonging to scheduled castes and scheduled tribes, that the Congress Party was allowing the slaughter of crores of cows and those who vote for that party would be partners in the sin of *gohatya*. The Supreme Court held in *Manubhai Nandlal Amersey v Popatlal Manilal Joshi*,[72] that the above speech of the *kirtankar* had the effect of reminding the voters that they would be partners in the sin of *gohatya* and that they would be object of divine displeasure or spiritual censure, if they voted for the Congress Party, and, thus, fell within the mischief of s 123(2). The Supreme Court took the same view in *Narbada Prasad v Chhaganlal*[73] and *Mohan Lal Selhia v Chiranjilal Harsola*[74] The Supreme Court observed that the criticism of the policy of a party was not objectionable, but what offended s 123(2) was the creation of the fear on the minds of voters that they would be guilty of the sin of *gohatya* if they voted for that party.

The Supreme Court has also observed in *Manubhai Nandlal Amersey's*[75] case, that for determining whether any undue influence has been caused by inducing or attempting to induce electors to believe that they would become object of divine displeasure or spiritual censure, the status of the person making or attempting such inducement is highly relevant, as also the type of audience. But it does not mean that a religious or spiritual leader has no right to canvass for any candidate for fear of his act amounting to corrupt practice within the meaning of s 123(2). The Supreme Court held in *Ram Dial v Sant Lal*,[76] that a religious or spiritual leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing for the votes of others, for that candidate. Like any other citizen, he has a right to express his opinion on the individual merits of the candidates and if he merely seeks votes for any particular candidate that would only be a legitimate use of his influence amongst a particular section of the voters. But where the speech of such religious or spiritual head transgresses the limits of appeal to voters on the merits or worth of the candidate and partakes the character of *hukam or farman* leaving no free choice to the voters to vote against such dictate and implying thereby that disobedience of such mandate would carry divine displeasure or spiritual censure, such appeal would fall within the ambit of s 123(2) so as to constitute the corrupt practice of undue influence. In this case, a circular was issued by a religious head of *Namdhari* Sikhs to the voters of the constituency belonging to that sect containing a 'command' to them from 'Shri Sat Guru Sacha Padshah' that they should vote for a particular candidate taking it to be their primary duty to make him successful in the

72 AIR 1969 SC 734.
73 AIR 1969 SC 395.
74 Civil Appeal No 272 of 1969, decided on 16 December 1969.
75 AIR 1969 SC 734.
76 AIR 1959 SC 855.

election. The Supreme Court held that the circular, the way it was worded, conveyed the distinct impression to the *Namdhari* voters that it was a mandate from their spiritual *guru* and that it was their bounden duty under the strict orders of their religious leaders to vote for the said candidate and that any infringement of that mandate had implicit in it the divine displeasure or spiritual censure.

Undue Influence, Not Caused by Public Action or Declaration of Public Policy

A declaration of public policy or a promise of public action or the mere exercise of a legal right by a person without intent to interfere with the electoral right of any other person shall not be deemed to be undue influence within the meaning of s 123(2). It was held in the above mentioned case of *Manubhai Nandlal Amersey v Popatlal Manilal Joshi*,[77] that there could be no objection to the declaration of a public policy by a party that it would ban cow slaughter or to the criticism of the policy of the rival party that it was not banning cow slaughter, but what offended s 123(2) in that case was the creation of the fear in the minds of the voters that they would be guilty of the sin of *gohatya* if they voted for that party.

The manifestos of political parties or declarations of common minimum programmes on the eve of elections promising reliefs of different kinds and undertaking of developmental activities, if voted to power, will also fall under this exception being declarations of public policy and promises of public action. In *Thakur Sen Negi v Dev Raj Negi*,[78] the highlighting of the party's manifesto and proposed developmental programmes by the chief minister, if voted to power, was held to be non-objectionable. Likewise, promises of certain 'freebies' by the Dravida Munnetra Kazhagam and All India Anna Dravida Munnetra Kazhagam in their manifestos for the general elections to the Tamil Nadu legislative assembly in 2006 and 2011 were held not be corrupt practice or electoral offence[79].

Appeal on the Ground of Religion, Race, Caste, Community or Language or Appeal to Religious or National Symbols

Object of the Provision

The reason why appeals on the ground of religion, race, caste, community or language in elections are considered reprehensible and a corrupt practice has been succinctly explained by the Supreme Court in *Ziauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra*.[80] The Supreme Court observed that:

77 AIR 1969 SC 734.
78 AIR 1994 SC 2526.
79 *S. Subramaniam Balaji v The Government of Tamil Nadu & Ors* decided on 5 July 2013.
80 AIR 1975 SC 1788.

Our Constitution makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed, and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

It seems to us that s 123, sub-ss (2), (3) and (3A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilized political and social order. Due respect for the religious beliefs and practices, race, creed, culture, and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture, or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories.

Definition of the Corrupt Practice

The corrupt practice on the ground of appeal to religion, etc has been defined in s 123(3) of the 1951 Act as follows:

> The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:
>
> Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purpose of this clause.

In the original Act, this was a minor corrupt practice in s 124(5); but in 1956 when the corrupt practices were redefined, it was made into one of the significant corrupt practices in s 123(3). Both in the original Act and the amended Act, the appeal on the ground of religion, etc had to be 'systematic' so as to constitute the corrupt practice. But in 1961, s 123(3) was further amended and the word 'systematic' was dropped, whereby even a single and solitary appeal on the prohibited grounds was regarded as a corrupt practice.

The above section underwent further amendment in 1975, whereby a proviso was added thereto to clarify that an election symbol allotted to a candidate shall not be deemed to be a religious or national symbol. This clarification was considered necessary in the wake of the objections raised in several election petitions and otherwise that the symbol 'cow and calf' allotted by the Election Commission to the Indian National Congress was a religious symbol and that the appeal for votes on that symbol was an appeal to a religious symbol within the meaning of s 123(3).

It is to be noted that the use of the word 'his' in the above definition of the corrupt practice has a special significance. The Supreme Court observed in *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar Kashinath Kunte and Ors.*[81]

> There can be no doubt that the word 'his' used in sub-section (3) must have significance and it cannot be ignored or equated with the word 'any' to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain language of sub-section (3) and this is the only manner in which the word 'his' used therein can be construed. The expressions 'the appeal ... to vote or refrain from voting for any person on the ground of his religion, ... for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate' lead clearly to this conclusion. When the appeal is to vote on the ground of 'his' religion for the furtherance of the prospects of the election of that candidate, that appeal is made on the basis of the religion of the candidate for whom votes are solicited. On the other hand when the appeal is to refrain from voting for any person on the ground of 'his' religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicially affected. It is thus clear that for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought; and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. There is no ambiguity in sub-section (3) and it clearly indicates the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3).

The same meaning will have to be given to the word 'his' in relation to any appeal on the ground of race, caste, community or language of the candidate. Significantly,

81 (1996) 1 SCC 130.

any appeal on the ground of sex of the candidate does not fall within the mischief of s 123(3).

Even where the rival candidate also belongs to the same religion, an appeal on the ground of religion of the candidate may amount to corrupt practice within the meaning of s 123(3) as clarified in *Kultar Singh v Mukhtiar Singh*[82] Charging a Muslim candidate with eating pork by a rival Muslim candidate was held to be a corrupt practice within the meaning of s 123(3).[83] Likewise, an appeal to the voters that the returned candidate was a true Muslim, whereas his rival, though a Muslim, was not true to his religion and was neither a good Hindu nor a true Muslim was held to be a corrupt practice in *Ziauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra.*[84]

In *Narayan Singh v Sunderlal Patwa,*[85] the Supreme Court had a further detailed look at the provisions of s 123(3) and observed:

> As it appears, under the amended provision, the words "systematic appeal" in the pre-amended provision were given a go-by and necessarily therefore the scope has been widened but by introducing the word "his" and the interpretation given to the aforesaid provision in the judgments referred earlier, would give it a restrictive meaning. In other words, while under the pre-amended provision it would be a corrupt practice, if appealed by the candidate, or his agent or any other person to vote or refrain from voting on the grounds of caste, race, community or religion, it would not be so under the amended provision so long as the candidate does not appeal to the voters on the ground of his religion even though he appealed to the voters on the ground of religion of voters. In view of certain observations made in the Constitution Bench decision of this Court in Kultar Singh case we think it appropriate to refer the matter to a larger Bench of seven Judges to consider the matter. The matter be placed before Hon'ble the Chief Justice for constitution of the Bench.

Appeal on the Ground of Religion

Explaining the purpose of enacting the provisions of s 123(3), the Supreme Court observed in *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar Kashinath Kunte and Ors*[86] that the object is:

82 AIR 1965 SC 141.
83 *Rahim Khan v Khurshid Ahmed* [1975] 1 SCR 643.
84 (1976) 2 SCC 17.
85 (2003) 9 SCC 300; No further decision of Constitution Bench appears to have been rendered so far.
86 (1996) 1 SCC 130.

...to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the ground of his religion. This is in keeping with the secular character of the Indian polity and rejection of the scheme of separate electorates based on religion in our constitutional scheme. An appeal of the kind forbidden by sub-section (3) based on the religion of a candidate, need not necessarily be prejudicial to public order and, therefore, the further element of likelihood of prejudice to public order is unnecessary, on account of which it is not implicit in the provision.

The Supreme Court further held in that case that the restriction imposed in s 123(3) is in the interest of 'decency' in a secular polity and was, thus, a reasonable restriction within the meaning of art 19(2) and not violative of the fundamental right of speech and expression guaranteed under art 19(1)(a).

What is appeal to religion depends on time and circumstance, the ethos of a community, the bearing of the deviation on the cardinal tenets and other variables. To confound communal passion and crude bigotry with religion is to sanctify in law what is irreligion in fact.[87] The Supreme Court further observed that religious appeal or communal appetite is stronger in a bigoted and backward population than in an enlightened or indifferent or other area with a long tradition of peaceful co-existence of variegated religious groups or cosmopolitan people. It all depends on the socio-political pathology or sensibility of each province or constituency.[88]

In *Harmohinder Singh Pradhan v Ranjeet Singh Talwandi*,[89] the Supreme Court drew a distinction between appeals simplicitor to vote or to refrain from voting made by religious leaders which may benefit any particular candidate and an appeal to vote or to refrain from voting on the ground of religion emanating from religious leaders and attributable to the candidate within the meaning of s 123(3). The apex court held that the former is not vulnerable while the latter is. Allegation that certain religious leaders, held in reverence by the voters, issued an appeal to vote in favour of respondent was not considered raising a triable issue.

In *Harcharan Singh v Sajjan Singh*,[90] it was alleged that the corrupt practice of appeal on ground of religion was made by: (a) sponsorship of the candidate and distribution of election ticket to him by the *Akal Takht*, which is the 'supreme religious authority of the Sikhs'; (b) issue of '*Hukamnama*' by the Jathedar of the *Akal Takht* indicating the approval of the *Akal Takht* to the decision to give the election ticket to the above candidate; and (c) appeal to the voters at election meetings and in the writings in the Akali Times to vote for that candidate by referring to the *Hukamnama* and appealing to the religious sentiments of voters. In

87 *Rahim Khan v Khurshid Ahmed* [1975] 1 SCR 643.
88 *Abdul Hussain Mir v Shamsul Huda* AIR 1975 SC 1612.
89 AIR 2005 SC 2379.
90 AIR 1985 SC 236.

one of the election meetings, an important leader of the *Akali Dal* was stated to have represented that the candidate was a nominee of the *Akal Takht*, and that the candidate himself had also made a statement to that effect. Though in the trial of the election petition the issue of *Hukamnama* was denied on the ground that it had to be issued in a particular textual form, the Supreme Court held that whether a *Hukamnama* as alleged was issued or not should not be considered technically in the strict textual sense and strict rules of the Sikh community, but the matter had to be judged from a broader perspective. The Supreme Court observed that the *Akal Takht* enjoys a unique position amongst the Sikhs and any communication from it which is represented by eminent members of the Sikh community as *Hukamnama* would have great religious persuasive value, even if, strictly speaking, it might not be a *Hukamnama*, and that it had the effect of a *Hukamnama* on the community at large, of inducing them to believe that ignoring the claim of the candidate nominated by the *Akal Takht* would be an act of sacrilege on the part of a good Sikh. The corrupt practice of appeal on ground of religion was accordingly held to have been committed.

The question whether an appeal in the name of '*Panth*' amounts to appeal on the ground of religion was considered by the apex court in *Kultar Singh v Mukhtiar Singh*.[91] The Supreme Court observed that the word '*Panth*' is one of Sanskrit origin and etymologically it means the path or the way, but it has come to indicate the Sikh religion because it has been used by the Sikhs to denote their religion and their denomination as the followers of that *Panth*. In that context, the *Panth* may mean the Sikh religion and the followers of the *Panth* would be the persons who follow the path prescribed by the Sikh Gurus and, as such, would signify the Sikh community and the glory or prestige of the *Panth* may mean the glory or prestige of the Sikh religion. But in that very case, the Supreme Court examined the contents a certain poster, printed on behalf of some persons living in Singapore, Malaya and South-East Asia, containing an appeal to Sikh voters to vote for the representatives of the Akali Dal to preserve the honour of the *Panth* so as to reach the final goal of Punjabi Suba. On reading that poster as a whole, the Supreme Court held that the word '*Panth*', as used in that poster and in the context of the appeal made therein, did not mean the Sikh religion. The apex court did not accept the contention that by distributing that poster the returned candidate had appealed to the voters to vote for him because of his religion.

In *M Chenna Reddy v V Ramachandra Rao*,[92] a dinner was hosted by a supporter of the appellant at the residence of a prominent Muslim which was attended by several Muslims and the candidate, who was the Finance Minister of the State, as chief guest. After the dinner, the host addressed the gathering saying that the respondent was an arch enemy of Islam and Muslims and if the Muslims voted for

91 AIR 1965 SC 141.
92 40 ELR 390.

him they would incur the displeasure of Allah and his Prophet. Thereafter, the appellant also spoke to the gathering, thanking the host for arranging the dinner and supported his speech and appealed for votes. It was held to be a corrupt practice on the ground of appeal to religion.

In *Mullapudi Venkata Krishna Rao v Vedula Suryanarayana*,[93] certain posters were pasted on the walls depicting the late Shri NT Rama Rao, chief of the political party to which the returned candidate belonged, in the role of the Lord Krishna as an incarnation blowing a conch shell with a *sloka* from Bhagwad Gita at the top and making a clarion call to the voters to defeat the party in power alleging that it had sold away the nation. The Supreme Court held that the poster contained an appeal not only to a Hindu by religion but to every Indian symbolic of the Hindu religion. The use by the candidate of such a poster coupled with the printing upon it of words derogatory of a rival political party must lead to the conclusion that the religious symbol was used with a view to prejudicially effect the election of the candidate of the rival political party within the meaning of s 123(3). With regard to use of similar posters in another constituency, the Supreme Court further observed in *Kalamata Mohan Rao v Narayana Rao Dharmana*[94] that the clear meaning of the posters was that the party chief was an incarnation of God worshipped by the Hindus and was seeking votes for his candidate to conquer the evil in the form of the rival party which was prohibited by s 123(3).

In the case of *PC Thomas v PM Ismail*[95], the returned candidate, Shri PC Thomas, was found guilty of publishing and distributing, through his agents and workers, with his consent, an election notice/pamphlet which described Shri Thomas as a leader of Catholic community and which sought support and prayers for him, and also a calendar in which the picture of Pope John Paul II was printed along with the photo of Shri Thomas attending the beatification ceremony of Mother Teresa. Both the Kerala High Court and the Supreme Court held Shri Thomas guilty of making an appeal on the ground of religion within the meaning of s 123(3). On the opinion of the Election Commission, the President disqualified Shri Thomas for a period of three years from the date of his order dated 19 May 2010.

Appeal to 'Hindutva' and 'Hinduism'

Whether an appeal to '*Hindutva*' or '*Hinduism*' in election speeches amounts to appeal on the ground of religion came up for intense scrutiny by the Supreme Court in *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar Kashinath Kunte and Ors*,[96] *Manohar Joshi v Nitin Bhaurao Patil*,[97] *Suryakant Venkatrao Mahadik v Saroj Sandesh*

93 AIR 1994 SC 1627.
94 (1995) 6 SCC 728.
95 AIR 2010 SC 905.
96 (1996) 1 SCC 130.
97 (1996) 1 SCC 169.

Naik,[98] and several other connected matters, all decided on 11 December 1995. After analysing the previous case law on the point, the Supreme Court observed in *Ramesh Yeshwant Prabhoo*'s case,[99] that no precise meaning can be ascribed to the terms 'Hindu', '*Hindutva*' and 'Hindusim'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. Ordinarily, *Hindutva* is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism. The word '*Hindutva*' is used and understood as a synonym of 'Indianisation', ie, development of uniform culture by obliterating the differences between all the cultures coexisting in the country. The words 'Hinduism' or '*Hindutva*' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract the terms 'Hinduism' or '*Hindutva*' cannot be confined merely to describe persons practicing the Hindu religion as a faith and cannot be considered per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. The mischief resulting from the misuse of the terms by any person in his speech has to be checked and not its permissible use. Fundamentalism of any colour or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation. Any misuse of these terms must, therefore, be dealt with strictly.

The Supreme Court further observed that it is a fallacy and an error of law to proceed on the assumption that any reference to *Hindutva* or Hinduism in a speech makes it automatically a speech based on the Hindu religion, as opposed to the other religions, or that the use of the words '*Hindutva*' or 'Hinduism' per se depicts an attitude hostile to all persons practicing any religion other than the Hindu religion. It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for votes for a Hindu candidate on the ground that he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of sub-s (3) or (3A) of s 123. It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant. Whether a particular speech in which reference is made to *Hindutva* and/or Hinduism falls within the prohibition under sub-s (3) or (3A) of s 123 is, therefore, a question of fact in each case.

98 (1996) 1 SCC 384.
99 (1996) 1 SCC 130.

Applying the above test, the apex court held in the above case of *Dr Ramesh Yeshwant Prabhoo* that the speeches made by Shri Bal Thackeray, the leader of the Shiv Sena political party,, wherein he appealed to the Hindu voters to vote for the candidate of his party because he was a Hindu, and wherein he also made some derogatory references to Muslims, amounted to corrupt practice under s 123(3) [and also under s 123(3A), as discussed later]. The court also held the appellant in *Suryakant Venkatrao Mahadik*'s case[1] guilty of committing a corrupt practice under s 123(3) for making an appeal in a speech at a congregation of Hindu devotees in a Hindu temple, during a Hindu religious festival with emphasis on the Hindu religion, for giving votes to a Hindu candidate espousing the cause of Hindu religion. But in *Manohar Joshi*'s case,[2] where the appellant was accused of having made an appeal on the ground of religion by stating in a public meeting that the first Hindu state would be established in Maharashtra, no corrupt practice under s 123(3) was found to have been committed by the appellant. The court held that a mere statement in the speech made by the appellant in election meeting that the first Hindu state would be established in Maharashtra was by itself not an appeal for votes on the ground of his religion, but the expression, at best, of such a hope. The Supreme Court observed that however despicable be such a statement, it could not be said to amount to an appeal for votes on the ground of the candidate's religion.

Appeal on Ground of Caste or Community

The Supreme Court held in *JK Choudhury v Birendra Chandra Dutta*,[3] that to say that the activities of a candidate run counter to the interest of his community is not the same thing as appealing to vote or refrain from voting on the ground of his caste or community or religion. In this case, the candidate had opposed the proposal mooted by some members of the Tripura legislative assembly for the inclusion of certain areas of Tripura as scheduled tribal areas under the Fifth Schedule to the Constitution, stating that the proposal, if carried into effect, would create a situation critical for the Bengalees. It was not considered as a corrupt practice on the ground of caste or community.

The allegation of fraud in obtaining a caste certificate or the fact that a candidate obtains a certificate that he belonged to and is a member of a particular scheduled caste or tribe cannot amount to appeal to vote or refrain from voting on ground of his caste or tribe. To attract the vice of s 123(3) as amounting to corrupt practice, independent appeal or canvassing for votes on the ground of caste or tribe by the candidate or his agent or any other person with the consent of the candidate or his

1 (1996) 1 SCC 384.
2 (1996) 1 SCC 169.
3 42 ELR 66.

election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate is an essential ingredient.[4]

Mere reference to one's tribe, ancestry or genetic commingling may not be tainted with the legal vice of religious or communal appeal, exceptional situations apart. It may well be that a strong secularist candidate may plead with the electorate to be non-communal and, therefore, ask for their votes on the basis that he was an inter-caste or inter-racial or inter-religious product and as such a symbol of communal unity. An appeal by a Muslim candidate in tribal areas of Assam that his mother was a tribal Hindu and that he personifies Hindu-Muslim interplay does not cross the line of corrupt practice. Further, calling the rival candidate a revolutionary communist or claiming to be an Assamese or Bengali is also not necessarily a communal appeal, though in certain circumstances it might be so.[5]

Appeal on Ground of Language

The Supreme Court observed in *Jagdev Singh Sidhanti v Pratap Singh Daulta*,[6] that the provision relating to corrupt practice on the ground of language must be read in the light of the fundamental right to conserve language guaranteed under art 29(1), for ascertaining the true meaning of the corrupt practice, the area of the fundamental right of citizen must be steadily kept in view and that the above provision cannot be so read as trespassing upon that fundamental right. Right to conserve language of the citizens includes the right to agitate for the protection of the language. Political agitation for the conservation of language of a section of the citizens cannot, therefore, be regarded as a corrupt practice within the meaning of s 123(3) of the 1951 Act. The said corrupt practice is committed when an appeal is made either to vote or refrain from voting on the ground of the candidate's language. It is the appeal to the electorate on a ground personal to the candidate relating to his language which attracts s 123(3). Therefore, it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where, for the conservation of language of the electorate, appeals are made and promises given that steps would be taken to conserve that language, it will not amount to a corrupt practice.

It was also held by the apex court in *Kultar Singh v Mukhtiar Singh*,[7] that political agitation for the creation of Punjabi *suba* could not be viewed as corrupt practice within the meaning of s 123(3) as it was a political issue and it was perfectly competent for political parties to hold bona fide divergent and conflicting views on such a political issue. Sometimes, political issues introducing, indirectly and incidentally, considerations of language or religion may be raised at election

4 *Regu Mahesh v Rajendra Pratap Bhanj Dev* AIR 2004 SC 38.
5 *Abdul Hussain Mir v Shamsul Huda* AIR 1975 SC 1612.
6 AIR 1965 SC 183.
7 AIR 1965 SC 141.

meetings, but whether they constitute corrupt practice under s 123(3) must be judged in the light of the relevant political controversy.

Appeal to Religious Symbols

In *Ramanbhai Ashabhai Patel v Dabhi Ajitkumar Fulsinhji*,[8] the elected candidate belonging to the Swatantra Party whose election symbol was 'star' described his election symbol as '*Dhruva* star' and it was alleged that he made an appeal to a religious symbol. The Supreme Court observed that it is impossible to say that any particular object, bird or animal could be regarded as a religious symbol of the Hindu religion. The basic concept of Hindu religion is that the supreme being is in every inanimate object—plant, creature or person—that is to say, in the entire creation and that the entire creation is within the supreme being and, if God or divinity is the reality or the substance of everything that exists, it would not be possible to say that any particular object is a symbol of the Hindu religion. Various deities in the Hindu pantheon are associated with some specific objects, birds or animals; for example, Lord Shiva is associated with a trident and a coiled cobra around his neck, Lord Vishnu is associated with the cobra 'Shesha' on which he reclines as upon a bed, Goddess Lakshmi is associated with lotus upon which she stands and so on. It does not mean that a person using a lotus or a cobra or a trident as his election symbol will be appealing to the religious sentiments of the people, the apex court observed.

The apex court further observed in that case that a reference to prophets or religions or to deities venerated in a religion or to their qualities and deeds does not necessarily amount to an appeal to the religious sentiments of the electorate. Something more has to be shown for this purpose. If, for instance, the illiterate, the orthodox or the fanatical electors are told that their religion would be in danger or they will suffer miseries or calamities unless they cast their vote for a particular candidate, that would be quite clearly an appeal to the religious sentiment of the people. Similarly, if they are told that the wrath of God or of a deity will visit them if they do not exercise their franchise in a particular way, or if they are told that they will receive the blessings of God or a deity if they vote in a particular way, that would be an appeal to the religious sentiments. Similarly, if they are told that they should cast their vote for a particular candidate whose election symbol is associated with a particular religion just as the Cross is with Christianity, that will be using a religious symbol for obtaining votes. But where, as in the case of the Hindu religion, it is not possible to associate a particular symbol with religion, the use of a symbol even when it is associated with some deity, cannot, without something more, be regarded as a corrupt practice within the meaning of s 123 (3) of the 1951 Act. For instance, a particular object or a plant, a bird or an animal associated with a deity is used in such a way as to show that votes are being solicited in the name of that deity

8 AIR 1965 SC 669.

or as would indicate that the displeasure of that deity be incurred if a voter does not react favourably to that appeal, it may be possible to say that this amounts to making an appeal in the name of religion. But the symbol standing by itself cannot be regarded as an appeal in the name of religion or religious symbol.

As regards '*Dhruva* star', the apex court held that it has no religious significance. *Dhruva* is regarded as a great devotee of Lord Vishnu and held in reverence by Hindus, but he is not regarded as a deity or a Godhead and that the worship of mortals is so common, at least in our country, that no one can seriously attach religious significance to it. The five qualities which are generally associated with *Dhruva* are noble qualities but they have no significance peculiar to Hindu religion and in no way different from that to persons professing other religions or systems of belief. Accordingly, the '*Dhruva* star' was not regarded as a religious symbol.

Likewise, the use of '*Om*' on a flag by a candidate was not held to be an appeal to religious symbol. The Supreme Court observed in *Jagdev Singh Sidhanti v Pratap Singh Daulta*,[9] that the expression '*Om*' is respected by the Hindus generally and has a special significance in the Hindu scriptures. It is a sacred syllable used in invocations, at the commencement of prayers, at the beginning and at the end of the Vedic recitation, and as a respectful salutation, and a subject of many mystical speculations. But the attribute of spiritual significance will not necessarily impart to its use, on a flag, the character of a religious symbol within the meaning of s 123(3) and that the flag on which the word '*Om*' was printed could not be called a religious symbol.

Cow is also regarded as an object of veneration by the Hindus. But it was not regarded by the Supreme Court as a religious symbol, when the election symbol 'cow and calf' was allotted to the Indian National Congress by the Election Commission in 1971.[10]

Likewise, the Supreme Court held in *Shubh Nath v Ram Narain*,[11] that the cock was not a religious symbol, though it was used by the *adivasis* in the worship of their deities. The Allahabad High Court held in *Karan Singh v Jammu Singh*,[12] that the portrait of Mahatma Gandhi was not a national symbol.

Appeal Inherent in the Name of a Political Party

Every political party registered with the Election Commission under s 29A of the 1951 Act has to give an undertaking in its constitution to the effect that it will, inter alia, uphold the principles of secularism. But there are several parties registered with the Commission whose membership is either confined to or predominantly held by members of some communities or religion. It may not be incorrect to state that the

9 AIR 1965 SC 183.
10 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.
11 AIR 1960 SC 198.
12 15 ELR 370.

appeals by such parties and their candidates for votes may in an indirect way influence certain sections of society, as the very name of those parties may have an inherent appeal on considerations of religion, race, community or language. But the Supreme Court has observed in *Das Rao Deshmukh (Dr) v Kamal Kishore Nanasaheb Kadam*,[13] that such situation cannot be avoided so long as the law recognises such parties for the purposes of elections and parliamentary life.

Promotion of Feelings of Enmity or Hatred Between Different Classes of Indian Citizens

A New Corrupt Practice and Electoral Offence

In 1961, a new corrupt practice came to be inserted in the 1951 Act for the first time by the Representation of the People (Amendment) Act 1961. The new corrupt practice was defined in s 123(3A) as follows:

> The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Simultaneously, a new electoral offence was also added in the 1951 Act, by inserting a new s 125 therein, by the same amending Act of 1961. The new s 125 reads as follows:

> 125. ***Promoting enmity between classes in connection with election.***—Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Nature and Object of the Corrupt Practice

In many respects, the corrupt practice under s 123(3) of making appeal on ground of religion, race, caste, community, or language and the corrupt practice of promotion of feelings of enmity or hatred between different classes of Indian citizens on the above grounds under s 123(3A) may be similar, and sometimes even overlapping, but not always. Whereas any appeal under s 123(3) may not have prejudicial effect on public order, the element of such prejudicial effect on public order is implicit in the corrupt practice under s 123(3A).

13 (1995) 5 SCC 123.

Explaining the rationale, nature and object of the provisions of s 123(3A), the Supreme Court observed in *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar Kashinath Kunte and Ors*:[14]

> We would now consider the meaning of sub-s (3-A) of s 123. This sub-section also was inserted along with the substituted sub-s (3) by Act 40 of 1961 wef 20–9–1961. The meaning of this sub-section is not much in controversy. Sub-section (3-A) is similar to s 153-A of the Indian Penal Code. In sub-section (3-A), the expression used is 'the promotion of, or attempt to promote, feelings of enmity or hatred' as against the expression 'Whoever...promotes or attempts to promote...disharmony or feelings of enmity, hatred or ill will...' in s 153-A IPC. The expression 'feelings of enmity or hatred' is common in both the provisions but the additional words in s 153-A IPC are 'disharmony...or ill will'. The difference in the plain language of the two provisions indicates that mere promotion of disharmony or ill will between different groups of people is an offence under s 153-A IPC while under sub-s (3-A) of s 123 of the RP Act, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign.
>
> The provision is made with the object of curbing the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies. The provision in the IPC as well as in the RP Act for this purpose was made by amendment at the same time. The amendment in the RP Act followed amendments made in the Indian Penal Code to this effect in a bid to curb any tendency to resort to divisive means to achieve success at the polls on the ground of religion or narrow communal or linguistic affiliations. Any such attempt during the election is viewed with disfavour under the law and is made corrupt practice under sub-s (3-A) of s 123. ...in sub-s (3-A), the element of prejudicial effect on public order is implicit. Such divisive tendencies promoting enmity or hatred between different classes of citizens of India tend to create public unrest and disturb public order. This is a logical inference to draw on proof of the constituent parts of sub-s (3-A). The meaning of sub-s (3-A) is not seriously disputed between the parties and, therefore, it does not require any further discussion. However, whether the act complained of falls within the net of sub-s (3-A) is a question of fact in each case to be decided on the basis of the evidence led to prove the alleged act.

The Supreme Court also upheld, in this case, the constitutional validity of the above provisions of s 123(3A), considering them to be reasonable restriction in the interest of 'decency' within the meaning of art 19(2).

14 (1996) 1 SCC 130.

Applying the above test in the same case, making of derogatory remarks against the Muslims in certain speeches by Shri Bal Thackeray, leader of Shiv Sena, was held to constitute corrupt practice under s 123(3A), and not only Shri Thackeray but the returned candidate, Dr Ramesh Yeshwant Prabhoo, was also held guilty of the above corrupt practice as his implied consent to the offending remarks of Shri Thackeray was successfully proved.

In *Das Rao Deshmukh (Dr) v Kamal Kishore Nanasaheb Kadam*,[15] a poster contained an appeal to the voters to vote for the appellant 'to teach the Muslims a lesson'. The apex court held the poster to be per se highly offensive and potentially vulnerable and likely to bring hatred and misunderstanding between the Hindu and Muslim communities. The appeal in that poster was likely to rouse passion in the minds of the voters on communal basis and bring disharmony between the two communities offending the secular structure of the country, so as to constitute the corrupt practice within the meaning of s 123(3A) and also s 123(3).

Condemning reforms by the Congress Party as anti-Muslim and describing them as interference by 'Hindu raj' in the religion of Muslims was held to be promoting hostility between people of different religions and falling within the ambit of s 123(3A).[16]

Propagation of practice of *Sati*

A New Corrupt Practice and New Ground for Disqualification

Sati is an age-old tradition and practice followed by the Hindus in certain parts of India, more prominently by the Rajputs in the State of Rajasthan. *Sati* means self-immolation by the wife on the death of her husband, normally by burning herself alive on the funeral pyre of the husband. Though several efforts were made to stop this practice by many social reformists and even by law during the British period, it could not be put to a complete end and instances of commission of *sati* still occur occasionally. One such case of *sati* by one Roop Kanwar in Rajasthan in the mid 1980s and the attempts to glorify it by certain sections of people there attracted wide public attention and condemnation. Parliament intervened and it led to the enactment of the Commission of Sati (Prevention) Act 1987. As a corollary, it was considered appropriate by Parliament that any person propagating the practice of sati or its glorification should be debarred from being a representative of the people in Parliament and state legislatures. Accordingly, a new ground of disqualification in respect of persons convicted of any offence under the said Commission of Sati (Prevention) Act 1987 and punished with imprisonment for six months was added in s 8 of the 1951 Act. Further, a new corrupt practice on the ground of propagation

15 (1995) 5 SCC 123.

16 *Ziauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra* AIR 1975 SC 1788.

or glorification of practice of sati was introduced by insertion of a new s 123(3B) in that Act, by the aforesaid 1987 Act, as follows:

...

(3B) The propagation of the practice or the commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation—For the purposes of this clause, 'sati' and 'glorification' in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act 1987.

There seems to be no case so far where a candidate was alleged to have indulged in the above corrupt practice.

Publication of False Statement

Publication of False Statement, Both Corrupt Practice and Electoral Offence

The law does not permit character assassination of any candidate in the election fray. The publication of any false statement of fact in relation to personal character or conduct of a candidate was a major corrupt practice under s 123(5) in the original 1951-Act. It was retained as one of the corrupt practices when major and minor corrupt practices ceased to have any distinction in 1956. At present, s 123(4) defines that corrupt practice as follows:

...

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

False statement in connection with an election is also an electoral offence under s 171G of the IPC. But that Code does not seem to attach much gravity to that offence as it is punishable only with fine, though the limit of such fine is not prescribed. Further, the scope of that offence is limited inasmuch as any false statement in relation to the candidature or withdrawal of a candidate is not covered by the provisions of s 171G. That section reads as follows:

171G. ***False statement in connection with an election.***—Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or

does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

Object and Scope of the Provision

The object and the policy underlying the provision relating to false statements in relation to personal character or conduct of candidates came to be explained by the Supreme Court in *Inder Lal v Lal Singh*.[17] The apex court observed that in order that the elections should be free, it is necessary that the electorate should be educated on political issues in a fearless manner and so the legislature thought that full and ample scope should be left for free and fearless criticism by candidates against the public and political character of their opponents. But the legislature also thought, at the same time, that the vilification of private or personal character of the candidate should not be permitted in election campaigns. Circulation of false statement about the personal or private character of the candidate during the election period is likely to work against the above freedom, inasmuch as the effect created by such false statements may not be met by denials in proper time and it may affect the voting of the electors. It is for the protection of the constituency against the acts which would be fatal to the freedom of election that the statute provides for the inclusion of the circulation of false statements concerning the private character of a candidate amongst corrupt practices. Dissemination of false statements about the personal character of a candidate thus constitutes a corrupt practice, but not a statement in relation to the public or political character of a candidate, even if it is likely to prejudice the prospects of that candidate's election. This distinction is presumably based on the theory that the electorate being politically educated and mature, would not be deceived by a false criticism against the public or political character of any candidate. The public and political character of a candidate is open to public view and public criticism and, even if any false statements are made about the political views of a candidate or his public conduct or character, the electorate would be able to judge the allegations on the merits and may not be misled by any false allegation in that behalf. It is on this theory that false statements of fact affecting the public or political character of a candidate are not brought within the mischief of s 123(4).

In *Sheopal Singh v Ram Pratap*,[18] the Supreme Court observed that an election is the expression of popular will and that it should be so conducted that the popular will shall be reflected on the basis of the policy of the party which the candidate represents and on his merits. That object cannot be achieved unless freedom of speech is assured at the election and the merits and demerits of a candidate, personal as well as political, are prominently brought to the notice of the voters in the constituency. At the same time, it shall not be allowed to degenerate into a

17 AIR 1962 SC 1156.
18 AIR 1965 SC 677.

vilification campaign aimed at bringing down the personal character or conduct of the candidate without any basis whatsoever. Section 123(4) is designed to achieve this dual purpose, namely, freedom of speech and prevention of malicious attack on personal character or conduct of rivals. The purity of an election is sought to be maintained without affecting the freedom of expression.

The Supreme Court also observed in *Jagjit Singh (Dr) v Giani Kartar Singh*,[19] that the policy underlying the provisions of s 123(4) is that in the matter of elections, the public and political character of a candidate is open to scrutiny and can be severely criticised by his opponents, but his private or personal character is not so. In order that the elections in a democratic country should be freely and fearlessly conducted, considerable latitude has to be given to the competing candidates to criticise the political and socio-economic philosophy of their opponents or their antecedents and character as public men. That is why even false statements as to the public character of candidates are not brought within the mischief of s 123(4), because the legislature thought that in the heat of election it may be permissible for competing parties and candidates to make statements in relation to the public character of their opponents, and even if some of the statements are false, they would not amount to corrupt practice.

The Supreme Court further observed in *Subhash Desai v Sharad J Rao*,[20] that the object of s 123(4) is not only to protect any candidate at the election from character assassination and vilification, but also to maintain the purity and fairness of the election. Section 123(4) maintains the delicate balance between the freedom of speech of an individual and the interest of the public to get full information about the candidate, but not to affect the prospect of the candidate concerned by publishing facts about his personal character or conduct which are false.

Ingredients of the Provision

A corrupt practice under s 123(4) shall be committed if each of the following ingredients are satisfied in relation to any publication of a statement: (i) it should be a statement of fact; (ii) it should be false; (iii) the person making it either believes it to be false or does not believe it to be true; (iv) it should be in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal of any candidate; and (v) it should be a statement reasonably calculated to prejudice the prospects of that candidate's election.[21] It goes without saying that any such statement will fall within the mischief of s 123(4) only if it is made by a candidate himself or by his agent, or by any other person with the consent of the candidate or his election agent, and not by any other person.[22]

19 AIR 1966 SC 773.
20 AIR 1994 SC 2277.
21 Supra.
22 *Baburao Bagaji Karemore v Govind* AIR 1974 SC 405.

Publication of a statement does not mean that it should be something written. Even an oral statement comes within the ambit of s 123(4). The recitation of a poem at a public meeting also amounts to publication within the meaning of s 123(4).[23]

Statement of fact, meaning of—Any statement attracting the provisions of s 123(4) should be a statement of fact and not a mere expression of opinion.[24] In that case, the respondent was called in one of the poems—the greatest of all thieves. The Supreme Court held that calling a person a thief or murderer is not a mere expression of opinion but a statement of fact, even if no details are given as to the time and place about the commission of the act, and it constituted therefore, a corrupt practice under s 123(4). Even a bald statement without particulars may be a statement of fact and not a mere expression of opinion. Mere absence of particulars would not necessarily mean that a statement sans particulars is always an expression of opinion. The question whether a bald statement amounts to a statement of fact or a mere expression of opinion would depend on the facts and circumstances of each case and also on the setting in which the statement appears, whether it is in writing or oral.

The meaning of the expression 'statement of fact' in s 123(4) was further elaborated by the Supreme Court in *Gadakh Yashwantrao Kankarrao v EV alias Balasaheb Vikhe Patil*.[25] The court observed that even if the meaning of the word 'fact' be wider to include opinion about another person and apprehensions about his future conduct, it cannot be so construed in the context of the provisions of s 123(4). A 'statement of fact' can be proved to be 'false' only if it relates to an event which has happened and not to a hypothetical future possibility. Similarly, the belief of the maker about its falsity or the lack of belief in its truth relates to an existing fact and not to a hypothetical future apprehension howsoever honestly one may believe in its likelihood. It is clear that any statement made which is a conjecture of a likelihood in future, would not come within the ambit of the expression 'statement of fact' used in s 123(4). This is also supported by the fact that another requirement of s 123(4) is that the statement of fact made should be 'reasonably calculated to prejudice the prospects of that candidate's election'. This further requirement cannot be satisfied by merely stating a likely apprehension for the future and if the event does not happen, this requirement cannot be tested. It is a different matter if the statement amounts to an opinion relating to the personal character or conduct of any candidate which is based on existing or past acts of the candidate. In other words, if the statement made is that a candidate is a 'murderer', that would imply that he had committed a murder and that amounts to a 'statement of fact' for the purpose of s 123(4). This view finds support from the meaning of 'fact' in the realm of jurisprudence. In this case, one of the speakers at an election meeting stated that the

23 *Kumara Nand v Brijmohan Lal Sharma* AIR 1967 SC 808.
24 Supra.
25 AIR 1994 SC 678.

rival candidate proposed to take out a rally of 5000 bicycles and then to distribute those bicycles to the participants and that there was likelihood of distribution of sarees, *dhoties*, liquor and cash by that rival candidate. The said speaker told the audience that they may accept those gifts from the rival candidate but should vote for the candidate for whom he was canvassing. The Supreme Court held that statement to be at best merely the expression of apprehensions which, in fact, did not materialise, and, therefore, not falling within the mischief of s 123(4).

In *Lalit Kishore Chaturvedi v Jagdish Prasad Thada*,[26] a leaflet was circulated which contained the statement: 'You recognise their true faces. They are wolf in the skin of jackals. They have started showing their blood-soaked hands and bloodthirsty jaws. The grip of Congress is tightening around your neck.' The Supreme Court construed that statement as an expression of opinion and not a statement of fact. In *Mahendra Singh v Gulab*,[27] it was alleged that the returned candidate had called an opponent as a 'drunkard' in a public meeting. The Supreme Court held that the general allegation as above would not amount to an allegation which could be treated as amounting to a corrupt practice, specially these days when drinking alcohol as such is not a taboo and in society people generally consume alcohol. In the same case, another alleged statement made by the returned candidate against his opponent that the latter indulged in unfair practice at examination in college days was held by the apex court as not establishing any corrupt practice.

Statement should be false—The provisions of s 123(4) are attracted only in the case of false statements of fact, and not the statements based on true facts. Even if a statement is strongly worded or highly condemnatory or even amounts to character assassination, such statement will fall outside the mischief of s 123(4) if the facts stated therein are true, because the making of such statement can be justified on the ground that the electorate should be informed of the true picture enabling it to weigh the relative merits and demerits of the candidates in the electoral fray. It implies that a statement of fact relating to the personal character or conduct of a candidate can be made, if it is true.[28]

Belief of the person making the statement—Whereas the statements based on true facts do not fall within the ambit of s 123(4), even the false statements of fact may not attract the provisions of that section and the person making it is protected, provided that the person making the statement believes it to be true or does not believe it to be false.[29] The corrupt practice is committed only if a person makes a false statement which he either believes to be false or does not believe it to be true. The onus of proving that the statement of fact made is false and that the person

26 AIR 1990 SC 1731.
27 AIR 2005 SC 2515.
28 *Sheopal Singh v Ram Pratap* AIR 1965 SC 677.
29 Supra.

making that statement did not believe it to be true or believed it to be false is initially on the person who challenges that statement. But the Supreme Court has held in *Subhash Desai v Sharad J Rao*,[30] that the onus on the challenger is very light and can be discharged by him by swearing to that effect and, once that is done by asserting and stating on oath that the impugned statement was false and was made by the person concerned knowing it to be false or believing it not to be true, the burden shifts to the person making the statement to show that the statement was not false and what was his belief when he made that statement.

Statement relating to personal character or conduct of candidate—As has been discussed above, the corrupt practice under s 123(4) is committed by making a false statement in relation to personal character or conduct of a candidate, and not his public or political character. The Supreme Court observed in *TK Gangi Reddy v MC Anjaneya Reddy*,[31] that the words 'personal character or conduct' of a candidate are so clear that they do not require further elucidation or definition. The character of a person may ordinarily be equated with his mental or moral nature. Conduct connotes a person's actions or behaviour. But in *Inder Lal v Lal Singh*,[32] the Supreme Court observed that though the statute wants to make a broad distinction between public and political character on the one hand and private character on the other, a sharp and clear-cut dividing line cannot be drawn to distinguish the one from the other. In such distinction, reference is sometimes made to the 'Man beneath the politician'; and if a statement affects the man beneath the politician, it can be said to touch his private character, and if it affects the politician, it does not touch his private character. Elaborating, the Supreme Court observed, if, for instance, it is said that the candidate is a cheat or murderer, there can be no doubt that the statement is in regard to his private character and conduct, but if the economic policy of the party to which he belongs or its political ideology is criticised in strong words suggesting that it would cause the ruin of the country, that would clearly be criticism against the public character of the candidate and his political party. But, the court further observed, there may be cases on the borderline where the false statement may affect both the politician and the man beneath the politician. If, for instance, it is said that in his public life, the candidate has utilised his position for a selfish purpose of securing jobs for his relations, it may be argued that it is criticism against the candidate in his public character and it may also be suggested that it nevertheless affects his private character. Observations to a similar effect were made by the Supreme Court in *Jagjit Singh (Dr) v Giani Kartar Singh*.[33] The Court observed that it is not easy to lay down any general considerations to decide in every case whether

30 AIR 1994 SC 2277.
31 22 ELR 261.
32 23 ELR 242.
33 28 ELR 81.

the impugned statement impinges on the personal character or political character of a candidate and nor would it be expedient and desirable to lay down any general principle in that behalf; but, in actual practice, it may not, however, be very difficult to decide that question in any such case. Another significant observation made by the Supreme Court in this behalf was in *Sheopal Singh v Ram Pratap*,[34] to the effect that any statement which reflects on the mental or moral character of a person is a reflection on his personal character, whereas any criticism of a person's political or public activities and policies is outside the purview of s 123(4). The court observed that the boundary between personal character and conduct of a candidate and his public character is sometimes thin and a statement may appear to touch both the candidate's personal as well as public character, but a deeper scrutiny enables a court to ascertain whether there is a reflection on the candidate's personal character or on his public character. In *MC Jacob v A Narayanan and others*,[35] the allegation was that the tail-piece of a pamphlet contained an exhortation to "recognize the shameless hypocrite of development trickery...." The Supreme Court considered it not an attack against the personal character and conduct of the petitioner, but as a statement in respect of his public and political character.

On the basis of such examination, the Supreme Court held in *Inder Lal's* case,[36] that the statement which alleged that the candidate had offered bribes to purchase votes was a statement assailing the private character of the candidate. The court observed that bribery is itself a corrupt practice and if it is said against the candidate that he practices the corrupt practice of buying votes by means of bribery, that clearly and unequivocally affects his personal character as it introduces an element of moral turpitude and means loss of reputation as an individual in the eyes of the public. In this very case, the other statements against the candidate to the effect that he was 'enemy of democracy', 'agent of foreigners strangling the freedom of Bharat', 'supporter and collaborator of the conspiracy of Pakistani attack on Bharat', 'bringer of tyrannical rule of Rajas in Rajasthan' and 'destroyer of Hindu-Muslim unity by raising the slogan of Ram Rajya' were not considerable objectionable within the meaning of s 123(4). Similarly, in the case of *Dr Jagjit Singh*,[37] the Supreme Court held that the statements in a newspaper against the appellant to the effect that 'among those who drink, his rank is very high' and 'he trimmed his beard which was contrary to the Sikh religion' were statements in relation to the personal character of the candidate, whereas the statements to the effect that 'he falsely claimed to be the chief minister's man and the C.I.D. police, therefore, was after him' and 'he was an unprincipled '*chhokra*' were held to be relating to his public character. In *TK Gangi*

34 AIR 1965 SC 677.
35 2009(3) SCJ 177.
36 23 ELR 242.
37 28 ELR 81.

Reddy's case,[38] it was stated in one of the leaflets circulated in the constituency that the respondent was responsible for the murder of the appellant's supporter. The Supreme Court held that the said act attributed to the respondent certainly related to his personal character or conduct as what could be more damaging to a person's character and conduct than to state that he instigated a murder and that he was guilty of violent acts in his political career. Likewise, in *Sheopal Singh*'s case,[39] the Supreme Court held a statement in which it was stated that a minister had misappropriated the cement in his charge and built a theatre from out of the proceeds, to be a reflection on his personal character and conduct. In *Gadakh Yashwantrao Kankarrao*'s case,[40] the candidate made a statement in a speech and interview that Rs 20 lakhs were paid by a rival candidate to another candidate for withdrawing from the constituency and shifting to another constituency, not believing in the truth of that statement. It was held to be a false statement relating to the personal character and conduct of the candidate against whom the allegation was made.

Sometimes, the false statements may be made in relation to personal character or conduct of a candidate, but without naming him directly. In such a case, the doctrine of innuendo may be applicable, but only where the person though not named is yet so fully described that there is no doubt that the allegation refers only to that person. Innuendo cannot be proved merely by inferential evidence which may be capable of two possibilities.[41] Where the defamatory words used in a statement are not defamatory in the natural or ordinary meaning, or in other words, they are not defamatory per se but are defamatory because of certain special or extrinsic facts which are in the knowledge of particular persons to whom they are addressed, the doctrine of innuendo may apply if the particulars of the said extrinsic facts are given. It is the publication of the statement together with the extrinsic facts which in such circumstances would constitute the corrupt practice.[42]

In *MC Jacob v A Narayanan and others*,[43] it was alleged in an election pamphlet brought out on behalf of the returned candidate that a member of the personal staff of a rival candidate was involved in a murder attempt and was absconding. The Supreme Court observed that there was no mention in the said pamphlet that the said rival candidate was harboruing his personal assistant which only stated that the said personal staff was absconding. The court rejected the plea of the petitioner that there was an innuendo in the said pamphlet and observed that there should have been a clear pleading in the election petition that the impugned statement in the

38 22 ELR 261.
39 AIR 1965 SC 677.
40 AIR 1994 SC 678.
41 *Manmohan Kalia v Yash* AIR 1984 SC 1161.
42 *MJ Zakharia Sait v TM Mohammed* (1990) 3 SCC 396.
43 2009(3) SCJ 177

election pamphlet was an innuendo and it really meant that the rival candidate under reference was harbouring his personal staff.

False statement in relation to candidature—Section 123(4) is attracted not only on the publication of a false statement in relation to the personal character or conduct of a candidate, but also by the publication of a false statement in relation to the candidature of any candidate or the withdrawal of his candidature. In *Elvin Sangma v Projengton Momin*,[44] dummy ballot papers were distributed three days before the date of poll in which wrong election symbol of the respondent was shown. The Supreme Court held that in a constituency which consisted of more than 80 percent illiterate electors, the consequences of distribution of dummy ballot papers with wrong election symbols could be well imagined and that it must have confused the voters, and possibility of casting votes by them contrary to their intention was real. The court held the distribution of those dummy ballot papers as a corrupt practice under s 123(4). But the court observed that a wrong spelling of name in the dummy ballot papers in a predominantly illiterate constituency was not likely to have any effect.

Similarly, in *Avtar Singh Brar v Tej Singh*,[45] certain posters were circulated among the voters of the constituency in which they were misled to believe that one of the candidates '*R*' had withdrawn and an appeal was made that any vote given to the respondent would be considered as a vote given to '*R*'. The apex court held that the effect of the posters was that all the voters who would have voted for '*R*' would now cast their votes in favour of the respondent. That was held to be a corrupt practice under s 123(4).

False Statement Calculated to Prejudice the Prospects of Rival Candidate, Meaning of 'Calculated'

Apart from the satisfaction of the other ingredients mentioned above, a false statement to fall within the mischief of s 123(4) should also satisfy another test that it is a statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it is made. The Supreme Court observed in *Sheopal Singh v Ram Pratap*,[46] that the word 'calculated' means designed; it denotes more than mere likelihood and imports a design to effect voters. It connotes a subjective element, but the actual effect of the statement on the electoral mind reflected in the result may afford a basis to ascertain whether the said statement was reasonably calculated to achieve that effect. The emphasis is on the calculated effect, not on the actual result, though the latter proves the former. The court added that it is not necessary to establish by positive evidence that the voters, with the knowledge of the contents of

44 AIR 1975 SC 425.
45 AIR 1984 SC 619.
46 AIR 1965 SC 677.

the statement, were deflected from voting for the candidate against whom the statement was made. The apex court had earlier explained in *Mohan Singh v Bhanwarlal*,[47] that the test in cases under s 123(4) was whether the imputation in the impugned statement, besides being false in fact, was published with the object of lowering the candidate in the estimation of the electorate and calculated to prejudice his prospects at the election. In order to ascertain whether the candidate was lowered in the estimation of the electorate, the imputation made must be viewed in the light of the matters generally known to them. Again, the Supreme Court observed in *MJ Zakharia Sait v TM Mohammed*,[48] that all that s 123(4) required was that the person publishing the complaining words must have intended and reasonably calculated to affect the prospects of the complaining candidate in the election. If the complaining words have been used in the background of some special facts or circumstances, those words cannot be held to be reasonably calculated to prejudice the prospects of election of the complainant in the absence of the knowledge of those special facts on the part of the electorate. Once, however, it is proved by laying the foundation of the facts that the words in question were, by virtue of the knowledge of the special facts, likely to be construed by the electorate as referring to the personal character or conduct of the complaining candidate, it may not further be necessary to prove that in fact the electorate had understood them to be so.

In *TK Gangi Reddy v MC Anjaneya Reddy*,[49] certain leaflets were published a few days before polling and referring to a murder which had taken place earlier, in an attempt to throw the blame for the murder on the respondent. The publication of such leaflets was held by the Supreme Court as an attempt calculated to prejudice the prospects of the respondent's election, as such publication was calculated to create an impression in the minds of the voters not to vote for the respondent, who was described as a murderer and a man of bad antecedents. The Supreme Court also held in this case that a false statement made as a counter-blast to another statement of the rival candidate was no defence to the charge of corrupt practice under s 123(4). In *Gadakh Yashwantrao v Balasaheb Vikhe Patil*,[50] it was stated in a speech that the rival candidate was likely to distribute some cycles, sarees, *dhoties*, etc, to voters and they were told that if some benefit was offered by that candidate it should be accepted by them but without being influenced thereby in the choice of the candidate. The Supreme Court held that such statement could not be regarded as a statement reasonably calculated to prejudice the prospects of that candidate, since the suggestion in the statement was to cast the vote, uninfluenced by any extraneous consideration.

47 AIR 1964 SC 1366.
48 (1990) 3 SCC 396.
49 22 ELR 261.
50 (1994) 1 SCC 682.

Free Conveyance of Voters

Free Conveyance of Voters, Both Corrupt Practice and Electoral Offence

The law frowns upon free conveyance of voters to and from polling stations on the day of poll. But the resort to this corrupt practice is most rampant in almost all parts of the country and indulged in by majority of the candidates. The law enforcing agencies also, mostly, adopt a complacent attitude because in many cases the polling stations are not within the easy walking distance of voters and any strict enforcement of the prohibitory provisions may result in inconvenience to voters, particularly old, infirm persons as well as women. Broadly speaking, it may also be treated as one kind of gratification, but the law makers considered it more appropriate to categorise it as a separate and distinct corrupt practice under s 123(5). That section defines the corrupt practice of free conveyance of voters as:

> The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate or his election agent, or the use of such vehicle or vessel for the free conveyance of any elector other than the candidate himself, the members of his family or his agent to or from any polling station provided under section 25 or a place fixed under sub-section (1) of section 29 for the poll:
>
> Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:
>
> Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.
>
> *Explanation*—In this clause, the expression 'vehicle' means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.

The above provisions of s 123(5) are slightly different from those which were put in that section in 1956. The 1956 provisions underwent some changes in 1958 and 1966.

Free conveyance of electors to polling stations is also an electoral offence under s 133 of the 1951 Act, which reads as follows:

> 133. ***Penalty for illegal hiring or procuring of conveyance at elections.***—If any person is guilty of any such corrupt practice as is specified in clause (5) of section 123 at or in connection with an election, he shall be punishable with imprisonment which may extend to three months and with fine.

Ingredients of the Corrupt practice

The existing provisions of s 123(5) came to be analysed by the Supreme Court in *Rizak Ram v JS Chouhan*.[51] The apex court observed:

> On analysis, cl (5) of s 123 falls into two parts. The requirements of the first part are: (i) the hiring or procuring whether on payment or otherwise, of any vehicle or vessel for the free conveyance of voters, (ii) such hiring or procuring must be by a candidate or his election agent or by any other person with the consent of a candidate or of his election agent. The second part envisages the 'use of such vehicle or vessel for the free conveyance of any elector (other than the candidate himself, the members of his family or his election agent) to or from any polling station.' Two parts are connected by the conjunction 'or' which is capable of two constructions. In one sense it is a particle coordinating the two parts of the clause and creating an alternative between them. In the other sense—which is akin to the sense of 'and'—it can be construed as conjoining and combining the first part of the clause with the second. The latter construction appears to comport better with the aim and object of amendment of 1966. In this connection, it is noteworthy than even before the amendment, this Court in *Balwan Singh v Lakshmi Narain*,[52] held that in considering whether a corrupt practice described in s 123(5) is committed, conveying of electors cannot be dissociated from the hiring of a vehicle. Even if the word 'or' is understood as a coordinating conjunction introducing alternatives, then also a petitioner in order to succeed on the ground of a corrupt practice under the second part of the clause, must prove in addition to the use of the vehicle or vessel for the free conveyance of any elector to or from any polling station, the hiring or procuring of that vehicle or vessel. This is so because the word 'such' in the phrase introduced by the 1966 amendment, expressly imports these elements of the first into the second part of the clause.

The same view was taken by the Supreme Court in *Dadasaheb Dattatraya Pawar v Pandurang Rao Jagtap*,[53] and the court emphasised that it was necessary to prove: (i) that any vehicle or vessel was hired or procured, whether on payment or otherwise, by the candidate or by his election agent or by any other person with the consent of the candidate or of his election agent; (ii) that it was used for the conveyance of the electors to or from any polling staition; and (iii) that such conveyance was free of cost to the electors. Failure to substantiate any of these ingredients leads to the collapse of the whole charge under s 123(5). If there is nothing to show as to when, by whom, and at what price the vehicle was hired or procured and whether it was

51 AIR 1975 SC 667.
52 AIR 1960 SC 770.
53 AIR 1978 SC 351.

used for free conveyance of electors to and from polling stations, the corrupt practice cannot be said to have been made out.[54] In this case, it was alleged that some voters were brought to the polling station in a truck without charging fare and that the truck was used by the workers of the returned candidate, but there was no allegation regarding hiring or procuring of the truck for free conveyance of electors.

It is not necessary that the vehicle should be procured on payment. But it must be for the free conveyance of any elector (other than the candidate himself or members of his family or his agents) to and from any polling station. Therefore, in addition to the hiring or procuring of a vehicle and the carriage of electors to and from any polling station, it should also be proved that the electors used the vehicle free of cost.[55] In *Dharmesh Prasad Verma v Faiyazal Azam*,[56] the respondent procured a jeep from his friend for free conveyance of voters and it was seized by the officials when it was being used for conveyance of some electors, free of cost, on the day of poll. The corrupt practice was held to have been committed by him.

It may not always be possible to prove by direct evidence that a particular vehicle was hired or procured with the consent of the candidate or his election agent. But this can be inferred from the proved circumstances where such inference is justifiable. In *Balwan Singh v Prakash Chand*,[57] a tractor standing in the name of the appellant's wife was found being used for free conveyance of voters and he could not succeed in his effort to prove that the tractor was used elsewhere for some other purpose on the day of poll. As the vehicle belonging to the wife could not be said to belong to the husband, it was held to have been procured by him from his wife within the meaning of s 123(5).

In an earlier case relating to the same candidate Balwan Singh,[58] the minority view was that the vehicle used for conveying voters should be a hired vehicle and there was no corrupt practice unless the hiring of the vehicle, ie, contract of hire, was established. But the majority view held that in considering whether the corrupt practice under s 123(5) is committed, conveying of voters to and from polling stations cannot be dissociated from the hiring of the vehicle and if particulars of conveying of voters by a vehicle to and from any polling station are given, the charge of corrupt practice is made out, even if the particulars of the contract of hiring, as distinguished from the fact of hiring, are not given. In *Umed v Raj Singh*,[59] a truck bearing the flag and symbol of the candidate was found being used for taking some voters from a village to the polling station and the voters stated that they had not paid any money for their transportation. It was held that the corrupt practice under s

54 *Dhartipakar Madan Lal Agarwal v Rajiv Gandhi* AIR 1987 SC 1577.
55 *JC Patel v Anverbeg* AIR 1969 SC 586.
56 AIR 1984 SC 1516.
57 AIR 1976 SC 1187.
58 *Balwan Singh v Lakshmi Narain* AIR 1960 SC 770.
59 AIR 1975 SC 43.

123(5) was committed by the candidate. At the simultaneous election to the House of the People and the Uttar Pradesh legislative assembly in 1952, trucks of the candidate for the assembly election were used on the day of poll for bringing electors from certain villages to polling stations. The candidate for the parliamentary election from that area and belonging to the same political party to which the above-mentioned assembly candidate belonged had no independent workers of his own in that area. The Supreme Court held in *Bhagwan Datta Shastri v Ram Ratanji Gupta*[60] that it was not unreasonable to impute to the parliamentary candidate the knowledge of the work done by his party in that area and to impute the consequent connivance on his part to the carrying of the voters on the trucks of the assembly candidate.

Incurring of Election Expenditure in Excess of Prescribed Limit

Election Expenses of Candidates, Relevant Provisions

Section 123(6) of the 1951 Act makes the 'the incurring or authorising of expenditure in contravention of s 77' a corrupt practice.

Section 77(1) makes it mandatory for every candidate at an election to the House of the People or a state legislative assembly to keep a separate and correct account of all expenditure incurred or authorised by him or by his election agent, between the date on which he was nominated and the date of declaration of the result of election, both dates inclusive. The total of the said expenditure shall not exceed such amount as may be prescribed under s 77(3). Under s 77(2), the account shall contain such particulars as may be prescribed. Rule 90 of the 1961 Rules prescribes varying limits of election expenditure for parliamentary and assembly constituencies in each of the states and union territories. Particulars which have to be shown in the account are prescribed in r 86 of those Rules. Failure to maintain the account is an electoral offence under s 171-I of the IPC, which reads as under:

> 171-I. ***Failure to keep election accounts.***—Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

Every contesting candidate is further required to lodge a true copy of the account of his election expenses with the district election officer within thirty days of the declaration of result of the election (s 78, 1951 Act). Failure to lodge the account of election expenses within the time and in the manner required by law without good reason or justification may result in disqualification[61] of the candidate concerned under s 10A of the 1951 Act.

60 AIR 1960 SC 200.

61 For further details, see under the heading 'Statutory Disqualifications' in ch 8.

Scope of the Corrupt Practice

The Supreme Court has held from the very beginning that what is referred to in s 123(6) as a corrupt practice is only the incurring or authorising of election expenditure in excess of the limit prescribed under s 77(3), and not the failure to maintain an account under s 77(1) or the failure to maintain an account containing the prescribed particulars under s 77(2).[62] In a recent case, it was proved that a successful candidate had not included, in his account of election expenses, the expenditure incurred on the printing of certain pamphlets, hiring of certain vehicles, getting some advertisements printed in newspapers and the expenditure incurred on postage. The Karnataka High Court held that the candidate had not maintained a true and correct account of his election expenditure and had, thereby, committed the corrupt practice under s 123(6) and declared his election void. On appeal, the Supreme Court, however, reversed that decision applying the law laid down by it in *Shri Krishan*'s case[63] and in the subsequent decisions to the same effect in *Dal Chand Jain v Narayan Shankar Trivedi*,[64] *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe*,[65] etc. The Supreme Court held that s 123(6) does not take into fold the failure to maintain true and correct account. The Supreme Court observed that the language of that section is so clear that the corrupt practice defined therein can relate only to s 77(3), ie, the incurring or authorising of expenditure in excess of the amount prescribed, and that it cannot by any stretch of imagination be said that non-compliance with ss 77(1) and 77(2) would also fall within the scope of s 123(6).[66] The apex court observed that the matter relating to non-compliance of s 77(1) or s 77(2) would fall for scrutiny of the Election Commission under s 10A.[67] The Supreme Court has further clarified in *Kamalnath v Sudesh Verma*[68] that mere non-disclosure of expenditure in the account is not a corrupt practice, but the expenditure in excess of the prescribed limit is.

But it may be important to note that where an account has not been correctly and truly maintained under ss 77(1) or 77(2) and certain items of expenditure have been suppressed therefrom or undervalued therein, the provisions relating to corrupt practice under s 123(6) will be attracted if, by adding the expenditure on such suppressed or undervalued items, the prescribed ceiling under s 77(3) is shown to have been exceeded.[69]

62 *Shri Krishan v Sat Narain* 37 ELR 13.

63 37 ELR 13.

64 (1969) 3 SCC 685.

65 AIR 1995 SC 2284.

66 *LR Shivaramagowda v TM Chandrashekar* (1999) 1 SCC 666. See also *Kamalnath v Sudesh Verma* AIR 2002 SC 599; Jeet *Mohinder Singh v Harminder Singh Jassi* AIR 2000 SC 256.

67 *LR Shivaramagowda v TM Chandrashekar* (1999) 1 SCC 666.

68 2002(2)SCC 410.

69 *Magraj Patodia v RK Birla* AIR 1971 SC 1295.

Object Underlying the Limiting of Election Expenditure

What beneficial object is sought to be achieved by making the incurring or authorising of election expenditure in excess of the prescribed limit a corrupt practice has been elucidated by the Supreme Court in *Kanwar Lal Gupta v Amar Nath Chawla*.[70] The apex court observed:

> ...The object of the provision limiting the expenditure is twofold. In the first place, it should be open to any individual or any political party, howsoever small, to be able to contest an election on a footing of equality with any other individual or political party, howsoever rich and well financed it may be, and no individual or political party should be able to secure an advantage over others by reason of its superior financial strength. It can hardly be disputed that the way elections are held in our country, money is bound to play an important part in the successful prosecution of an election campaign...If, therefore, one political party or individual has larger resources available to it than another individual or political party, the former would certainly, under the present system of conducting elections, have an advantage over the latter in the electoral process. The former would have a significantly greater opportunity for the propagation of its programme while the latter may not be able to make even an effective presentation of its views. The availability of disproportionately larger resources is also likely to lend itself to misuse or abuse for securing to the political party or individual possessed of such resources, undue advantage over other political parties or individuals...This would result in serious discrimination between one political party or individual and another on the basis of money power and that in turn would mean that 'some voters are denied an 'equal' voice and some candidates are denied an 'equal chance'. It is elementary that each and every citizen has an inalienable right to full and effective participation in the political process of the legislatures and this requires that each citizen should have equally effective voice in the election of the members of the legislatures. That is the basic requirement of the Constitution... The democratic process can function efficiently and effectively for the benefit of the common good and reach out the benefits of self-government to the common man only if it brings about a participatory democracy in which every man, howsoever lowly or humble he may be, should be able to participate on a footing of equality with others. Individuals with grievances, men and women with ideas and vision, are the sources of any society's power to improve itself. Government by consent means that such individuals must eventually be able to find groups that will work with them and must be able to make their voices heard in these groups and no group should be insulated from competition and criticism. It is only by the

70 AIR 1975 SC 308.

maintenance of such conditions that democracy can thrive and prosper and this can be ensured only by limiting the expenditure which may be incurred in connection with elections, so that, as far as possible, no one single political party or individual can have unfair advantage over the other by reason of its larger resources and the resources available for being utilised in the electoral process are within reasonable bounds and not unduly disparate and the electoral contest becomes evenly matched. Then alone the small man will come into his own and will be able to secure proper representation in our legislative bodies.

The other objective of limiting expenditure is to eliminate, as far as possible, the influence of big money in the electoral process. If there were no limit on expenditure, political parties would go all out for collecting contributions and obviously the largest contributions would be from the rich and affluent who constitute but a fraction of the electorate. The pernicious influence of big money would then play a decisive role in controlling the democratic process in the country. This would inevitably lead to the worst form of political corruption that in its wake is bound to produce other vices at all levels....It is obvious that pre-election donations would be likely to operate as post-election promises resulting ultimately in the casualty of the interest of the common man, not so much ostensibly in the legislative process as in the implementation of laws and administrative or policy decisions. The small men's chance is the essence of Indian democracy and that would be stultified if large contributions from rich and affluent individuals or groups are not divorced from the electoral process. It is for this reason that our Legislators in their wisdom, enacted a ceiling on the expenditure which may legitimately be incurred in connection with an election.

Expenditure Incurred During Prescribed Period Alone Accountable

Initially, a candidate was accountable for all expenditure incurred or authorised by him in connection with his election right from the date he started holding himself out to be a candidate for an election. Thus, even an expenditure incurred before the formal calling of the election also came within the purview of ss 77(3) and 123(6). In *S Khader Sheriff v Munnuswami Gounder*,[71] the candidate had not included, in his account of election expenses an amount of Rs 500 deposited by him with his party while applying for the party ticket and another amount of Rs 500 paid to the district committee of his party before the start of the electoral process. It was held that he ought to have included the above amounts in his return of election expenses, and his election was set aside as by including those amounts, his election expenditure exceeded the prescribed limit.

71 AIR 1955 SC 775.

But the law has since been amended in 1975 and the period for which the election expenditure of a candidate is now to be accounted for has been limited to the period starting with the date of the nomination of the candidate and ending with the date of declaration of result [s 77(1) as amended by the Election Laws (Amendment) Act 1975]. The candidate is now no longer accountable for any expenditure incurred either before the filing of his nomination paper or after the declaration of result, nor can such expenditure be taken into consideration in calculating the total expenses of the candidate with a view to judging whether his expenses exceeded the prescribed limit.[72] In *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe*,[73] the expenditure incurred by the winning candidate on advertisements in newspapers, after the declaration of result, thanking the voters for voting for him, was not considered to be his election expenditure within the meaning of s 77(1), so as to attract the corrupt practice under s 123(6). But the Election Commission has clarified that where an expenditure is incurred by a candidate prior to the date of his nomination for preparation of campaign materials etc. which are actually used during the post nomination period in connection with the election, such expenditure should also be accounted for in his return of election expenses.[74]

Where an election expenditure is authorised during the prescribed election period but the actual payment is not made and it remains outstanding during that period such expenditure will nevertheless come within the purview of ss 77(1) and 123(b), as is evident from r 86(1)(c) of the 1961 Rules.

Meaning of Expenditure Incurred or Authorised, Expenditure by Political Parties, Friends and Supporters

As mentioned above, what is prohibited under the law as a corrupt practice is the exceeding of the limit of expenditure incurred or authorised by a candidate or by his election agent during the prescribed period. Up to 1975, this provision was not subject to any exception and the candidate was accountable for all expenditure incurred or authorised by him or his election agent in connection with his election. The 'incurring' of expenditure by a candidate or by his election agent does not admit of any ambiguity or confusion, as it is well understood that one incurs expenditure when one actually spends money[75] and the expression 'incurring' in reference to expenditure conveys the sense of being immediately out of pocket or assuming the liability to pay the expenses in question.[76] Thus, all election expenses paid by a candidate or his election agent are deemed to have been incurred by him. But there

72 *Nongthombam Ibomcha Singh v Leisangthem Chandramani Singh* AIR 1977 SC 682.
73 AIR 1995 SC 2284.
74 See Election Commission's circular No 76/2004/JS-II, dated 6 August 2004.
75 *Sheopat Singh v Harish Chandra* 16 ELR 103 (Raj).
76 *Nelasasatu Kedistsu v Lhemiti Sema* 55 ELR 292.

has been controversy with regard to the meaning of the expression 'authorised' by him or by his election agent in relation to expenditure made in connection with his election. Such authorisation may be either express or implied. The expenditure incurred by the political party to which the candidate belonged or by any of his friends or supporters or even by the enemies of his rival candidate with the consent or express authority of the candidate were held to be not falling within the meaning of s 77(1).[77] In *Hans Raj v Hari Ram*,[78] the Supreme Court held that the expenditure must be by the candidate himself and that any expenditure in his interest by others except the agents was not to be taken note of. In this case, a jeep was hired by the Congress Committee and used in different constituencies. The Supreme Court held that the Congress Committee was not an agent of the candidate and, therefore, the amount spent by that Committee could not be taken as an amount to be included in the expenditure over the election by the candidate. The Supreme Court further observed that it could not be said that the whole of the benefit of the jeep went to one candidate and that the court was not in a position to allocate the expenses between him and the other candidates in the other constituencies.

However, a different view was taken by the Supreme Court in *Kanwar Lal Gupta v Amar Nath Chawla*,[79] which had far reaching repercussions on the law on the point. The Supreme Court held:

> Now, if a candidate were to be subject to the limitation of the ceiling, but the political party sponsoring him or his friends and supporters were to be free to spend as much as they like in connection with his election, the object of imposing the ceiling would be completely frustrated and the beneficent provision enacted in the interest of purity and genuineness of the democratic process would be wholly emasculated. The mischief sought to be remedied and the evil sought to be suppressed would enter the political arena with redoubled force and vitiate the political life of the country. The great democratic ideal of social, economic and political justice and equality of status and opportunity enshrined in the Preamble of our Constitution would remain merely a distant dream eluding our grasp. The legislators could never have intended that what the individual candidate cannot do, the political party sponsoring him or his friends and supporters should be free to do. That is why the legislators wisely interdicted not only the incurring but also the authorising of excessive expenditure by a candidate. When the political party sponsoring a candidate incurs expenditure in connection with his election, as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it or participates in the programme of activity or fails to disavow

77 *Megraj Patodia v RK Birla* AIR 1971 SC 1295.
78 40 ELR 125.
79 AIR 1975 SC 308.

the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorised the political party to incur such expenditure and he cannot escape, the rigour of the ceiling by saying that he has not incurred the expenditure, but his political party has done so. A party candidate does not stand apart from his political party and if the political party does not want the candidate to incur the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate. The same proposition must also hold good in case of expenditure incurred by friends and supporters directly in connection with the election of the candidate. This is the only reasonable interpretation of the provision which would carry out its object and intendment and suppress the mischief and advance the remedy by purifying our election process and ridding it of the pernicious and baneful influence of big money.

The above judgment of the Supreme Court, delivered on 3 October 1974 created quite a stir in certain political circles and was considered to be contrary to the view taken by that court in the previous cases. Therefore, s 77(1) was urgently amended by the Representation of the People (Amendment) Ordinance 1974, on 19 October 1974 by the insertion of an explanation thereto, to the effect that:

> Notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorised by the candidate or by his election agent for the purposes of this sub-section.

The Statement of Objects and Reasons appended to the Representation of the People (Amendment) Bill 1974, introduced in the House of the People on 7 November 1974, to replace the above Ordinance stated:

> ...In the Election Law, the emphasis has been on imposing a curb on an individual incurring expenditure in connection with his election in excess of the prescribed limit. The provision contained in s 77 of the Act is very specific in this respect and the intention that the curb is on the expenditure incurred or authorised by the candidate has found support in the judicial pronouncements on the point. The expression 'incurred or authorised' had not been construed so as to bring within its purview the expenditure incurred by a political party in its campaign or by any person other than the candidate unless incurred by such third person as the candidate's agent. In other words, the provisions of s 77 and cl (6) of s 123 have been intended and understood to be restraints on the candidate's election expenditure and not on the expenditure of a political party.

However, in the recent case of *Kanwar Lal Gupta v Amar Nath Chawla and Ors*,[80] the Supreme Court has interpreted the aforementioned expression 'incurred or authorised' as including within its scope expenses incurred by a political party or other person referred to above. In view of the effect which such interpretation might have particularly with reference to the candidates against whom election petitions are pending, it became urgently necessary to clarify the intention underlying the provisions contained in s 77 of the Representation of the People Act 1951, namely, that in computing the maximum amount under that section any expenditure incurred or authorised by any other person or body of persons or political parties should not be taken into account. As Parliament was not in session, the President promulgated on 19 October 1974, the Representation of the People (Amendment) Ordinance 1974.

Further, in 1975, another explanation was added as expln (3) to the said s 77(1) by the Election Laws (Amendment) Act 1975, to the effect that any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done for any candidate by any person in the service of the government, in the discharge or purported discharge of his official duty, shall not be deemed to be expenditure incurred or authorised by the candidate or his election agent. This explanation was added in the wake of the judgment of the Allahabad High Court in *Raj Narain v Indira Nehru Gandhi*[81] whereby the high court had held that certain government officers had assisted the respondent and incurred expenditure in providing certain facilities to her at state cost.

From the beginning itself, these exceptions made in 1974 and 1975 generated a lot of controversy and were even challenged before the Supreme Court. It was considered by many that these amendments had diluted the main provisions of s 77(1).

But considering the constitutional validity of these amended provisions, the Supreme Court (per Beg J, as he then was) held in *Indira Nehru Gandhi v Raj Narain*[82] that:

> After examining the catena of cases, I think, with great respect, that the decision of this court in *Kanwar Lal Gupta's* case could be understood to point in a direction contrary to that in which the previous cases were decided. Hence, it appears to me that the amendment made by Act 58 of 1974 by adding the expl 1 to s 77 of the Act could be justified as merely an attempt to

80 Civil Appeal No 1549 of 1972.
81 57 ELR 49.
82 AIR 1975 SC 2299.

restore the law as it had been understood to be previous to the decision of the Court in *Kanwar Lal Gupta*'s case.

The Constitution Bench unanimously upheld the amended provisions and even the retrospective effect given thereto.

The validity of these provisions again came to be considered in *P Nalla Thampy Terah (Dr) v Union of India and Ors.*[83] The apex court held:

> The argument really bears upon the interpretation of the section and the explanation, and not upon the validity of the explanation. We do not agree that the explanation denudes the section of its meaning and makes it purposeless. Section 77(1) deals with the expenditure 'incurred or authorised by' a candidate or his election agent, in connection with the election. It is obligatory to keep a separate and correct account of such expenditure. Explanation 1 deals with the expenditure incurred or authorised by a political party or any other association or body of persons or by an individual other than the candidate or his election agent. It is not obligatory for the candidate or his election agent to keep a separate and correct account of such expenditure. That is because of two reasons. In the first place, such expenditure is not incurred or authorised by the candidate or his election agent and therefore, in the very nature of things, they cannot keep an account of that expenditure. Secondly, the argument that expenditure of the kind described in Explanation 1 must be deemed to be incurred or authorised by the candidate or his election agent, is met by the provision in the Explanation that it shall not be so deemed. Section 77(1) on the one hand and explanation 1 on the other, deal with two different situations wherefor, the latter cannot render the former meaningless.

Though the Supreme Court upheld the legal validity of the amended provisions of the law in the cases of *Indira Nehru Gandhi* and *Nallah Thumpy Terah,*[84] the apex court, however, severely criticised them in the cases of *C Narayana Swamy v CK Jaffer Sharief*[85] and *GadakhYashwantrao v Balasaheb Vikhe Patil*[86] The Supreme Court observed in the case of *Gadakh Yashwantrao* that:

> The existing law does not measure up to the existing realities. The ceiling on expenditure is fixed only in respect of the expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal sanction. The

83 78 ELR 98.
84 Supra.
85 (1994) Supp 3 SCC 170.
86 (1994) 1 SCC 682.

spirit of the provision suffers violation through the escape route. The prescription of ceiling on expenditure by a candidate is a mere eye-wash and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This lacuna in the law is, however, for the Parliament to fill lest the impression is reinforced that its retention is deliberate for the convenience of everyone. If this be not feasible, it may be advisable to omit the provision to prevent the resort to indirect methods for its circumvention and subversion of the law, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hide the reality.

In *Common Cause v Union of India and Ors*[87] also, the Supreme Court observed:

> The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows. In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted.

The apex court was equally scathing in its criticism of the above provisions in *Jaffer Sharief's* case. The apex court observed that though s 123(6), r/w s 77 and r 90 of the 1961 Rules, purports to restrict the unlimited flow of money power and makes expenditure in excess of the prescribed limit a corrupt practice, but legality and sanctity has been given to such excess expenditure by expln (1) to s 77(1), which fixes no limit on the expenditure by political parties and others in connection with the election of a candidate. Neither the candidate nor the political party nor the persons who incur such expenditure are required to disclose the same to anyone. As the law stands, anybody including a smuggler, criminal or any other anti-social element may spend any amount over the election of any candidate in whom such person is interested, for which no account is to be maintained or furnished and any such expenditure shall not be deemed to have been in connection with the election, incurred or authorised by the candidate or by his election agent for the purpose of s 77(1), so as to amount to a corrupt practice within the meaning of s 123(6). Election funds should not come from hidden sources which are not available for public scrutiny and encouraging corruption by underhand methods. The court expressed the hope that Parliament would take care of the situation to identify and locate the persons investing funds in the election of candidates if the call for 'purity of elections' was not to be reduced to a lip service or a slogan.

87 AIR 1996 SC 3081.

The Election Commission had all along been recommending[88] that the amendments made to s 77(1) in 1974 and 1975 should be done away with and the position of law, as it stood and was understood prior thereto, should be restored. The Committee on State Funding of Elections, set up by the government in June 1998, went into the question, but did not make any positive recommendation[89] as the opinion of the members representing various national and state parties was divided on this issue.

The above discussions will show that the Supreme Court virtually rejected the theory of implied authorisation in relation to election expenditure incurred by political parties, friends and supporters of candidates.

The Supreme Court observed in *Indira Nehru Gandhi*'s case[90] that:

> Authorisation means acceptance of the responsibility. Authorisation must precede the expenditure. Authorisation means reimbursements by the candidate or election agent of the person who has been authorised by the candidate or by the election agent of the candidate to spend or incur. In order to constitute authorisation, the effect must be that the authority must carry with it the right of reimbursement.[91]

It was further observed that:

> The test of authorisation would naturally be the creation of a liability to reimburse whoever spends the money and not necessarily the provision of money beforehand by the candidate on whose behalf it is spent.[92]

Accordingly, the Supreme Court held that voluntary expenditure by friends, relations, or sympathisers and expenditure incurred by a candidate's party without any request could not be deemed to be authorised by the candidate. The law requires proof of circumstances from which at least implied authorisation can be inferred. It is not enough that some advantage accrued or expenditure was incurred within the knowledge of the candidate.

But in a subsequent case *Common Cause v Union of India and Ors*[93] the Supreme Court took a view which seems to be somewhat at variance with the above view in *Indira Nehru Gandhi*'s case. The Supreme Court held in the case of *Common Cause*:

88 See views of the Election Commission on electoral reforms communicated to government from 1977 onwards and reiterated in its note to the Government on 22 November 1999.

89 See Report of the Committee submitted to the Government on 30 December 1998.

90 Supra.

91 Per Ray CJ, para 121.

92 Per Beg J, para 497.

93 AIR 1996 SC 3081.

> That the expenditure, (including that for which the candidate is seeking protection under explanation 1 to s 77 of the RP Act) in connection with the election of a candidate to the knowledge of the candidate or his election agent shall be presumed to have been authorised by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent).

It logically follows from the above judgment that any expenditure made by a political party or friends or supporters of a candidate shall be presumed to be authorised by him, even when he does not make a request to them to spend on his election campaign and he will have to displace or rebut that presumption by evidence that it was a voluntary expenditure and actually incurred by them without any liability on his part to reimburse the same. In other words, a mere claim or declaration by a candidate, without anything more, that he had not authorised the expenditure incurred by his political party, friend or supporter which was within his knowledge is not sufficient to disown such expenditure having been made without his authorisation.

The Supreme Court further laid down that the candidate will have to show by positive evidence that the political party or his friend or supporter who incurred any expenditure on his election campaign had the necessary financial resources and capability to incur such expenditure. The Supreme Court observed:

> A political party which is not maintaining, audited and authentic accounts and is not filing the return of income before the income tax authorities cannot justifiably plead that it has incurred or authorised any expenditure in connection with the election of a party candidate. The expenditure 'incurred or authorised in connection with the election of a candidate by a political party' can only be the expenditure which has a transparent source. Explanation 1 to s 77 of the Income Tax Act [sic] does not give protection to the expenditure which comes from an unknown or black source.

The Supreme Court further laid down in the above case of *Common Cause* that the expression 'conduct of election' in art 324 is wide enough to include in its sweep, the power of the Election Commission to issue-in the process of the conduct of elections—directions to the effect that the political parties shall submit to the Commission for its scrutiny, the details of the expenditure incurred or authorised by the political parties in connection with the election of their respective candidates.

Earlier also, the Supreme Court had observed in *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe*[94] that:

> We wish, however, to point out that though the practice followed by political parties in not maintaining accounts of receipts of the sale of coupons and donations as well as the expenditure incurred in connection with the election of its candidate appears to be a reality but it certainly is not a good practice. It leaves a lot of scope for soiling the purity of election by money influence. Even if the traders and businessmen do not desire their names to be publicised in view of the explanation of the witnesses, nothing prevents the political party and particularly a National Party from maintaining its own accounts to show total receipts and expenditure incurred, so that there could be some accountability. The practice being followed as per the evidence introduces the possibility of receipt of money from the candidate himself or his election agent for being spent for furtherance of his election, without getting directly exposed, thereby defeating the real intention behind Explanation I to Section 77 of the Act. It is, therefore, appropriate for the Legislature or the Election Commission to intervene and prescribe by Rules the requirements of maintaining true and correct accounts of the receipt and expenditure by the political party by disclosing the sources of receipts as well. Unless, this is done, the possibility of purity of elections being soiled by money influence cannot really be ruled out. The political parties must disclose as to how much amount was collected by it and from whom and the manner in which it was spent so that the Court is in a position to determine 'whose money was actually spent' through the hands of the Party. It is equally necessary for an election petitioner to produce better type of evidence to satisfy the Court as to 'whose money it was' that was being spent through the party.

In the wake of the above-referred judgment in the case of *Common Cause*, the Election Commission now calls upon all recognised political parties at the national and state levels to submit for its scrutiny the details of expenditure incurred by them both on the general party propaganda and also on the election campaigns of individual candidates in every general election. The Commission has prescribed the format in which such accounts are to be furnished by them. The format of the return of election expenses to be lodged by the candidates under s 78 was also correspondingly remodelled to show separately the expenditure incurred or authorised by them, and the expenditure incurred by political parties and others in respect whereof they claimed exemption under the explanation (1) to s 77(1). In appropriate cases, it was possible for the courts to co-relate the two returns filed by

94 AIR 1995 SC 2284.

the parties and the candidates to decide whether any item of expenditure should or should not be included in the candidate's account covered by the prescribed ceiling.

Latest Position of Law Relating to Expenditure by Political Parties, Friends, etc—Exemption Only of Expenditure on Travelling of Leaders of Political Parties

The question as to what is to be included and what to be excluded from the purview of the expenditure incurred or authorised by a candidate in connection with the election campaigns has recently undergone a sea change in 2003 by the Election and Other Related Laws (Amendment) Act 2003. Under the amended law, all expenditure incurred or authorised by political parties, friends and supporters of a candidate in connection with his election is to be considered as part of the candidate's expenditure, except the expenditure on travelling of leaders of his political party.

By the aforesaid Act of 2003, the earlier explanations (1) and (3) to s 77(1) of 1951 Act have been substituted by two new explanations (1) and (2).[95] By these two newly inserted explanations, it has been declared by Parliament, for the removal of doubt, that the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be the expenditure in connection with the election incurred or authorised by a candidate of that political party or his election agent for the purposes of s 77(1) [Explanation (1)(a)]. 'Leaders of a political party' in relation to any election mean: (i) where the political party is a recognised political party, such persons not exceeding forty in number, and (ii) where the political party is other than a recognised political party, ie, an unrecognised registered political party, such persons not exceeding twenty in number, and whose names have been communicated to the Election Commission and the chief electoral officer of the state concerned by the political party to be leaders for the purposes of such election. Such intimation of names of leaders of the political party has to be given by the party to the Election Commission and the chief electoral officer within a period of seven days from the date of the notification for such election published in the gazette of India or, as the case may be, the official gazette of the state concerned [Explanation (2)]. Where any of the aforesaid leaders dies or ceases to be a member of the political party, that party may, by further communication to the Election Commission and the chief electoral officer, substitute new name for the name of the leader who died or ceased to be a member of the party. Such substitution of new leader can be made at any time up to 48 hours before the hour fixed for the conclusion of the last poll for such election [proviso to Explanation (2)].

The Election Commission has taken the view that if any political party or candidate wishes to avail itself of the exemptions provided by these new provisions

95 Earlier explanation (2) to s 77(1) had already been omitted by Act 1 of 1989 wef 15 March 1989.

under s 77(1), the intimation of names of leaders of the political party should be communicated to the Election Commission and the chief electoral officer within the period of seven days prescribed in the Act and that any delayed intimation may result in denial of the exceptional benefit provided in that section, as the Commission has no power under that section to condone any delay in the matter. In the case of such delayed communication, the expenditure on travel of leaders of political parties might become includible in the account of the election expenditure of the candidates concerned.[96] The format of the return in which the candidates have to furnish their accounts to the district election officers under the law has been suitably modified by the Election Commission enabling the candidates to seek exemption on the travelling expenses of the said leaders of their parties.

The new explanation (1)(b), however, retains the exemption earlier provided in the old explanation (3) that any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the government and belonging to any of the classes mentioned in s 123(7) in the discharge or purported discharge of his official duty shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of s 77(1).

Conflict Between the Provisions of s 77(1) of the 1951 Act and s 171H of Indian Penal Code

But it is submitted, with respect, that while interpreting the provisions of s 77(1) and expln (1) thereto, the provisions of s 171H of the IPC do not seem to have been given due attention. That section mandates as follows:

171H. ***Illegal payments, in connection with an election.***—Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extent to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

A plain reading of s 171H itself makes its intention unambiguously clear that no expenditure whatsoever can be incurred by anyone whosoever in connection with the election of any candidate without the written authorisation, general or special, of the candidate. The criminal law of the land considers any election expenditure incurred,

96 See Election Commission's letter No 576/3/2005/JS-II, dated 29 December 2005.

without the written authorisation of the candidate, as an illegal payment, and whoever does so commits an electoral offence for which he is liable to punishment. Thus, there is an apparent conflict between the provisions of s 77(1) of the 1951 Act and s 171H of the IPC, which needs to be resolved.

Obtaining of Assistance of Government Servants

Policy Underlying the Provision

For an election to be fairly conducted, it is of paramount importance that the government machinery acts with absolute impartiality and neutrality. Therefore, the obtaining or procuring of assistance of government servants for the furtherance of the prospects of election of candidates has been made a corrupt practice. The policy underlying such provision was explained by the Supreme Court in *Raj Krushna Bose v Binod Kanungo and Ors.*[97] The apex court observed:

...policy of the law is to keep Government servants aloof from politics and also to protect them from being imposed on by those with influence or in positions of authority and power, and to prevent the machinery of Government from being used in furtherance of a candidate's return. But at the same time it is not the policy of the law to disenfranchise Government servants or to denude them altogether of their rights as ordinary citizens of the land.

Legislative History of the Provision

Initially, obtaining or procuring of assistance of government servants was a major corrupt practice under s 123(8) of the 1951 Act. In 1956, it became one of the corrupt practices under s 123(7) of that Act. The said s 123(7) presently defines the above corrupt practice as follows:

The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance other than the giving of vote for the furtherance of the prospects of that candidate's election, from any person whether or not[98] in the service of the Government and belonging to any of the following classes, namely:

(a) gazetted officers;
(b) stipendiary judges and magistrates;
(c) members of the armed forces of the Union;
(d) members of the police forces;
(e) excise officers;

97 AIR 1954 SC 202.

98 Inserted by the Representation of the People (Amendment) Act, 2009 with effect from 1 February 2010.

(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions;

(g) such other class of persons in the service of the Government as may be prescribed; and

(h) class of persons in the service of a local authority, university, government company or institution or concerned or undertaking appointed or deputed by the Election Commission in connection with the conduct of elections[99]:

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent whether by reason of the office held by the candidate or for any other reason, such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.

It was observed that the above definition of the corrupt practice suffered from a serious lacuna inasmuch as the obtaining or procuring the assistance of polling staff and other officials on election duties was not a corrupt practice within the meaning of this section, unless such official was a gazetted officer of the government. Now, this lacuna has been filled by incorporating sub-clause (h) by the Representation of the People (Amendment) Act, 2009 with effect from 1 February 2010.

The above provisions of s 123(7) have to be read with expls (2) and (3) to the main s 123, which provide as follows:

...

Explanation—.....(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent of that candidate.

(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government including a person serving in connection with the

99 Ibid.

administration of a Union territory or of a State Government shall be conclusive proof:

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or, removal from service such person ceased to be in such service with effect from the said date.

By the above-mentioned expln (2), earlier the appointment of a person as a polling agent or a counting agent of a candidate and his acting as such agent was also deemed to be assistance in the furtherance of the prospects of that candidate's election. The mere appointment of a government servant as such agent was enough to attract the provisions of s 123(7) and the intention of the candidate in procuring the assistance of such person was held to be irrelevant in *YS Parmar (Dr) v Hira Singh Pal*[1] However, in 1966, polling agents and counting agents were taken out of the purview of the provisions of s 123(7), as a large number of polling agents and counting agents are appointed by a candidate and, in some cases, he may not even be aware that any such agent is a government servant.

The above quoted proviso to s 123(7) and the above referred expln (3) to the main s 123 were inserted in 1975 in the wake of the judgment of the Allahabad High Court in *Raj Narain v Indira Nehru Gandhi*.[2] The high court held in that case that the respondent had obtained the assistance of officers of the state government, particularly, the district magistrate, superintendent of police, Executive Engineer, PWD and Engineer, Hydel Department, for the construction of rostrums and arrangements for the supply of power for loudspeakers in public meetings addressed by her, and that the obtaining of such assistance amounted to corrupt practice under s 123(7), as it then stood. The high court also held that the respondent obtained the assistance of her private secretary when he was in government service. The said private secretary had tendered his resignation from government service on 13 January 1971 and the same was accepted by the President on 25 January 1971, but with retrospective effect from 14 January 1971, by means of a notification published on 6 February 1971. The high court held that the private secretary was in the service of the Government till the acceptance of his resignation by the President on 25 January 1971. As it was felt that the above decision of the high court was contrary to the law as understood generally, the aforementioned proviso to s 123(7) and expln

1 AIR 1959 SC 244.

2 57 ELR 49.

(3) to s 123 were added by the Election Laws (Amendment) Act 1975 and the amendment was given retrospective effect. The validity of this amendment was challenged by the respondent in *Indira Nehru Gandhi v Raj Narain*,[3] but the challenge was rejected. Upholding the validity of the impugned amendments, the Supreme Court observed that the same were merely clarifying the existing state of law and not changing the law.

Prior thereto, sub-cl (f) of s 123(7) was also amended in 1958, so as to take out from the purview of that sub-clause certain officers, like, *lambardars*, who could be considered to be revenue officers. The Supreme Court had held in *Gurmej Singh v Pratap Singh Kairon*,[4] that a revenue officer was one who was employed in the business of revenue and the term was comprehensive enough to take in all such revenue officers in the chain of hierarchy in the revenue administration of the state.

Scope of the Provision

There is a material difference between the phraseology of s 123(8), as originally enacted, and the present s 123(7), which defines the corrupt practice of obtaining or procuring the assistance of government servants. As observed by the Supreme Court in *Kishore Chandra Deo Bhanj v Raghunath Misra*,[5] the language of the provisions of s 123(8) covered a wide field and referred to every person 'serving under the Government' of India or of a state, unless such person was declared to be one to whom the provisions of that section were not to apply, but after the amendment in 1956 the provisions of s 123(7) were made narrower in scope. There is a distinction between a person 'serving under the government' and 'in the service of the government', because while one may serve under the government, one may not necessarily be in the service of the government. Under the latter expression, one not only serves under the government but is in the service of the government and it imports the relationship of master and servant.

Further, these provisions now apply only to those persons 'in the service of the Government' who belong to the classes specified in sub-cl (a)–(g) of s 123(7), and to none else. It may be pertinent to add here that under sub-cl (g) of s 123(7), no other class of persons in the service of the government has so far been prescribed so as to fall within the ambit of that section. 'Prescribed' here will mean prescribed by rules made under s 169 of the 1951 Act and not by any executive order of the government.[6] A teacher (if not a gazetted officer) or a forest guard is not covered in the classes of government servants specified in s 123(7).[7]

3 AIR 1975 SC 2299.
4 AIR 1960 SC 122.
5 AIR 1959 SC 589.
6 *Dina Nath Kaul v Peer Mubarak Shah* AIR 1962 J&K 28.
7 *Surinder Pal v Gurpreet Singh Kangar and Ors* AIR 2005 P & H 251.

Ingredients of the Corrupt Practice

Analysing the provisions of s 123(7), the Supreme Court observed in *Hardwari Lal v Kanwal Singh*,[8] that the corrupt practice of seeking assistance of government servants for the furtherance of the prospects of a candidate's election can fall under four different heads, namely: (a) obtaining of assistance; (b) procuring of assistance; (c) abetting to obtain or procure the assistance; and (d) attempting to obtain or procure the assistance. Any such thing should be done by a candidate or his agent or by any other person with the consent of the candidate or his election agent, and in relation to a person in the service of the government who falls within any of the classes mentioned in that section.

In *Jeet Mohinder Singh v Harminder Singh Jassi*,[9] the allegation was that the returned candidate had managed to post some officers in the constituency. The Supreme Court observed that transfers and postings are ordinary incidents of service and ordinarily any transfer or posting is presumed to have been made to satisfy the administrative exigencies of service. Merely because a government servant happens to be posted twice at a particular station within a short range of time, an inference as to his having been 'brought' to a particular station for a particular purpose cannot be drawn so as to constitute a corrupt practice within the meaning of s 123(7).

In the Service of the Government, Illustrative Cases

In *Karam Singh v Kamal Chaudhary*, the governor of the state was held to be in the service of the Government by the Punjab and Haryana High Court.[10] The high court observed that s 123(7) does not talk of any particular government and that the Governor, being appointed by the President and drawing salary, etc, was in the service of the Central Government, ie, President. However, in *Hargovind Pant v Raghukul Tilak*,[11] the Supreme Court held that the governor was the state government itself and could not be considered to be a person holding an office under the government. The Gujarat High Court held in *Laljibhai Jodhabhai Bar v Vinodchandra Jethalal Patel*[12] that a parliamentary secretary formed part of the government and was not in the service of the government. The Gauhati High Court held the view in *Rohiteswar Saikia v Tonu Kannan*[13] that ministers and members of Parliament and of state legislatures were not in the service of the government. The Supreme Court held in *Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi*[14] that the

8 AIR 1972 SC 515.
9 AIR 2000 SC 256.
10 AIR 1991 P&H 231.
11 AIR 1979 SC 1109.
12 AIR 1963 Guj 297.
13 AIR 1990 Gau 41.
14 AIR 1986 SC 1534.

members of the Parliament were not holding any office of profit under the government.

The Supreme Court clarified in *Bachan Singh v Prithvi Singh*[15] that persons in the service of the government meant persons in flesh and blood and not their inanimate photographs. In this case, certain posters were printed containing the photographs of the Prime Minister and certain army officers below which the name and symbol of the candidate were printed and appeal was made to vote for that candidate. The Supreme Court held that such posters could not be construed as procuring the assistance of army officers in the service of the government within the meaning of s 123(7), though the publication of such posters was an act of impropriety. The Supreme Court had earlier held in *Kishore Chandra Deo Bhanj v Raghunath Misra*[16] that the *sarpanch* of *gram panchayat*, constituted under the Orissa Gram Panchayat Act 1948, was not a person in the service of the government as there was no relationship of master and servant.

Nature of forbidden assistance—The nature of assistance on the part of government servants, which is forbidden or prohibited under the law, is some assistance other than the giving of vote. Thus, any approach to government servants seeking their votes is not forbidden or prohibited. It was held by the Supreme Court in *Raj Krushna Bose v Binod Kanungo and Ors*[17] that government servants are not prevented from nominating candidates in elections and the mere proposing of a nomination of a candidate by a government servant does not fall within the ambit of s 123(7). But, if the procurement of government servants to propose a nomination is part of a plan to procure their assistance for the furtherance of the candidate's prospects in other ways than by vote, then s 123(7) is attracted, for in that case, the plan, and its fulfillment must be viewed as a connected whole and the act of proposing a nomination which is innocent in itself cannot be separated from the rest, the apex court observed.

In *Baldev Singh Mann v Surjit Singh Dhiman*[18], it was alleged that the respondent had met two gazetted officers of the government of Punjab and asked them to help him in his election. It was further alleged that the respondent was seen moving with the said two officers in different areas in the constituency. The Supreme Court observed that casting a vote or asking for it does not amount to obtaining any assistance. There must be some positive and explicit proof on the part of the voters belonging to categories mentioned in s 123(7)(a) to (g) to constitute corrupt practice which was not proved in that case.

15 AIR 1975 SC 926.
16 AIR 1959 SC 589.
17 AIR 1954 SC 202.
18 2009(2) SCJ 386.

Assistance given voluntarily—It is also very important to note that what the law prevents is the obtaining or procuring of assistance of a government servant. It does not prohibit any voluntary assistance rendered by a government servant without the candidate asking for it. A government servant has a 'private personality' too and help rendered voluntarily by a government servant without any attempt by the candidate to 'obtain' or 'procure' does not constitute the corrupt practice under s 123(7), whatever be the impropriety of it for the government servant himself.[19] It is the act of solicitation for the aid of the officials mentioned in s 123(7), whether successful or not, which is penalised and not the mere fact that certain advantages flow quite naturally and conventionally from the occupation of an office, without any solicitation, or the mere fact that some assistance is voluntarily given by someone to an election campaign. On the language of s 123(7), a liability is not created by merely not rejecting aid voluntarily given. The candidate may not often be aware of the voluntarily given assistance so as to be able to reject it. The word 'obtain' in s 123(7) has been used in the sense of the meaning which connotes purpose or effort behind the action of the candidate. The word has not been used in that section in the sense of a mere passive receipt of assistance, without the candidate being even conscious of the fact that the assistance has been rendered.[20]

Assistance for furthering the prospects of candidate's election, performance of official duty—Assistance by a government servant so as to come within the meaning of corrupt practice under s 123(7) should be for the furtherance of the prospects of the election of the candidate.[21] Mere performance of official duty by a government servant, which may incidentally give benefit to a candidate or enhance the prospects of the election of a candidate, does not constitute corrupt practice. In *Narender Singh v Mala Ram and Anor,*[22] it was alleged that the returning officer had improperly rejected the nomination papers of two candidates at the behest of, and in collusion with, the returned candidate. The Supreme Court held that the main thrust of the allegation was improper rejection of nomination papers by the returning officer and the allegation of collusion was only an embellishment and that no corrupt practice within the meaning of s 123(7) was alleged or committed. The Calcutta High Court held in *Dipak Kumar Das v Mrinal Kanti Roy,*[23] that any irregularity by the returning officer in the counting of votes could not be regarded as a corrupt practice under s 123(7).

The Supreme Court has clarified in *Indira Nehru Gandhi v Raj Narain*[24] that 'official duty' will be a duty in law. It does not only mean the duty imposed by

19 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.
20 *Dina Nath Kaul v Peer Mubarak Shah* AIR 1962 J&K 28.
21 *US Sasidharan v K Karunakaran* AIR 1990 SC 924.
22 AIR 1999 SC 3655.
23 AIR 1998 Cal 139.
24 AIR 1975 SC 2299.

statute. It would include not merely duties imposed by a statute but also those which have to be carried out in pursuance of administrative instructions and directions of the executive for security, law and order, and matters in aid of public purpose. In *Laxmi Narayan Nayak v Ramratan Chaturvedi*,[25] it was alleged that certain sub-divisional officers accompanied the returned candidate in election rallies and distributed money and requested voters to vote in favour of the candidate. The Supreme Court considered the allegation to be vague, in the absence of details of specific dates and places of election rallies and names of officers accompanying the candidate, but observed that even if it was assumed that the sub-divisional officers accompanied the candidate, they might have done so for maintaining law and order and that no definite inference of rendering assistance by them to the candidate could be drawn. Deployment and presence of police at the instance of the candidate on the front or the back or on the side of the procession organised by the candidate was not held to amount to corrupt practice under s 123(7) by the Punjab and Haryana High Court.[26]

Booth Capturing

Booth Capturing, a New Edition to List of Corrupt Practices and Electoral Offences

Booth capturing has been one of the oldest forms of rigging elections. Booth capturing, in simple words, will mean the unauthorised casting of votes by some persons other than the genuine voters either by intimidating or threatening the polling officials to surrender the ballot papers or by preventing the voters from going to the polling stations. Mercifully, it has been confined only to certain parts of the country. Prior to 1989, booth capturing was considered as interference with the exercise of electoral right of the voters and was treated as corrupt practice of undue influence under s 123(2) of the 1951 Act. However, in 1989, booth capturing was made a specific corrupt practice under s 123(8) of the 1951 Act by the Representation of the People (Amendment) Act 1988, effective from 15 March 1989. It was defined by s 123(8) as—'Booth capturing by a candidate or his agent or other person'. The Supreme Court has observed in *Markio Tado v Takam Sorang and Others*[27] that booth capturing is by use of force or intimidation. Impersonation or double voting involves cheating or deception. These two grounds deal with different aspects of corrupt practices.

By expln (4) to s 123 as inserted by the aforesaid amendment Act of 1988, it was provided that for the purposes of s 123(8), 'booth capturing' shall have the same meaning as in s 135A of that Act, which was also newly inserted by the same Act making booth capturing an electoral offence as well. The said s 135A reads as follows:

135A. *Offence of booth capturing.*—(1) Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine, and where such offence is committed by a person in the service of the Government, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine.

Explanation—For the purposes of this sub-section and section 20B 'booth capturing' includes, among other things, all or any of the following activities, namely:

(a) seizure of a polling station or a place fixed for the poll by any person or persons making polling authorities surrender the ballot papers or voting machines and doing of any other act which affects the orderly conduct of elections;

(b) taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his or their own supporters to exercise their right to vote and prevent others from free exercise of their right to vote;

(c) coercing or intimidating or threatening directly or indirectly any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;

(d) seizure of a place for counting of votes by any person or persons, making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

(e) doing by any person in the service of Government of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate.

(2) An offence punishable under sub-section (1) shall be cognizable.

It will be observed from cl (d) of the above quoted expln to s 135A(1) that the booth capturing has been given an extended meaning so as to cover even the rigging of the counting process at the counting places and not merely the polling process at the polling stations.

Initially in 1989, booth capturing was not made a cognisable offence and the punishment provided was also from six months to two years (three years in the case of government servants). However, it was made a cognisable offence by the Representation of the People (Amendment) Act 1996 and the punishment for committing the offence was also made more exemplary.

25 AIR 1991 SC 2001.
26 *Parkash Kaur (Dr) v Sardar Parkash Singh Majithia* AIR 1981 NOC 231.
27 2013 (4) SCJ 178.

Cases of Booth Capturing Before 1989

Before the corrupt practice and electoral offence of booth capturing came to be defined in the 1951 Act in 1989 as aforesaid, the forcible removal of ballot papers from the possession of polling officers and putting the same in the ballot box after marking them in favour of a candidate was held by the Supreme Court to be a corrupt practice under s 123(2).[28] In that case, the respondent candidate came to the polling station accompanied by his companions armed with deadly weapons, threatened and scared away the voters interfering with the exercise of their electoral rights. He also threatened the polling officials and polling agents and got some ballot papers marked in his favour and polled forcibly. These acts were held to constitute booth capturing and were considered as a corrupt practice of undue influence within the meaning of s 123(2). Likewise, in *Ram Sharan Yadav v Thakur Muneshwar Nath Singh*,[29] the appellant was found to be present at the polling booth at the time of voting and his supporters or agents indulged in acts of assault, hurling of bombs, etc, in his presence and he did not stop them from doing so. He was held to be guilty of indulging in corrupt practice of undue influence under s 123(2). Now, such acts would straightaway fall within the mischief of s 123(8), ie, booth capturing.

In *Amar Singh v Dharam Vir*,[30] a duplicate marking seal was recovered in the counting hall and the returning officer after examining certain ballot papers containing duplicate voting marks, came to the conclusion that the duplicate marks were unauthorisedly put and counted the ballot papers in favour of the candidate for whom the original marks were put on those ballot papers. Thereupon, the returning officer was manhandled by the returned candidate and his associates, and the returning officer then gave in and begged pardon of the returned candidate and his companions with folded hands and promised that he would do what they wanted and, thereafter, rejected the ballot papers containing duplicate marks. The Punjab and Haryana High Court held the returned candidate guilty of the corrupt practice of obtaining or procuring the assistance of a gazetted officer within the meaning of s 123(7), besides being guilty of the corrupt practice under s 123(2). However, the Supreme Court did not agree with that view of the high court and held that the above acts of the returned candidate could not be termed as corrupt practice either under s 123(2) or under s 123(7), though the Supreme Court maintained the order of the high court declaring the election of the returned candidate as void for the commission of the above acts. The Supreme Court observed that such an act would now fall within the ambit of s 123(8), but the provisions of this section could not be

28 *Ram Singh v Col Ram Singh* AIR 1986 SC 3.
29 AIR 1985 SC 24.
30 AIR 1990 NOC 132.

made applicable to the facts and circumstances of that case as these provisions were brought in the statute book long after the election in question.[31]

In *Baldev Singh Mann v Gurcharan Singh*,[32] it was held that threatening the polling agent of a candidate and asking him not to go inside the polling station and not to raise objections in regard to the identity of persons coming to vote did not amount to booth capturing within the meaning of s 123(8).

ELECTORAL OFFENCES

General

It has been mentioned in the introductory part of this chapter that electoral offences are specified both in the IPC and in the Representation of the People Act 1951. These relate to the stage of conduct of elections. There are also a few offences which may be committed during the preparation, revision and correction of electoral rolls. They are separately prescribed under the Representation of the People Act 1950.

Electoral Offences Under the Indian Penal Code

Legislative Background

The electoral offences under the IPC are enumerated in ch IXA of that Code under the heading 'Of Offences Relating to Elections'. This chapter was inserted in that Code more than 90 years ago in 1920 by the Indian Elections Offences and Inquiries Act 1920, when concept of elections in a limited way was introduced in some of the legislative bodies under the Government of India Act 1919. The quantum of punishment, particularly the amount of fine, prescribed under some of the provisions of that chapter may be considered extremely low in the context of the present scenario, but the same was considered quite a deterrent during that period. It is felt that the punitive provisions for these electoral offences need a fresh look so as to meet the expectations of the present electorate and some of these offences call for sterner punishment.

Electoral Offences Recognised by Penal Code

At the time of elections, there may be several acts done or performed which may not be correct, morally or ethically, but the IPC recognised only: (1) bribery at elections (s 171B); (2) undue influence at elections (s 171C); (3) personation at elections (s 171D); (4) false statement in connection with an election (s 171G); (5) illegal payments in connection with an election (s 171H); and (6) failure to keep election accounts (s 171-I), as electoral offences and made them punishable.

31 *Dharam Vir v Amar Singh* AIR 1996 SC 2314.
32 AIR 1996 SC 1109.

Of the above, the offences of 'bribery', 'undue influence', 'false statements', 'illegal payments' and 'failure to keep election accounts' have already been discussed in the earlier part of this chapter, while describing the corresponding corrupt practices of 'bribery', 'undue influence', 'false statements' and 'incurring election expenses in excess of prescribed limits' and as such are not proposed to be repeated here. Suffice to add that mere conviction for the offences of 'bribery' and 'undue influence', irrespective of the quantum of punishment imposed, will entail disqualification for being chosen as, and for being, a member of either House of Parliament and of a state legislature for a minimum period of six years from the date of conviction [s 8(1), 1951 Act], and also for voting at any such election for six years [s 11A(1)].

Only the offence of 'personation at elections' as described in s 171D of the Code has not been discussed above. Section 171D provides that:

Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election:

Provided that nothing in this section shall apply to a person who has been authorized to vote as proxy for an elector under any law for the time being in force in so far as he votes as a proxy for such elector.

The above definition of the offence shows that even voting by the genuine voter in his own name will also constitute the offence of personation, if he votes more than once at the election, as a voter has only one vote (except as proxy voter). The offence of personation is punishable under s 171F with imprisonment of either description for a term which may extend to one year, or with fine, or with both. Any conviction for this offence also results in disqualification for membership of Parliament and state legislatures for a minimum period of six years, and for voting for six years, from the date of conviction [ss 8(1) and 11A(1), 1951 Act].

Offences Under the Representation of the People Act 1950

Malpractices in relation to Electoral Rolls

The original 1950 Act did not envisage any malpractices in relation to preparation, revision and correction of electoral rolls and did not make any provision in this behalf. But experience showed that the process of registration of electors could also be rigged by the inclusion of ineligible names or deletion of eligible names by false statements and declarations by interested parties and by manipulations on the part of the registering authorities. Therefore, the following acts of commission and omission were made offences under that Act in 1958, with some modifications in 1960 and 1996:

31. ***Making false declarations.***—If any person makes in connection with:
(a) the preparation, revision or correction of an electoral roll, or
(b) the inclusion or exclusion of any entry in or from an electoral roll,

a statement or declaration in writing which is false and which he either knows or believes to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to one year or with fine, or with both.

Comments—The offence under s 31 is non-cognisable.[33] For detailed discussion on the provisions of this section, see 'False Declarations in Connection with Electoral Rolls' in ch 7.

32. ***Breach of official duty in connection with preparation, etc, of electoral rolls.***—(1) If any electoral registration officer, assistant electoral registration officer or other person required by or under this Act to perform any official duty in connection with the preparation, revision or correction of electoral roll or the inclusion or exclusion of any entry in or from the roll, is without reasonable cause, guilty of any act or omission in breach of such official duty, he shall be punishable with imprisonment for a term which shall not be less than three months but may extend to two years and with fine.

(2) No suit or other legal proceeding shall lie against any such officer or other person for damages in respect of any such act or omission as aforesaid.

(3) No court shall take cognisance of any offence punishable under sub-section (1) unless there is a complaint made by order of, or under authority from, the Election Commission or the chief electoral officer of the State concerned.

Electoral Offences Under the Representation of the People Act 1951

Malpractices Affecting Free and Fair Elections

The following malpractices and acts of commission and omission have been considered as having an obnoxious impact on the conduct of free and fair elections and have, therefore, been prohibited by being declared as electoral offences under ch III of Part VII of the 1951 Act, namely:

(1) Promoting enmity between classes in connection with election (s 125);
(2) Filing false affidavits, etc (s 125A);
(3) Holding of public meetings during period of forty-eight hours ending with hour fixed for conclusion of poll (s 126);
(4) Restriction on publication and dissemination of result of exit polls, etc. (s 126A);
(5) Offences by companies (conducting exit poll) (s 126B);

33 *Keshav Lal Thakur v State of Bihar* (1996) 11 SCC 557.

(6) Disturbances at election meetings (s 127);
(7) Printing of pamphlets, posters, etc, without printing the names of publisher, printer, etc (s 127A);
(8) Violation of secrecy of voting (s 128);
(9) Officers, etc, at elections not to act for candidates or to influence voting (s 129);
(10) Canvassing in or near polling stations (s 130);
(11) Disorderly conduct in or near polling stations (s 131);
(12) Misconduct at the polling station (s 132);
(13) Failure to observe procedure for voting (s 132A);
(14) Illegal hiring or procuring of conveyance at elections (s 133);
(15) Breaches of official duty in connection with elections (s134);
(16) Government servants not to act as election agent, polling agent or counting agent (s 134A);
(17) Going armed to or near a polling station (s 134B);
(18) Removal of ballot papers, etc, from polling station (s 135);
(19) Booth capturing (s 135A);
(20) Non-grant of paid holiday to employees on the day of poll (s 135B);
(21) Sale, distribution, etc, of liquor on polling day (s 135C);
(22) Fraudulently tampering with nomination papers, ballot boxes, ballot papers, election records, unauthorisedly supplying ballot papers, etc (s 136).

Any conviction for an offence under s 125 or s 135 or s 135A or s 136(2)(a) (ie, fraudulently defacing or destroying any nomination paper) attracts disqualification for membership of Parliament and state legislatures for a minimum period of six years from the date of conviction, whatever may be the punishment imposed [s 8(1)]. Further, such conviction under s 125 or s 135 or s 136(2)(a) also imposes disqualification for voting for six years [s 11A(1)].

For convenience and easy reference, all the above mentioned ss 125–136 are being reproduced hereunder, with necessary comments wherever called for:

125. ***Promoting enmity between classes in connection with election.***—Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Comments—It is also a corrupt practice under s 123(3A), as discussed above.

125A. ***Penalty for filing false affidavit, etc.***—A candidate who himself or through his proposer, with intent to be elected in an election—

(i) fails to furnish information relating to sub-section (1) of section 33A; or
(ii) gives false information which he knows or has reason to believe to be false; or
(iii) conceals any information,

in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

Comments—The Election Commission has clarified to the returning officers that the nomination paper of a candidate shall not be rejected solely on the ground that the candidate has given any wrong information or suppressed any material information in his affidavit. If any such defect or discrepancy is brought to the notice of the returning officer, he shall file a complaint before the competent magistrate under s 195 CrPC for violation of the present s 125A and s 177 IPC.

126. ***Prohibition of public meetings during period of forty-eight hours ending with hour fixed for conclusion of poll.***—(1) No person shall:

(a) convene, hold, attend, join or address any public meeting or procession in connection with an election; or
(b) display to the public any election matter by means of cinematograph, television or other similar apparatus; or
(c) propagate any election matter to the public by holding, or by arranging the holding of, any musical concert or any theatrical performance or any other entertainment or amusement with a view to attracting the members of the public thereto,

in any polling area during the period of forty-eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling area.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to two years or with fine, or with both.

(3) In this section, the expression election matter means any matter intended or calculated to influence or affect the result of an election.

Comments—The scope of this section was considerably enlarged in August 1996, by the Representation of the People (Amendment) Act 1996. Earlier, it prohibited only public meetings during the specified period.

But the Election Commission has clarified that even the amended provisions of s 126 do not apply to the print media and advertisements by political parties in

newspapers, etc, can continue to be published during the prohibited period of 48 hours mentioned in the section.

126A. ***Restriction on publication and dissemination of result of exit polls, etc.*** — (1) No person shall conduct any exit poll and publish or publicise by means of the print or electronic media or disseminate in any other manner, whatsoever, the result of any exit poll during such period, as may be notified by the Election Commission in this regard.

(2) For the purposes of sub-section (1), the Election Commission shall, by a general order, notify the date and time having due regard to the following, namely: —

(a) in case of a general election, the period may commence from the beginning of the hours fixed for poll on the first day of poll and continue till half an hour after closing of the poll in all the States and Union territories;

(b) in case of a bye-election or a number of bye-election held together, the period may commence from the beginning of the hours fixed for poll on and from the first day of poll and continue till half an hour after closing of the poll :

Provided that in case of a number of bye-elections held together on different days, the period may commence from the beginning of the hours fixed for poll on the first day of poll and continue till half an hour after closing of the last poll.

(3) Any person who contravenes the provisions of this section shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

Explanation.— For the purposes of this section, —

(a) "exit poll" means an opinion survey respecting how electors have voted at an election or respecting how all the electors have performed with regard to the identification of a political party or candidate in an election;

(b) "electronic media" includes internet, radio and television including Internet Protocol Television, satellite, terrestrial or cable channels, mobile and such other media either owned by the Government or private person or by both;

(c) "print media" includes any newspaper, magazine or periodical, poster, placard, handbill or any other document;

(d) "dissemination" includes publication in any "print media" or broadcast or display on any electronic media.

126B. Offences by companies. —(1) Where an offence under sub-section (2) of section 126A has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for

the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided the noting contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purpose of this section, —

(a) "company" means any body corporate, and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm, means a partner in the firm.

Comments---These sections have been inserted by Representation of the People (Amendment) Act, 2009, (w.e.f. 1-2-2010). For a detailed discussion, see Chapter 12, under the heading Opinion polls and Exit polls

127. ***Disturbances at election meetings.***—(1) Any person who at a public meeting to which this section applies acts, or incites others to act, in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees, or with both.

(1A) An offence punishable under sub-section (1) shall be cognizable.

(2) This section applies to any public meeting of a political character held in any constituency between the date of the issue of a notification under this Act calling upon the constituency to elect a member or members and the date on which such election is held.

(3) If any police officer reasonably suspects any person of committing an offence under sub-section (1), he may, if requested so to do by the chairman of the meeting, require that person to declare to him immediately his name and address and, if that person refuses or fails so to declare his name and address, or if the police officer reasonably suspects him of giving a false name or address, the police officer may arrest him without warrant.

Comments—Disturbing a public meeting amounts only to electoral offence under s 127; it does not constitute corrupt practice of undue influence under s 123(2).[34]

127A. ***Restrictions on the printing of pamphlets, posters, etc.***—(1) No person shall print or publish, or cause to be printed or published, any election pamphlet or poster which does not bear on its face the names and addresses of the printer and the publisher thereof.

(2) No person shall print or cause to be printed any election pamphlet or poster,—

(a) unless a declaration as to the identity of the publisher thereof, signed by him and attested by two persons to whom he is personally known, is delivered by him to the printer in duplicate; and

(b) unless, within a reasonable time after the printing of the document, one copy of the declaration is sent by the printer, together with one copy of the document,—

(i) where it is printed in the capital of the State, to the Chief Electoral Officer; and

(ii) in any other case, to the district magistrate of the district in which it is printed.

(3) For the purposes of this section,—

(a) any process for multiplying copies of a document, other than copying it by hand, shall be deemed to be printing and the expression 'printer' shall be construed accordingly; and

(b) 'election pamphlet or poster' means any printed pamphlet, hand-bill or other document distributed for the purpose of promoting or prejudicing the election of a candidate or group of candidates or any placard or poster having reference to an election, but does not include any hand-bill, placard or poster merely announcing the date, time, place and other particulars of an election meeting or routine instructions to election agents or workers.

(4) Any person who contravenes any of the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

Comments—The Supreme Court observed in *Rahim Khan v Khurshed Ahmad*[35] and *Kanwar Lal Gupta v Amar Nath Chawla*[36] that there is no agency of law which takes prompt action after due investigation of a complaint of breach of s 127A. The court desired that there should be some independent semi-judicial instrumentality set up

34 *Surinder Singh v Hardial Singh* AIR 1985 SC 89.

35 AIR 1975 SC 290.

36 AIR 1975 SC 308.

by law, which would immediately investigate as to how the offending handbills and posters have come into existence, who has printed them and who is responsible for getting them printed. But no such agency seems to have been set up and the offences under s 127A are investigated in the normal course by the police authorities as in the case of other criminal offences.

In order to ensure compliance of the provisions of s 127A, the Election Commission has instructed[37] that each printer publishing any election material should send four copies of the printed material, along with the declaration of the publisher, within three days of the printing of the material to the district magistrate or, as the case may be, to the chief electoral officer. The printer is also to furnish information regarding the number of copies of the document printed and the price charged for the printing job. The Commission has also prescribed the format of the declaration to be obtained from the publisher and the proforma in which the requisite information is to be furnished by the printer. The Commission has further instructed that one copy of the printed material shall be exhibited by the district magistrate or, as the case may be, the chief electoral officer immediately at some conspicuous place in his office for information of all interested. The Commission has also taken the view that the advertisements published in the newspapers in the garb of 'paid news' would also fall in the category of 'other document' mentioned in s 127A(3)(b).

The Commission has clarified that display of election materials, like, card board badges, paper caps, mobile stickers, sticker badges, flag banners, cutouts, masks, scarfs, which are normal publicity materials are not covered under the provisions of s 127A and, thus, need not carry the name of the printer and publisher.

128. ***Maintenance of secrecy of voting.***—(1) Every officer, clerk, agent or other person who performs, any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy:

Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both.

Comments—Secrecy of ballot means that once an elector has cast his vote, no one should know for whom he voted. That is why under s 128 a voter can refuse to testify for whom he had cast his vote and he cannot be compelled under s 94 to

37 See Election Commission circular No 3/9(ES008)/94-JSII dated 2 September 1994.

divulge for whom he voted. But s 128 has nothing to do with the voter himself voluntarily disclosing for whom he voted.[38]

As has been explained in ch 13 on 'Poll', the votes at elections to the Council of States are now taken by open ballot since 2003. Therefore, the provisions of s 128 have been made inapplicable to these elections.

129. ***Officers, etc, at elections not to act for candidates or to influence voting.***—(1) No person who is a district election officer or a returning officer, or an assistant returning officer, or a presiding or polling officer at an election, or an officer or clerk appointed by the returning officer or the presiding officer to perform any duty in connection with an election shall in the conduct or the management of the election do any act (other than the giving of vote) for the furtherance of the prospects of the election of a candidate.

(2) No such person as aforesaid, and no member of a police force, shall endeavour—

(a) to persuade any person to give his vote at an election, or
(b) to dissuade any person from giving his vote at an election, or
(c) to influence the voting of any person at an election in any manner.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment which may extend to six months or with fine or with both.

(4) An offence punishable under sub-section (3) shall be cognizable.

Comments—Election must be freely and fairly conducted and the police and Government officers should not create even an impression that they are interfering for the benefit of one or the other candidate.[39]

130. ***Prohibition of canvassing in or near polling stations.***—(1) No person shall, on the date or dates on which a poll is taken at any polling station, commit any of the following acts within the polling station or in any public or private place within a distance of one hundred metres of the polling station, namely:

(a) canvassing for votes; or
(b) soliciting the vote of any elector; or
(c) persuading any elector not to vote for any particular candidate; or
(d) persuading any elector not to vote at the election; or
(e) exhibiting any notice or sign other than an official notice relating to the election.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to two hundred and fifty rupees.

38 *Raghbir Singh Gill v Gurcharan Singh Tohra* AIR 1980 SC 1362.
39 *PR Belagali v BD Jatti* AIR 1971 SC 1348.

(3) An offence punishable under this section shall be cognizable.

Comments—Wearing of a badge with the inscription of the name of the candidate would amount to canvassing of votes for the particular candidate and the wearing of any such badge within the polling station or within a radius of 100 metres thereof would be violation of s 130.[40] However, the Election Commission has clarified that wearing of any badge or cap or scarf, etc., containing the name of the candidate or party or the symbol outside the prohibited limit of 100 metres is not an offence.

131. ***Penalty for disorderly conduct in or near polling stations.***—(1) No person shall, on the date or dates on which a poll is taken at any polling station—

(a) use or operate within or at the entrance of the polling station, or in any public or private place in the neighbourhood thereof, any apparatus for amplifying or reproducing the human voice, such as a megaphone or a loudspeaker, or
(b) shout, or otherwise act in a disorderly manner, within or at the entrance of the polling station or in any public or private place in the neighbourhood thereof,

so as to cause annoyance to any person visiting the polling station for the poll, or so as to interfere with the work of the officers and other persons on duty at the polling station.

(2) Any person who contravenes, or wilfully aids or abets the contravention of, the provisions of sub-section (1) shall be punishable with imprisonment which may extend to three months or with fine or with both.

(3) If the presiding officer of a polling station has reason to believe that any person is committing or has committed an offence punishable under this section, he may direct any police officer to arrest such person, and thereupon the police officers shall arrest him.

(4) Any police officer may take such steps, and use such force, as may be reasonably necessary for preventing any contravention of the provisions of sub-section (1), and may seize any apparatus used for such contravention.

132. ***Penalty for misconduct at the polling station.***—(1) Any person who during the hours fixed for the poll at any polling station misconducts himself or fails to obey the lawful directions of the presiding officer may be removed from the polling station by the presiding officer or by any police officer on duty or by any person authorised in this behalf by such presiding officer.

(2) The powers conferred by sub-section (1) shall not be exercised so as to prevent any elector who is otherwise entitled to vote at a polling station from having an opportunity of voting at that station.

40 *G Panneerselvam v S Narayanaswami* 46 ELR 36.

(3) If any person who has been so removed from a polling station re-enters the polling station without the permission of the presiding officer, he shall be punishable with imprisonment for a term which may extend to three months, or with fine, or with both.

(4) An offence punishable under sub-section (3) shall be cognizable.

132A. ***Penalty for failure to observe procedure for voting.***—If any elector to whom a ballot paper has been issued, refuses to observe the procedure prescribed for voting the ballot paper issued to him shall be liable for cancellation.

133. ***Penalty for illegal hiring or procuring of conveyance at elections.***—If any person is guilty of any such corrupt practice as is specified in clause (5) of section 123 at or in connection with an election, he shall be punishable with imprisonment which may extend to three months and with fine.

134. ***Breaches of official duty in connection with elections.***—(1) If any person to whom this section applies is without reasonable cause guilty of any act or omission in breach of his official duty, he shall be punishable with fine which may extend to five hundred rupees.

(1A) An offence punishable under sub-section (1) shall be cognizable.

(2) No suit or other legal proceedings shall lie against any such person for damages in respect of any such act or omission as aforesaid.

(3) The persons to whom this section applies are the district election officers, returning officers, assistant returning officers, presiding officers, polling officers and any other person appointed to perform any duty in connection with the receipt of nominations or withdrawal of candidatures, or the recording or counting of votes at an election; and the expression 'official duty' shall for the purposes of this section be construed accordingly, but shall not include duties imposed otherwise than by or under this Act.

134A. ***Penalty for Government servants for acting as election agent, polling agent or counting agent.***—If any person in the service of the Government acts as an election agent or a polling agent or a counting agent of a candidate at an election, he shall be punishable with imprisonment for a term which may extend to three months, or with fine, or with both.

134B. ***Prohibition of going armed to or near a polling station.***—(1) No person, other than the returning officer, the presiding officer, any police officer and any other person appointed to maintain peace and order at a polling station who is on duty at the polling station, shall, on a polling day, go armed with arms, as defined in the Arms Act 1959, of any kind within the neighbourhood of a polling station.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to two years or with fine, or with both.

(3) Notwithstanding anything contained in the Arms Act 1959, where a person is convicted of an offence under this section, the arms as defined in the said Act found in his possession shall be liable to confiscation and the licence granted in relation to such arms shall be deemed to have been revoked under section 17 of that Act.

(4) An offence punishable under sub-section (2) shall be cognizable.

Comments—The Election Commission has clarified that the security personnel guarding a protectee under the Special Protection Group Act 1988, can escort the protectee up to the polling station or the counting hall, as the case may be. Thereafter, only one PSO with concealed fire arm will accompany the protectee inside and position himself in such a manner as to be able to provide the requisite cover to the protectee should it become essential, without otherwise interfering with the proceedings in any manner.[41]

135. ***Removal of ballot papers from polling station to be an offence.***—(1) Any person who at any election unauthorisedly takes, or attempts to take, a ballot paper out of a polling station, or wilfully aids or abets the doing of any such act, shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to five hundred rupees or with both.

(2) If the presiding officer of a polling station has reason to believe that any person is committing or has committed an offence punishable under sub-section (1), such officer may, before such person leaves the polling station arrest or direct a police officer to arrest such person and may search such person or cause him to be searched by a police officer:

Provided that when it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.

(3) Any ballot paper found upon the person arrested on search shall be made over for safe custody to a police officer by the presiding officer, or when the search is made by a police officer, shall be kept by such officer in safe custody.

(4) An offence punishable under sub-section (1) shall be cognizable.

Comments—A journalist found a ballot paper lying on the road thrown by miscreants and published a report in the newspaper. It was held that the journalist could not be said to have stolen or unlawfully removed the ballot paper, nor could any dishonest intention be attributed to him thereby. Section 135 was not held to be attracted in this case.[42]

135A. ***Offence of booth capturing.***—(1) Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine, and where such offence is committed by a person in the service of the Government, he shall be

41 See Election Commission's circular No 476/3/98/JS-II, dated 14 February 1998.

42 *ABK Prasad v State of AP* AIR 1997 AP 357.

(b) if he is any other person, be punishable with imprisonment for term which may extend to six months or with fine or with both.

(3) For the purposes of this section, a person shall be deemed to be on official duty if his duty is to take part in the conduct of an election or part of an election including the counting of votes or to be responsible after an election for the used ballot papers and other documents in connection with such election, but the expression 'official duty' shall not include any duty imposed otherwise than by or under this Act.

(4) An offence punishable under sub-section (2) shall be cognizable.

CHAPTER 17

Election Disputes

SYNOPSIS

INTRODUCTION

General

Democracy is one of the basic inalienable features of the Constitution of India and forms part of its basic structure:[1]

> Free, fair, fearless and impartial elections are the guarantee of a democratic polity. Effective mechanism is the basic requirement for having such election. For conducting, holding and completing the democratic process, a potential law based upon requirements of the society tested on the touchstone of the experience of times is concededly of paramount importance. A balanced judicial approach in implementing the laws relating to franchise is the mandate of this (Supreme) Court.[2]

Democracy is a part of the basic structure of the Constitution and rule of law and free and fair elections are basic features of democracy.[3]

Elections can be free and fair, if they are transparent and subject to judicial scrutiny. Election law in India lays stress on both the above aspects. The entire electoral exercise is conducted in a totally transparent manner, in full public gaze, with the active participation of political parties and candidates, who are the main stake-holders, and of electors who are the ultimate beneficiaries under democracy. The exercise is also subject to judicial scrutiny in all its aspects, as India is wedded to the rule of law.

In 1975, the election of the then Prime Minister was declared void by the Allahabad High Court. Parliament amended the Constitution by the Constitution (Thirty-ninth Amendment) Act 1975, inserting a new art 329A therein. Clause (4) of that article had the effect of validating the election of the Prime Minister by Parliament, notwithstanding the declaration of the high court to the contrary. The Supreme Court struck down that clause of art 329A as unconstitutional. The apex court observed that the Constitution visualises the resolution of election disputes by judicial process, by ascertaining the facts relating to the election and applying the law.[4]

Challenge to Election, When and How to be Made

Thus, every election to any elected body or elective office, be it the office of the President of India or a member of Parliament or of a state legislature, is open and subject to judicial scrutiny. But the Constitution prescribes the manner in which,

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1 *Kesavanand Bharati v State of Kerala* AIR 1973 SC 1461.
2 *VS Achuthanandan v PJ Francis and Anor* [1999] 2 LRI 200.
3 *People's Union of Civil Liberties and another v Union of India and another* 2009(2) SCJ 875.
4 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.

and the stage at which, a dispute relating to an election to any House of Parliament or of a state legislature shall be submitted for resolution by judicial process. It is provided by art 329(b) of the Constitution that:

329. *Bar to interference by courts in electoral matters.*—Notwithstanding anything in this Constitution—

(b) 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.

Pursuant to the above mandate of the Constitution, necessary provisions governing all matters relating to election petitions have been made by Parliament in Part VI (ss 79–122) of the 1951 Act. Section 81(1) expressly provides, *inter alia*, that no election petition shall be filed before the date of declaration of result of the election.

During the first general elections in 1951–52, the nomination of one of the candidates in the Namakkal assembly constituency in the State of Madras was rejected by the returning officer at the time of scrutiny of nominations. Feeling aggrieved by the rejection of his nomination, which had the effect of putting him out of the electoral contest, he moved the Madras High Court by filing a writ petition under art 226 for a direction to the returning officer to include his name in the list of contestants. But the high court refused to intervene, holding that art 329(b) barred its jurisdiction to interfere in electoral matters and his remedy lay in filing an election petition after the election was over. Thereupon, he approached the Supreme Court for the redressal of his grievance. The question, thus, before the Supreme Court was as to what was the role of courts *vis-à-vis* electoral matters and what was the meaning of 'election' in art 329(b). After a thorough and critical examination of the whole scheme of elections, a Constitution Bench of the Supreme Court held in *NP Ponnuswami v The Returning Officer, Namakkal Constituency*:[5]

> The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like art 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it...
>
> The conclusions which I have arrived at may be summed up briefly as follows:
>
> (1) Having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.
>
> (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to any thing which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

The Supreme Court further laid down in this case that "the word 'election' has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature".

Thus, from the time of the first general elections in 1951-52 itself, the constitutional position and mandate became clearly enunciated that the electoral process once started cannot be interdicted or interfered with by courts, at any intermediary stage till its completion and culmination in the declaration of result.

5 AIR 1952 SC 64.

The above view is still held sacrosanct and has been reiterated time and again by the Supreme Court in innumerable cases. The above constitutional position was again elucidated and summed up by the Supreme Court in *Mohinder Singh Gill v Chief Election Commissioner and Ors*[6] as follows:

(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

The provisions of art 329(b) have come for further elucidation by the Supreme Court in *Election Commission of India v Ashok Kumar and Ors*.[7] In this case, the Supreme Court, by its interim dated 5 October 1999, stayed the order dated 4 October 1999 of the Kerala High Court, whereby the high court had directed that the votes for the Allapuzha parliamentary constituency in Kerala at the time of the 1999 general election should be counted polling station-wise, and not by mixing the ballot papers as was directed by the Election Commission. The Supreme Court, by its final order dated 30 August 2000, struck down the impugned order of the high court, as not justified in view of art 329(b). But the apex court carved out certain exceptions in the sweep of art 329(b), and laid down as to when the high court could intervene in electoral matters in the exercise of their writ jurisdiction under art 226.

The Supreme Court observed:

(i) If an election (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(ii) Any decision sought and rendered will not amount to 'calling in question an election' if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(iii) Subject to the above, the action taken or orders issued by the Election Commission are open to judicial review on the well-settled parameters

6 AIR 1978 SC 851.

7 AIR 2000 SC 2979.

which enable judicial review of decisions of statutory bodies such as, on a case of *mala fide* or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(iv) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and the stage is set for invoking the jurisdiction of the court.

(v) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of art 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

In *Manda Jaganath v KS Rathnam*,[8] the Supreme Court further observed that erroneous actions which are amenable to correction in the writ jurisdiction of the courts should be such as had the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered, then the courts under art 226 of the Constitution should not interfere with the orders of the returning officers the remedy for which lies in an election petition only.

'Elections' and 'Electoral Rolls'

It is, thus, now well settled that 'election' connotes the entire electoral process commencing with the issue of the notification calling the election and culminating in the declaration of result of election. Though an election cannot be held unless there is an electoral roll, the process of preparation, revision and correction of electoral roll is not part of 'election' within the meaning of art 329(b). It is a stage anterior to election.[9] Electoral rolls are prepared, revised and corrected so as to be

8 AIR 2004 SC 3600.

9 *Lakshmi Charan Sen v AKM Hassan Uzzaman and Ors* AIR 1985 SC 1233; *Indrajit Barua and Ors v Election Commission of India and Ors* AIR 1986 SC 103.

kept up-to-date under the provisions of the 1950 Act. This Act, and the rules made thereunder, have been held by the Supreme Court to be a self-contained code and any person aggrieved in the matter of any inclusion or exclusion in or from an electoral roll has to avail of the remedies available under the said Act.[10] But, where a general grievance is made in regard to faulty preparation or revision of an electoral roll or wrongful inclusion or deletion of names of large number of persons, the high courts have entertained writ petitions for corrective action under art 226. In *Lakshmi Charan Sen's* case[11] and *Indrajit Barua's* case,[12] writ petitions questioning the validity of electoral rolls were first entertained by the High Courts at Calcutta and Guwahati, and later transferred to the Supreme Court. The Supreme Court has also admitted some of these matters straightaway for its consideration in exercise of its writ jurisdiction for the enforcement of fundamental rights under art 32.[13]

But the apex court advised in *Lakshmi Charan Sen's* case,[14] that the high courts should not pass any orders under art 226 which would tend to postpone elections indefinitely. The court observed that more imminent an electoral process, the greater ought to be the reluctance of the high court to do anything or direct anything to be done which will postpone that process indefinitely and create a situation in which the government of a state cannot be carried on in accordance with the provisions of the Constitution. The high courts must observe a self-imposed limitation on their powers to act under art 226, by refusing to pass orders to give directions, which would inevitably result in indefinite postponement of elections to legislative bodies.

It has been held by the Supreme Court in *Indrajit Barua's* case,[15] that where an election has been held on the basis of an electoral roll, the validity of the election cannot be called in question, on the ground that the electoral roll was defective. It may be pertinent to add here that in an election petition also, the finality of an electoral roll cannot be called in question, nor can the right of a person to be included in an electoral roll be questioned in an election petition.[16] But where it is alleged in the election petition that any name has been included in or deleted from an electoral roll after the last date of making nominations when the roll becomes final under s 23(3) of the 1950 Act, the high court has the jurisdiction to go into

10 *Baidyanath Panjiar v Sita Ram Mahto* AIR 1970 SC 314; *Kabul Singh v Kundan Singh* AIR 1970 SC 340; Narendra Madivalapa Kheni v Manikarao Patil and Ors AIR 1977 SC 2171 etc.

11 AIR 1985 SC 1233.

12 AIR 1986 SC 103.

13 *Lal Babu Hussain and Ors v Electoral Registration Officer and Ors* AIR 1995 SC 1189.

14 *Lakshmi Charan Sen v AKM Hassan Uzzaman and Ors* AIR 1985 SC 1233.

15 *Indrajit Barua and Ors v Election Commission of India and Ors* AIR 1986 SC 103.

16 *PR Belagali v BD Jatti AIR 1971 SC 1348; Wopansao v NL Odyuo* AIR 1971 SC 2123; *Hari Prasad Mulshankar Trivedi v VB Raju* AIR 1973 SC 2602.

that question to determine whether any vote has been improperly accepted or rejected.[17]

Jurisdiction of Civil Courts Barred in Electoral Matters

It is expressly provided in the law that civil courts shall have no jurisdiction to interfere in electoral matters. Civil courts here will mean the courts subordinate to the high courts set up under the Code of Civil Procedure 1908, and not the high courts which are a creation of the Constitution.

It is provided in s 30 of the 1950 Act that no court shall have jurisdiction: (a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency; or (b) to question the legality of any action taken by or under the authority of an electoral registration officer, or of any decision given by an authority appointed under that Act for the revision of any such roll.

Likewise, s 170 of the 1951 Act provides that no civil court shall have the jurisdiction to question the legality of any action taken or of any decision given by the returning officer, or by any other person appointed under this Act, in connection with an election.

Powers of High Court Under Article 329(b) and Article 226—Questions of Pre-Election and Post-Election Disqualification of Sitting Members of Parliament and State Legislatures

The Constitution has prescribed several disqualifications, and several others have been prescribed under the Constitution in the 1951 Act, for being chosen as, and for being, a member of Parliament or a state legislature (arts 102 and 191 and ss 8–10A of the 1951 Act). All these matters have been discussed at length in ch 8. Further, in ch 5, while discussing the functions of the Election Commission, a detailed reference has also been made to the special jurisdiction conferred on the Election Commission to give its opinion to the President and the state governors on the question of disqualification of sitting members of Parliament and state legislatures which can be raised before them in terms of arts 103(1) and 192(1) respectively. The constitutional position has been clarified in those discussions that, under arts 103(1) and 192(1), only those questions of disqualification can be raised before the President and State Governors in respect of sitting members of Parliament and state legislatures to which they have become subject after their election, ie, post-election disqualification questions.[18] If a sitting member was subject to some disqualification prior to, or at the time of, his election, the question of such pre-election

17 *Baidyanath Panjiar v Sita Ram Mahto* AIR 1970 SC 314; *Kabul Singh v Kundan Singh* AIR 1970 SC 340 *Narendra Madivalapa Kheni v Manikarao Patil and Ors* AIR 1977 SC 2171.

18 *Election Commission v Saka Venkata Rao* AIR 1953 SC 210.

disqualification can be raised only by means of an election petition under art 329(b) and Part VI of the 1951 Act. In those discussions, a gap between the provisions of arts 103(1) and 192(1), on the one hand and of art 329(b) on the other, has also been pointed out, inasmuch as there appears to be no forum before which the question of pre-election disqualification, which continues to subsist even after the election and continues to affect a sitting member of Parliament or a state legislature, may be raised, if an election petition is not presented within the prescribed period. This constitutional question was raised before the Supreme Court in *Dharmendra Sankhyadhar v Union of India*,[19] but the matter has remained unresolved.

However, a significant pronouncement of the Supreme Court has recently come in *K Venkatachalam v A Swamickan and Anor*,[20] which has an important bearing on the above question. In this case, the appellant before the Supreme Court was elected to the Tamil Nadu legislative assembly at the general election held from Lalgudi assembly constituency in December 1984. No election petition was filed questioning his election. After about a year of the election, one of the rival candidates filed a writ petition before the Madras High Court alleging that the appellant was not registered as an elector in the constituency, that he had impersonated another person of the same name in the electoral roll and that the above fraudulent act came to notice on scrutinising the electoral roll. A single Bench of the high court dismissed the writ petition on the ground that it was not maintainable in view of art 329(b). But, on appeal, a Division Bench of the high court allowed the writ appeal and declared that the appellant was illegally elected as he did not possess the basic qualification under the Constitution and the statute, and could not represent the constituency in the state legislative assembly. The high court further held that the appellant was liable to pay a fine under art 193 to the tune of Rs 500 for each of the days he sat in the assembly. On appeal, the Supreme Court also upheld the decision of the high court. The apex court held that art 226 is couched in the widest possible terms and, unless there is a clear bar to the jurisdiction of the high court, the high court could exercise power under that article against any act which is violative of the Constitution or against the provisions of any law and when recourse cannot be had to the provisions of any Act for appropriate relief. The court also held that art 329(b) will not come into play when the case falls under art 191 and 193. The court posed a question that if a non-citizen gets elected to an assembly, would it allow a foreign citizen to sit and vote in the assembly if the matter is brought before it?

This appears to be the only case so far, where a sitting member of a state legislature has been unseated on the basis of a writ petition.

19 Civil Appeal Nos 419–420 of 1985.

20 [1999] 3 LRI 40.

ELECTION PETITIONS

General

It will be apparent from the above discussions that any election to any House of Parliament or of a state legislature can be called in question only by means of an election petition presented to such authority and in such manner as may be prescribed under art 329(b), and in no other manner. It has been consistently held from the time of the very first general elections in 1951–52 that an election petition is a special statutory proceeding governed by the provisions of art 329(b) and the law made thereunder. Such law made under art 329(b) is the 1951 Act and Part VI thereof contains detailed provisions relating to filing and disposal of election petitions. 1951 Act has been held to be a self-contained code having elaborate provisions as to disputes regarding elections and these provisions of the Act have to be interpreted as mentioned by the legislature.[21]

The above constitutional position enunciated by the Supreme Court in *NP Ponnuswami v The Returning Officer, Namakkal Constituency*,[22] *Jagan Nath v Jaswant Singh*,[23] *K Kamaraja Nadar v Kunju Thevar*,[24] *Dr. K Krishna Murthy and others v Union of India and Ors*[25] and in a catena of other cases, was summed up by that court in *Jyoti Basu v Debi Ghosal*,[26] in the following terms:

> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the

21 *GV Sreerama Reddy and another v Returning Officer and others* 2009(7) SCJ 432 – see also *Sheo Sadan Singh v Mohan Lal Gautam* (1969) 1 SCC 408.

22 AIR 1952 SC 64.

23 AIR 1954 SC 210.

24 AIR 1958 SC 687.

25 2010(5) SCJ 757.

26 AIR 1982 SC 983.

trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute.

The object subserved by the judicial scrutiny of elections when questioned by means of election petitions has been explained by the Supreme Court in *Azhar Hussain v Rajiv Gandhi*.[27] The Supreme Court observed:

> In a democratic polity 'election' is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interest in the legislature. The results of the election are subject to judicial scrutiny and control only with an eye on two ends. First, to ascertain that the 'true' will of the people is reflected in the results and second, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation. In order that the 'true will' is ascertained the Courts will step in to protect and safeguard the purity of elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established. So also when the essential qualifications for eligibility demanded by the constitutional requirements are not fulfilled, the fact that the successful candidate is the true choice of the people is a consideration which is totally irrelevant notwithstanding the fact that it would be virtually impossible to re-enact the elections and re-ascertain the wishes of the people at the fresh elections the time scenario having changed.

27 AIR 1986 SC 1253.

But in *Jeet Mohinder Singh v Harmindar Singh Jassi*,[28] the Supreme Court added a word of caution referring to the settled legal principle in the field of election jurisprudence as under:

> The success of a candidate who has won at an election should not be lightly interfered with. Any petition seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves an enormous load on the public funds and administration.

The Supreme Court expressed its further concern in the matter by observing thus in *Mahender Pratap v Krishan Pal*:[29]

> ...the court legitimately expects the parties to approach it with genuine grievances on truthful facts. Where false facts are pleaded and false evidence is produced to mislead the court into interfering with the people's verdict of election, the misconduct of the parties to the election has to be viewed seriously. The court allows an election petition only on strict proof of one of the grounds prescribed in s 100 of the Act. If the parties to the election petitions are allowed to take the court lightly even though attempts are skillfully made by them by false pleas and evidence to mislead the court, the whole judicial process would be misused by clever parties to their advantage and to the detriment of the interest of the electorate who are vitally interested in the result of election.
>
> In election petition, if the parties are found to have made incorrect statements in their pleadings, affidavits or depositions and there is thereby an intention on their part to mislead the court, appropriate deterrent action like dismissal of their cases with costs, prosecution for perjury or initiation of contempt proceedings should be taken by the court lest the judicial process would continue to be polluted and misused by undeserving parties who have no real grievance or cause for seeking aid of judicial forums. Such false cases not only contribute to the work-load of the court and kill its precious time but create hurdles in the ways of genuine litigants who sincerely need assistance of the court for obtaining justice.

28 AIR 2000 SC 256.
29 AIR 2003 SC 304, (2003) 1 SCC 390.

Each Election to be Challenged Separately, No Challenge to General Election as a Whole

Under the 1951 Act, each election from a Parliamentary or assembly constituency is a separate election and has to be challenged separately by means of separate election petitions relating to each election. A general election as a whole cannot be called in question by means of one election petition or by a writ petition. In *Indrajit Barua and Ors v Election Commission and Ors*,[30] the general election to the Assam legislative assembly held in 1983 was sought to be challenged by means of several writ petitions on the ground that the electoral rolls which formed the basis for that general election were defective. Rejecting the writ petitions, and the ground on which they were sought to be maintained, the Supreme Court held:

> In the first place, art 329(b) of the Constitution bars any challenge to the impugned elections by a writ petition under art 226 as also on the ground that the electoral rolls on the basis of which the impugned elections were held were invalid. The petitioners sought to escape from the ban of art 329(b) by contending that they are challenging the impugned elections as a whole and not any individual election and that the ban of art 329(b) therefore does not stand in the way of the writ petitions filed by them challenging the impugned elections. But we do not think this escape route is open to the petitioners. There is in the Representation of the People Act 1951, no concept of elections as a whole. What that Act contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition. It may be that there is a common ground which may vitiate the elections from all the constituencies but even so it is the election from each constituency which has to be challenged though the ground of challenge may be identical. Even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency and art 329(b) must, therefore, be held to be attracted.

Amendment to Laws During Pendency of Election Petitions or Election Appeals

After the election of Smt Indira Nehru Gandhi, the then Prime Minister of India, was declared void by the Allahabad High Court on 12 June 1975 in *Raj Narain v Indira Nehru Gandhi*,[31] certain amendments were made to some of the provisions of the 1951 Act by the Election Laws (Amendment) Act 1975, as it was felt that the Allahabad High Court had not correctly interpreted those provisions. The amendments so made in the law were given retrospective effect and made applicable even in relation to election petitions pending before the high courts and the election

30 AIR 1986 SC 103.
31 57 ELR 49.

appeals under consideration of the Supreme Court. Examining the validity of these amendments and the retroactive effect given thereto, during the pendency of the election appeal filed by Smt Indira Nehru Gandhi, the Supreme Court observed that if certain matters fell within the legislative powers of Parliament, the same could not be questioned, except where the piece of legislation clearly infringed a constitutional provision or indubitably over-rode a constitutional purpose or mandate or prohibition. The Supreme Court held that the amendments to the 1951 Act, by the Election Laws (Amendment) Act 1975, were within the unquestionable powers of Parliament to legislate, either prospectively or retrospectively, with regard to election matters and that they could not be interpreted as an attack on free and fair elections. The apex court observed that the courts could not take upon themselves the task of laying down what electoral laws should be.

> The law makers, assembled in Parliament, are presumed to know and understand their business of making laws for the welfare and well-being of the mass of people of this country for the protection of democracy and of free and fair elections, in accordance with the needs of the democratic process, better than Courts know and understand these.

The Supreme Court then applied the provisions of the amended law while deciding finally the election appeal of Smt Indira Nehru Gandhi.[32]

Authority to Try Election Petition

Article 329(b) provides that an election petition shall be presented to such authority as may be provided for by or under any law made by the appropriate legislature.

Initially, there was an additional provision in art 324(1) to the effect that the authority of appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the legislatures of states shall be vested in the Election Commission. Therefore, it was provided in s 81 of the 1951 Act that all election petitions calling in question any election to Parliament or a state legislature held anywhere in the country shall be presented to the Election Commission. Further provisions were then made in s 86 of that Act for the appointment by the Election Commission of election tribunals to try those election petitions. Furthermore, such election tribunals were, at first, to consist of three members being the sitting or retired district judges and advocates with 10 years standing, who were, in the opinion of the high court, fit to be appointed such members. But in 1956, these election tribunals were made single member tribunals consisting of sitting or retired district judges. However, the experience of the Election Commission showed that the system of election tribunals was not functioning smoothly and the trial of election petitions by the election

32 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.

tribunals was getting inordinately delayed, as even the interlocutory orders of the tribunals were being challenged before the high courts under their writ jurisdiction under arts 226 and 227 and, in many cases, further before the Supreme Court by way of appeals against the orders of the high courts. It was held by the Supreme Court in *Hari Vishnu Kamath v Ahmed Ishaque*,[33] that art 329(b) prohibited only the 'initiation' of proceeding, questioning an election, in any manner other than by an election petition and once that proceeding was initiated by filing an election petition, the requirements of art 329(b) were met and, thereafter, the trial of the petition by the election tribunal was subject to the general law and to the supervision of high courts over tribunals. In such circumstances, the Election Commission, with a view to expediting the disposal of election petitions, recommended that the trial of election petitions should be entrusted to the high courts instead of the election tribunals. This recommendation of the Election Commission found favour with Parliament and art 324(1) was amended by the Constitution (Nineteenth Amendment) Act 1966, taking away the jurisdiction of the Election Commission to appoint election tribunals. As a follow up action, the 1951-Act was also amended by the Representation of the People (Amendment) Act 1966, to provide therein, by insertion of a new s 80A, that the court having jurisdiction to try an election petition shall be the high court. Accordingly, any election petition calling in question any election to either House of Parliament or a state legislature is, at present, filed before the high court of the state in which the impugned election took place.

In 1975, the Constitution was amended by the Constitution (Thirty-ninth Amendment) Act 1975, to make a special provision in respect of election petitions relating to members of Parliament who are appointed as the Prime Minister or Speaker of the House of the People. It was provided by insertion of a new art 329A in the Constitution, that any such election petition shall lie not before the high court but before such authority as may be prescribed, and it shall be tried by such authority as may be specially constituted for the purpose. Pursuant thereto, Parliament enacted the Disputed Elections (Prime Minister and Speaker) Act 1977. Under that Act, the abovesaid election petitions were to be filed before the Election Commission and were to be tried by a special authority consisting of a sitting judge of the Supreme Court. It was further provided that his decision shall be final. After the sixth general election to the House of the People in 1977, when Shri Morarji Desai was appointed as the Prime Minister, an election petition was filed calling in question his election to the House of the People. As required under the aforesaid 1977 Act, that petition was filed before the Election Commission and a sitting judge of the Supreme Court, PN Bhagwati J (as he then was), was appointed as the special authority to try that petition. The petition was, however, dismissed by that authority *in limine*, as it was filed beyond the prescribed period of 45 days under the said Act. But shortly afterwards, the Constitution was further amended by the Constitution

33 10 ELR 216.

(Forty-fourth Amendment) Act 1978, whereby art 329A was deleted and the earlier position was restored, providing for all election petitions to be filed only before the high courts.

Some of the states have a common high court, like the High Court for the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura at Guwahati (in Assam) or the High Court for the States of Punjab and Haryana at Chandigarh. The Guwahati High Court has benches in some of the states which are under its jurisdiction. But the election petitions relating to elections in any of the above-mentioned states are filed at the principal bench of the High Court at Guwahati and, thereafter, these petitions may be transferred to its benches for trial keeping in view the convenience of the parties and the judges hearing those petitions.

But there are some other high courts exclusively for one state and they have their benches in different parts of the state, like, the Allahabad High Court for the State of Uttar Pradesh having its benches at Allahabad and Lucknow, Mumbai High Court for the State of Maharashtra having benches at Mumbai, Aurangabad and Nagpur, Madhya Pradesh High Court with benches at Jabalpur, Gwalior and Indore, and so on. These benches have jurisdiction over specified parts or areas of those states. In some of these high courts, the election petitions can be filed in the principal bench relating to all parts of the state, whereas in some others, such petitions have to be filed only before that bench which has exclusive jurisdiction over the area from where the election took place. For instance, an election petition was filed before the Lucknow bench of the Allahabad High Court calling in question an election from Rae Bareli parliamentary constituency which fell under the territorial jurisdiction of the principal bench of the High Court at Allahabad. It was held that the election petition was not properly instituted by filing before the appropriate bench of the high court and was dismissed as non-maintainable. Even the prayer of the petitioner to transfer the petition to the appropriate bench of the high court was not considered maintainable because of the exclusive jurisdiction vested in two benches of the high court over the specified territories. As, by the time of the dismissal of the election petition, the period for filing the election petition relating to that election had expired, the election ultimately went unchallenged.

Similarly, an election petition was filed before the Gwalior Bench of the Madhya Pradesh High Court calling in question the election from the Gwalior parliamentary constituency, as Gwalior fell under the territorial jurisdiction of the Gwalior Bench of the High Court. It was filed on the day of reopening of the high court after summer vacation, but was returned to the petitioner on the ground that all election petitions were to be filed at the principal Bench of the high court at Jabalpur, and not at the Gwalior Bench. The next day, it was filed before the principal Bench at Jabalpur. But the high court held that the election petition was not properly instituted, by being filed within the prescribed time limit, before the appropriate Bench of the high court, and dismissed it as time-barred. On appeal, the Supreme

Court also upheld the decision of the high court and dismissed the appeal.[34] Therefore, every petitioner must ascertain and be sure as to where the election petition is to be validly filed lest he suffers as in the above-mentioned case.

Status and Powers of Authority Trying Election Petition

In the trial of an election petition, the High Court acts as a court of original jurisdiction and cannot be said to be an appellate authority in nature.[35]

An interesting question was raised before the Supreme Court in *T Deen Dayal v High Court of Andhra Pradesh*,[36] whereby it was contended that the high court trying an election petition was an 'authority' under art 329(b) and not a 'court' and it could not take action for its contempt under the Contempt of Courts Act 1971. The Supreme Court rejected that contention holding that the jurisdiction to try election petitions has been conferred on the high courts under the law and that the high courts, while trying election petitions, are also 'courts of record' under art 215 and can take action against the contemner under the Contempt of Courts Act 1971.

Another interesting question was raised before the Supreme Court in *Hari Shanker Jain v Sonia Gandhi*,[37] whether the vires of any law may be put in issue by either party to an election petition before the high court for adjudication. The apex court observed that a judge of the high court can, while hearing an election petition, adjudicate upon the validity of any statutory provision subject to two limitations: (i) that it must be necessary to go into that question for the purpose of trying an election petition on any one or more of the grounds enumerated in s 100 and for the purpose of granting any one or more of the reliefs under s 98 and 99 of the Act, and (ii) a specific case for going into the validity or vires of any law is made out on the pleadings raised in the election petition.

In the above case, the Supreme Court further held that the validity of a certificate granting citizenship by registration under s 5(1)(c) of the Citizenship Act can be looked into to determine whether the elector is qualified or disqualified from registration in an electoral roll. Following the above decision of the Supreme Court, the Andhra Pradesh High Court[38] held a returned candidate ineligible for registration as an elector on the basis of a registration certificate from the central government and, consequently, declared his election also void. The court held that the registration certificate as citizen of India was obtained by furnishing wrong

34 See order dated 26 November 1999 of Supreme Court in *Devendra Nath Gupta v Returning Officer, Gwalior Parliamentary Constituency and Ors* Civil Appeal No 7480 of 1997.

35 *Uttamrao Shivdas Jankar v Ranjitsinh Vijaysinh Mohite-Patil* 2009(7) SCJ 658.

36 AIR 1997 SC 3453.

37 AIR 2001 SC 3689.

38 *Addi Sreenivas v Ramesh Chennamaneni* (Election Petition No.1 of 2010 decided on 14 August 2013).

information to the government and that the returned candidate was not a citizen of India.

The Supreme Court has also held in *Sobha Hymavathi Devi v Setti Gangadhar Swami and Ors*,[39] that the high court trying an election petition is not precluded from going into the question of reservation status of a candidate or proceeding to make an independent enquiry into that question despite the production of a caste certificate by a candidate. At best, such a certificate could be used in evidence and its evidentiary value will have to be assessed in the light of the other evidence let in, the apex court observed.

Powers of High Court to Frame Rules for Trying Election Petitions

There is no express provision in the 1951 Act empowering high courts to frame rules governing the procedure of trial of election petitions before them. But, as has been observed by the Supreme Court in *Kailash v Nankhu*,[40] the high courts are not powerless in the matter. Article 225 confers powers on high courts, inter alia, to make rules for the purpose of hearing, trying and deciding any matter lying within their jurisdiction, and this will include election petitions as they are also tried in the original civil jurisdiction of the high courts. According to the apex court, s 129, CPC is another source of power of high courts to make rules to regulate their own procedure in the exercise of their original civil jurisdiction. In case of any conflict between the rules so framed by a high court and the provisions of the 1951 Act, these shall, as far as may be, be harmoniously construed avoiding the conflict and, if the conflict is irreconcilable, the provisions of the 1951 Act being primary legislation shall prevail over the rules of the high court framed in exercise of its delegated power to legislate.

Petitions to be Tried Ordinarily by Single Judge

An election petition shall ordinarily be tried by a single judge of the high court. For that purpose, the Chief Justice of the high court shall, from time to time, assign one or more judges for trying election petitions [s 80A(2), 1951 Act]. It was held in *Krishan Gopal v Prakash Chandra*[41] that the retired judges of a high court requested by the Chief Justice of the high court, with the consent of the President, to sit and act as a judge of the high court under art 224A, could also hear election petitions. However, the apex court observed that it was desirable that election petitions should ordinarily, if possible, be entrusted to a permanent judge of a high court. In the instant case, the Supreme Court also held that there was no infirmity in the Chief

39 AIR 2005 SC 800, 2005(2) SCC 244.

40 AIR 2005 SC 2441.

41 AIR 1974 SC 209.

Justice relieving the judge from the task of trying an election petition which had been earlier entrusted to him, and allocating the same to another judge.

Place of Trial

All election petitions are tried at the seat of the high court or its concerned bench. But the high court has the discretion of trying an election petition, wholly or partly, at a place other than the place of seat of the high court, if it considers it expedient in the interests of justice or convenience of either the parties or its own.[42]

Time Limit for Presentation of Election Petition

An election petition calling in question an election has to be presented within 45 days from, but not earlier than, the date of election of the returned candidate.[43] It means that an election petition can be filed only after the result of the election has been declared, and not when the election process is still on. The date of election of the returned candidate here means the date on which a candidate is declared elected by the returning officer, under the provisions of s 53, in the case of an uncontested election, or s 66, in the case of a contested election.[44] When and how the result of an election is to be declared by a returning officer has been discussed in detail in ch 15.

If there are more than one returned candidate at the impugned election and dates of their election are different, the said period of 45 days shall be reckoned from the later of those two dates.[45]

In *Raj Kumar Yadav v Samir Kumar Mahaseth*,[46] the election petition was presented to the designated election judge in his chamber at 4:25 pm on the last date for presentation of election petitions. The designated election judge did not receive the petition on the ground that it could be presented to him in the open court up to 4:15 pm, ie, working hours of the judge in the open court. The petition was thereafter presented to the judge in open court on the following day, and the high court dismissed the petition *in limine* holding it to be time-barred. The Supreme Court, however, did not agree with the high court, and setting aside the high court's order, held:

> Confining the filing time to the working hours of the court is not what is specifically spelt out by Rules 6 and 7 of the Patna High court Rules. The High Court, in its impugned judgment, seems to have thought that the election petition could have been presented only to the Judge and that too in

42 1951 Act, s 80A(3).
43 1951 Act, s 81(1).
44 Ibid, s 67A.
45 Ibid, 81(1).
46 (2005) 3 SCC 601, AIR 2005 SCW 1647.

> the open court. The Judge would ordinarily sit in open court upto 4.15 pm of the day as per the rules or practice of the High Court but that time is not the end of that day. The availability of time falling within the meaning of the word 'day', as provided by s 81 of the Act, cannot be curtailed by making a provision in the rules contrary to the Act itself. Ordinarily, no litigant and lawyer would like to delay the presentation till the fag end of the day and then present it at an odd time to the inconvenience of the Judge wherever he may be. However, exceptional situations cannot be completely ruled out. It would be better if the ministerial act of receiving the election petition presented to the High Court is left to the administrative or ministerial staff of the High Court either by clarifying or by making a suitable amendment in the Rules of the Patna High Court...
>
> Reverting back to the facts of the present case, we find that the election petition was handed over to the designated Election judge on the last day of limitation at 4.25 p.m. when the learned Judge was still available within the court premises though he was not sitting in the open court, as the prescribed time of 4. 15 p.m. ordinarily meant for transacting judicial work was over. The learned Judge did not himself receive the presentation nor did make any other order such as the one directing any official of the Registry to receive the same. The election petitioner had done all that was within his power to do for the purpose of presentation but he failed. He made the presentation on the next day when the Judge was available and sitting in the open court. The presentation would be deemed to be within limitation and valid.

Computation of Period

Under s 9 of the General Clauses Act 1897, if anything is required to be done under any Act, within certain specified period to be counted 'from' a certain date, then that date is excluded from the computation of the period. Therefore, in the computation of the period of 45 days for the filing of an election petition, the date of election of the returned candidate, ie, the date on which the result of the election was declared by the returning officer, is to be excluded. In *Chandra Kishore Jha v Mahavir Prasad*,[47] the result of election was declared on 1 April 1995 and the Supreme Court held that the prescribed period of 45 days within which the election petition could be filed expired on 16 May 1995, excluding the day on which the result was declared. If there was any lingering doubt on this aspect, it has been set at rest by the Supreme Court, by its judgment in *Tarun Prasad Chatterjee v Dinanath Sharma*,[48] on 10 October 2000. The apex court has categorically held that s 9 of the General Clauses Act 1897 applies for the purposes of calculation of the period of 45 days for

47 AIR 1999 SC 3558, [2000] 1 LRI 1108.
48 AIR 2001 SC 36.

filing an election petition under s 81 (1) of the 1951 Act, and that the date of declaration of result of the election has to be excluded for computing the said period of 45 days.

The Supreme Court has held in *Ramlal and Ors v Rewa Coal Fields Limited*,[49] that the litigant has a right to avail limitation up to the last day. Accordingly, an election petition can be filed on the forty-fifth day also. Further, the last day will mean the whole of the day and up to the normal closing hours of the high court. In *Chandra Kishore Jha v Mahavir Prasad*,[50] the Patna High Court did not sit after 3:15 pm on 16 May 1995, after an obituary reference to an advocate of the high court who had expired and the Chief Justice declared that 'the court shall not sit for the rest of the day' after 3:15 pm. That was the last date for filing the election petition in that case. The election petition filed on 17 May 1995 was held by the Supreme Court to have been filed within the prescribed period.

No Condonation of Delay

The above said period of 45 days for the presentation of election petitions is mandatory and sacrosanct. Any election petition presented to the high court beyond the prescribed period of 45 days shall be summarily dismissed by it under s 86.[51] Under s 5 of the Limitation Act 1963, the courts have the discretion to condone the delay in the filing of a suit or petition, if the inability to present it on the last day of limitation and each day thereafter, till it is actually presented, is explained to the satisfaction of the court. But the Supreme Court has held in *KV Rao*'s case,[52] and *Hukumdev Narain v Lalit Narain Mishra*,[53] that the 1951 Act is a self-contained code and that the provisions of s 5 of the Limitation Act 1963 do not apply to the presentation of election petitions. The high court has, thus, no discretion or power to condone the delay on any ground at all.

Closure of High Court on Last Day of Limitation

The only exception to the entertainment of an election petition filed beyond the forty-fifth day from the date of declaration of the result of election shall be the closure of the high court on that day. In such an event, the election petition must be filed on the very first day on which the high court reopens after the forty-fifth day which was a closed day for the high court, in view of the provisions of s 10 of the

49 AIR 1962 SC 361.
50 AIR 1999 SC 3558, [2000] 1 LRI 1108.
51 *KV Rao v BN Reddi* AIR 1969 SC 872.
52 Ibid.
53 AIR 1974 SC 480.

General Clauses Act 1897.[54] Section 10 of that Act provides that if, under any central law or regulation:

> Any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next day afterwards on which the Court or office is open.

In *Manohar Joshi v Nitin Bhaurao Patil*,[55] the last date for filing the election petition fell on a day on which the high court was closed. The petition was filed on the very first day of the opening of the high court. It was contended by the appellant that the petition was time-barred, as it was not filed within 45 days as required under s 81(1). The contention of the appellant was that the 1951 Act was a self-contained code, and that the provisions of the General Clauses Act 1897 were not applicable in relation to the filing of election petitions under the former Act. Therefore, the question before the Supreme Court was whether s 10 of the General Clauses Act applied to the presentation of election petitions under the 1951-Act. The court answered that question thus:

> The question now is: Whether the applicability of s 10 of the General Clauses Act to the presentation of election petitions under the RP Act is excluded? No doubt the RP Act is a self-contained Code even for the purpose of the limitation prescribed therein. This, however, does not answer the question. It has to be seen whether the context excludes the applicability of s 10 of the General Clauses Act which is in the part therein relating to the General Rules of Construction of all Central Acts. The legislative history of prescribing limitation of presentation of election petitions in accordance with sub-s (1) of s 81 is also significant for a proper appreciation of the context. Admittedly, s 10 of the General Clauses Act applied when by virtue of the requirement in the then existing sub-s (1) of s 81, the period of limitation was prescribed by Rules framed under the RP Act, in r 119 of the 1951-Rules. This was expressly provided by r 2(6) of the 1951-Rules. There is nothing to indicate that providing the period of limitation in sub-s (1) of s 81 itself by substitution of certain words 'by Act 27 of 1956' instead of prescribing the limitation by Rules, was with a view to exclude the applicability of s 10 of the General Clauses Act. The change appears to have been made to provide for a fixed period in the Act itself instead of leaving that exercise to be performed by the rule making authority. An express provision in r 2(6) of the 1951 Rules was

54 *Harinder Singh v Karnail Singh* AIR 1957 SC 271.
55 AIR 1996 SC 796.

required since the General Clauses Act *ipso facto* would not apply to Rules framed under the Central Act, even though it would to the Act itself. The context supports the applicability of s 10 of the General Clauses Act instead of indicating its exclusion for the purpose of computing the limitation prescribed in sub-s (1) of s 81 for presentation of election petitions.

In *Chandra Kishore Jha v Mahavir Prasad*,[56] it was reiterated that s 10 of the General Clauses Act 1897 applies in relation to the presentation of election petitions. As mentioned above, the high court did not sit after 3:15 pm on the last date for filing election petitions because of the death of one of the advocates of the high court. The Patna High Court Rules (r 6, ch 21E) prescribe that an election petition shall be presented to the designated election judge in the open court and 'if on any Court day the judge is not available on account of temporary absence or otherwise, the petition may be presented before the bench hearing civil applications and motions'. As the judges of the high court did not sit after 3:15 pm, that day was deemed by the Supreme Court to be a closed day for the purposes of s 81(1) and the presentation of the election petition to the designated judge in the open court, on the following day, was considered to be valid in view of s 10 of the General Clauses Act 1897.

Limitation Period Expiring During Vacation of High Court

What would be the position if the period for filing election petitions expired when the high court was on vacation came to be considered by the Supreme Court in *Hari Shanker Tripathi v Shiv Harsh*.[57] In this case, the period expired during the summer vacation of the high court and the petition was filed on the day of reopening of the high court, after vacation. The Supreme Court observed that the distinction must be made between the opening of the court and opening of the office of the court. While the court may be closed, the office may remain open for conducting ministerial business or administrative work. The apex court held, in that case, that the office of the registrar though open during summer vacation, could not entertain election petitions and the presentation of the petition on the reopening of the court after vacation was within the period of limitation.

Similarly, in *Simhadri Satya Narayana Rao v M Budda Prasad*[58] the period for filing election petitions expired when the Andhra Pradesh High Court was closed for Sankranthi vacation. Though the high court notification stated that applications of urgent nature could be filed during the vacation and two judges were appointed as vacation judges, the Supreme Court held that the election petition could be filed only on the day of reopening of the high court. The Supreme Court observed that in

56 AIR 1999 SC 3558, [2000] 1 LRI 1108.
57 [1976] 3 SCR 308.
58 (1994) Supp 1 SCC 449.

the high court notification there was no provision for filing of election petitions during the vacation and no reasonable person could be expected to knock the door of the high court during the vacation period for filing an election petition.

But in *Mohd Ali v Azad Mohd*,[59] the election petition filed on the reopening of the Punjab and Haryana High Court after summer vacation was held to be time-barred. In this case, the high court had issued a notification on 27 November 1995, declaring that the high court would remain open during summer vacation for hearing election petitions. The Supreme Court held that in view of that notification the election petition should have been filed within the period of 45 days, even if that period expired during the high court's vacation. It was contended that the High Court Judges (Conditions of Service) Act 1954, provided in s 23A that the high court shall have vacation for such period as may be fixed from time to time, and during the period of vacation, the court would not be considered open for any purposes. Rejecting that contention, the Supreme Court observed that the basic fallacy in the above contention was that the provisions of s 23A had nothing to do with the functioning of the high courts and the transaction of the court business during the vacation was controlled not by the 1954 Act, but by the notification of the high court dated 27 November 1995.

Who Can be Petitioner

An election petition can be filed either by any candidate at the impugned election or by any elector at that election,[60] and by no one else.

The candidate will mean a person who has been or claims to have been duly nominated as a candidate at the election.[61] A person whose nomination is rejected is also a candidate for the purposes of s 81(1).[62] A person whose nomination paper is not received by the returning officer on some ground can also claim to be duly nominated candidate even though his nomination paper is not on record.[63] But a person cannot claim to be duly nominated if he does not even aver in the petition that his nomination was subscribed was ten proposers.[64] Further, a person does not become duly nominated candidate by merely filing nomination paper. Other formalities as directed by Election Commission are also required to be fulfilled. Where the Election Commission in exercise of its power under art 324 of the Constitution had passed order issuing direction that candidate filing nomination paper has to file affidavit to satisfy that he was not suffering from any disqualification mentioned in s 8 of the 1951 Act and the petitioner–candidate to

59 AIR 1999 SC 3429.
60 1951 Act, 81(1).
61 Ibid, 79(b).
62 *Madan Lal v Hira Singh Pal* AIR 1968 Del 110.
63 *Kavitha Mahesh v Nandiesha Reddy* Civil Appeal No. 5142 of 2011 decided on 08.07.2011.
64 *Pothula Rama Rao v Pendayala Venkata Kishore Rao* 2007 (11) SCC 1.

whom sufficient time was given for filing the affidavit had chosen not to file the affidavit as required by the Election Commission and it was a wilful defiance on his part, it could not be said that he was a 'duly nominated candidate' and thereby he had no *locus standi* to file an election petition.[65]

A person whose nomination paper is not subscribed by requisite number of proposers cannot be regarded as person who had been nominated or can claim to be duly nominated as candidate and he has no locus standi to challenge the election.[66] However, the election petition filed by a candidate whose nomination paper was rejected on the ground that the name of one of his proposers stood deleted from electoral roll on the date of scrutiny of nominations was held to be maintainable, as the question whether the proposer was eligible to propose or not needed to be decided on evidence.[67] When there is a clear averment in the election petition that the nomination paper was subscribed by ten electors, the election petitioner shall be deemed to be a candidate and entitled to challenge the election of the returned candidate by filing an election petition.[68]

An elector, here, means a person who was entitled to vote at the election to which the election petition relates. But it is not necessary that he should have voted for that election. Even if he has not voted, he is entitled to file an election petition.[69] But it has to be noted that an elector in relation to a constituency means a person whose name is entered in the electoral roll of the constituency for the time being in force and who is not subject to any of the disqualifications for registration as an elector under s 16 of the 1950 Act [s 2(1)(e), 1951 Act]. Some difference in the name of the petitioner as given in the electoral roll and as signed by him in the form of his appointment as agent of a candidate was treated by the Karnataka High Court as 'difference of identity' resulting in the dismissal of the petition. The Supreme Court, however, did not agree with that view and reversed the decision of the Karnataka High Court in *G Mallikarjunappa and Anor v V Shamanur Shivashankarappa and Ors.*[70]

If an elector changes his residence after the election, he still can maintain an election petition, if he was elector at the election under challenge in the petition.[71]

65 See *Hari Krishna Lal v Atal Bihari Bajpayee* AIR 2003 All 128; *Hari Krishna Lal v Babu Lal Marandi* AIR 2002 Jha 142.
66 *Charan Lal Sahu v APJ Abdul Kalam* AIR 2003 SC 548.
67 *Kapil Muni Karwariya v Chandra Narain Tripathi* 2012 (4) SCJ 42.
68 *Nandiesha Reddy v Kavitha Mahesh* 2011(6) SCJ 219.
69 1951 Act, expln to s 81(1).
70 AIR 2001 SC 1121. See also *Ram Prasad Sarma v Mani Kumar Subba* AIR 2003 SC 51.
71 *Subhash Arya v Charanjit Singh* AIR 1981 Del 23.

Parties to Election Petition, Only Candidates as Respondents

Section 82 of the 1951 Act lays down as to who shall be joined as respondents to an election petition. Where, in an election petition, the only relief claimed is that the election of the returned candidate should be declared void, only the returned candidate is required to be made a respondent to the petition. If more than one candidate was returned at the election, like, the elections to the Council of States and state legislative councils, then, all such returned candidates shall be joined as respondents to the petition.

Where, however, in addition to claiming the declaration that the election of the returned candidate is void, a further declaration is also claimed that either the petitioner himself or any other candidate at the election had been duly elected, all the contesting candidates and the returned candidate(s) at the election (other than the petitioner) should be joined as respondents to the petition [s 82(a), 1951 Act].

The 'returned candidate' here means the candidate who has been elected [s 79(f)] and the 'contesting candidate' means a candidate whose nomination was found valid on scrutiny and who did not withdraw his candidature under s 37 [s 38(1)].[72]

If, in an election petition, allegations of any corrupt practice are made against any candidate, then such candidate must also be joined as a respondent to the petition, even if no further declaration as aforesaid has been claimed in the petition.[73] The candidate here does not mean a contesting candidate but also means a candidate who had withdrawn his candidature, within the period prescribed for the withdrawal of candidatures.[74] In this case, it was alleged that one of the candidates was made to withdraw on payment to him of illegal gratification by another candidate. As the taint of corrupt practice of bribery attached both to the payee and payer of illegal gratification, the candidate withdrawing his candidature was held to be a necessary party. In *Ram Chand Bhatia v Hardyal*,[75] allegation of corrupt practice was made against a defeated candidate but the allegation pertained to the period prior to his becoming a candidate at the election. His impleadment as a party to the petition was held to be not necessary and s 82(b) was held to be not attracted in that case.

In *Gadnis Bhawani Shankar v Faleiro Eduardo Martinho*,[76] one of the candidates (a sitting member of the Goa legislative assembly) for election to the Council of States, by the members of the Goa legislative assembly, withdrew his candidature. It was alleged that, after the withdrawal of his candidature, he voted for the respondent, on his agreeing to receive a gratification in the form of a promise to be appointed to a cabinet berth or some other important public office. He was

72 See also *Har Swarup v Brij Bhushan Saran* AIR 1967 SC 836.
73 1951 Act, s 82(b).
74 *K Venkateswara Rao v Bekkam Narasimha Reddy* AIR 1969 SC 872.
75 AIR 1986 SC 717.
76 2000 (5) Supreme Today 353.

considered by the high court and the Supreme Court to be a candidate at the election, and the election petition was dismissed *in limine* for non-compliance with the provisions of s 82(b), as he was not joined as a respondent to the petition.

In *Patangrao Kadam v Prithviraj Sayajirao Yadav Deshmukh and Ors*,[77] allegations of corrupt practices were made against a candidate who had withdrawn his candidature and had become the election agent of the returned candidate. But he was not joined as a respondent to the election petition on the ground that by becoming election agent of the returned candidate he was his alter ego. The Supreme Court held him to be a necessary party to be joined as respondent and dismissed the petition for his non-joinder. The plea that he could be joined at later stage under s 99 was held to be untenable.

The expression 'any other candidate' in s 82(b) means a candidate at the election to which the election petition relates, and not a candidate in some other constituency.[78] The Supreme Court observed in *Udhav Singh v Madhav Rao Scindia*[79] that behind the provision of s 82(b) was the fundamental principle of natural justice, namely, that nobody should be condemned unheard.

Joinder of Candidate as Respondent, Not Made Party to Petition

If a candidate at an election has not been joined under s 82 as a respondent to the election petition calling in question that election, he has the option to implead himself as a respondent to that petition. For this purpose, he must make an application to the high court, within 14 days from the date of commencement of the trial of the petition [s 86(4)].

The trial of the petition here shall be deemed to commence on the date fixed for the respondents to appear before the high court and answer the claim or claims made in the petition [explanation to s 86(4)]. But if in a case, the high court, after having fixed a date for appearance of the original respondents, fixes a fresh date for their appearance on account of their non-appearance on the date originally fixed, for want of service of court's notice on them, the aforesaid period of 14 days for making the application under s 86(4) will be counted from the subsequent fresh date and not from the earlier date fixed by the court.[80] If the aforesaid candidate so makes an application, he shall be entitled to be joined as a respondent, subject to any order which may be made by the high court as to the security for costs to be deposited by him. No person shall be entitled to be joined as a respondent under s 86(4) unless he has given the security for costs, as directed by the high court (s 118).

77 AIR 2001 SC 1121.
78 *Kanta Kathuria (Smt) v Manak Chand Surana* AIR 1970 SC 694.
79 AIR 1976 SC 744.
80 *Sreekumar Mukherjee v Zainel Abedin and Ors* (1999) 2 Supreme Today 217.

But such opportunity to be impleaded as a respondent is given by law only to the candidates at the election and not to any other person.[81] As mentioned above, a person who has withdrawn his candidature under s 37 is still to be regarded as a candidate for the purposes of s 86(4).

Third Persons, Whether can be Joined as Respondents

Section 82 of the 1951 Act prescribes which of the candidates at the election are to be joined as respondents to an election petition. The question whether any third person, that is to say, a person who was not a candidate at the election, can or should be joined as a respondent to the election petition came to be considered by the Supreme Court in *Jyoti Basu v Debi Ghosal*.[82] In this case, the election of the returned candidate, sponsored by the Communist Party of India (Marxist), was challenged on the ground, inter alia, that Shri Jyoti Basu, Chief Minister of West Bengal and two other ministers of the state government had colluded and conspired with the returned candidate to commit various corrupt practices. Shri Jyoti Basu was also joined as a respondent to the election petition by the election petitioner, contending that he was a proper party, even if not a necessary party under s 82. The Supreme Court answered the question as follows:

> Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency, it may be none else. Section 82 is headed 'Parties to the petition' and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidate if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of s 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86(4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while clause (b) of s 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under s 86(4) any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the

81 *Jyoti Basu v Debi Ghosal and Ors* AIR 1982 SC 983.
82 Ibid.

election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all? We think that the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act 1951. Only those may be joined as respondents to an election petition who are mentioned in ss 82 and 86(4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

The Supreme Court, thus, held that, except the candidates at the election, none else can be joined as a respondent to an election petition, even if he may otherwise be considered as a proper party.

Election Commission and Other Election Authorities, Whether Can be Joined as Respondents

In election petitions, the orders or directions given by the Election Commission in the course of conduct of election are often called in question. Quite often, allegations of illegalities and irregularities in the scrutiny of nominations, counting of votes, and so on, are also made against the returning officers and other election authorities. In such cases, the Election Commission and other election authorities are also generally impleaded as respondents by the petitioners. But in view of the law laid down by the Supreme Court in *Jyoti Basu*'s case,[83] they cannot be joined as respondents, howsoever proper or desirable their participation in the trial of the petition as a party thereto may be. The question whether the Election Commission can be made a respondent to an election petition was specifically considered by the apex Court in *B Sundra Rami Reddy v Election Commission of India.*[84] The Supreme Court held:

> Learned counsel for the petitioner urged that even if the Election Commission may not be a necessary party, it was a proper party since its orders have been challenged in the election petition. He further urged that since Civil Procedure Code 1908 is applicable to trial of an election petition the concept of proper party is applicable to the trial of election petition. We find no merit in the contention. Section 87 of the Act lays down that subject to the provisions of the Act and any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure 1908 to the trial of suits. Provisions of the Civil Procedure Code have thus been made applicable to the

83 AIR 1982 SC 983.

84 (1991) Supp 2 SCC 624.

trial of an election petition to a limited extent as would appear from the expression '*subject to the provisions of this Act*'. Since s 82 designates the persons who are to be joined as respondents to the petition, provisions of the Civil Procedure Code 1908 relating to the joinder of parties stand excluded. Under the Code even if a party is not necessary party, is required to be joined as a party to a suit or proceedings if such person is a proper party, but the Representation of the People Act 1951 does not provide for joinder of a proper party to an election petition. The concept of joining a proper party to an election petition is ruled out by the provisions of the Act. The concept of joinder of a proper party to a suit or proceeding underlying Order I of the Civil Procedure Code cannot be imported to the trial of election petition, in view of the express provisions of ss 82 and 87 of the Act. The Act is a self-contained Code, which does not contemplate joinder of a person or authority to an election petition on the ground of proper party. In *K Venkateswara Rao & Anor v Bekkam Narasimha Reddi and Ors,* this Court while discussing the application of Order I Rule 10 of the Civil Procedure Code to an election petition held that there could not be any addition of parties in the case of an election petition except under the provisions of Sub-section (4) of Section 86 of the Act. Again in *Jyoti Basu & Ors v Debi Ghosal & Ors,* this Court held that the concept of 'proper party' is and must remain alien to an election dispute under the Representation of the People Act 1951. Only those may be joined as respondents to an election petition who are mentioned in ss 82 and 86(4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

In *Michael B Fernandes v CK Jaffer Sharief,*[85] the Supreme Court again reiterated its above view taken in *Jyoti Basu's* case and reaffirmed in the later case of *B Sundara Rami Reddy,* and saw no infirmity with those judgments, requiring its interference under art 136 of the Constitution.

Following the above dictum of the Supreme Court, several high courts have deleted the names of the Election Commission and even the returning officers,[86] from the array of respondents in election petitions. But in *Kanakeswar Nazary v Deputy Commissioner, Kokrajhar and Ors,*[87] whereas the high court, by interim order dated 15 March 2000, deleted the name of the Election Commissi on from the array of respondents, it retained the Union of India as a respondent as the question of interpretation of certain legal provisions was involved in the election petition. But it appears from the interim order that the Union of India had not made any

85 AIR 2002 SC 1041.

86 *Prabhakar Kashinath Bhawade v State of Maharashtra and Ors* Election Petition No 4 of 1995.

87 Election Petition No 4 of 1999 before the Guwahati High Court.

application for removal of its name from the list of respondents, unlike the specific application of the Election Commission for such relief.

Non-Joinder of Necessary Party, Effect of

It is provided in s 86(1) that an election petition shall be dismissed by the high court, which does not comply with the provisions of, inter alia, s 82 which prescribes the parties to the petition. If a candidate who is a necessary party to an election petition under s 82 is not joined as a respondent to the petition, such non-joinder of a necessary party will be fatal to the very maintainability of the election petition and such petition is liable to be dismissed summarily under s 86(1).[88] It was further held by the Supreme Court in that case that the election petition could not be permitted to be amended so as to cure the defect of non-joinder of the necessary party, either by way of withdrawal of a claim in the petition or by abandonment of a part of the claim therein. The Supreme Court again held in *Mohan Raj v Surendra Kumar Taparia*[89] that when the 1951 Act enjoins the penalty of dismissal of the petition for non-joinder of a necessary party, the provisions of the Civil Procedure Code 1908 for allowing the impleadment of parties to the suit could not be used as curative means to save the election petition. If that was permitted, every election petition could be saved by amendment, but that was not the policy of the law. That the dismissal is peremptory and the law does not admit of any other approach, the apex court observed. Again, in *NE Horo v Jahan Ara Jaipal Singh*,[90] the Supreme Court held that, if the allegation made in the election petition against a candidate amounts to the commission of a corrupt practice by him, the petition is liable to dismissal if such candidate has not been joined as a respondent thereto. The same view was reiterated by the Supreme Court in *Manohar Joshi v Nitin Bhaurao Patil*.[91] In *Ram Prasad Sarma v Mani Kumar Subba*,[92] a candidate was duly impleaded as a respondent to the petition but there was mistake in spelling his name in the petition, though his correct name was available on the record. It was held that the petition could not be dismissed for non-joinder of necessary party and the fact that no application for correcting the name was moved nor was any written objection filed to indicate that it was a typing error, would not adversely affect the petition.

In regard to the non-joinder of a necessary party under s 82(b), ie, the candidate against whom an allegation of corrupt practice has been made, the Supreme Court held in *Udhav Singh v Madhav Rao Scindia*,[93] that:

88 *K Kamaraja Nadar v Kunju Thevar* AIR 1958 SC 687.
89 AIR 1969 SC 677.
90 AIR 1972 SC 1840.
91 AIR 1996 SC 796.
92 AIR 2003 SC 51; See Also *Michael B Fernandes v CK Jaffar Sharief* AIR 2002 SC 1041.
93 AIR 1976 SC 744.

> ...section 82(b) in clear, peremptory terms, obligates an election-petitioner to join as respondent to his petition, a candidate against whom allegations of any corrupt practice are made in the petition. Disobedience of this mandate, inexorably attracts s 86 which commands the High Court, in equally imperative language, to 'dismiss an election petition which does not comply with the provisions of section 82.'
>
> The respondent cannot by consent, express or tacit, waive these provisions or condone a non-compliance with the imperative of s 82(b). Even inaction, latches or delay on the part of the respondent in pointing out the lethal defect of non-joinder cannot relieve the Court of the statutory obligation cast on it by s 86. As soon as the non-compliance with s. 82(b) comes or is brought to the notice of the court, no matter in what manner and at what stage, during the pendency of the petition, it is bound to dismiss the petition in unstinted obedience to the command of s 86.

The Supreme Court held in *Krishan Chander v Ram Lal*,[94] that both ss 82(a) and 82(b) are mandatory and that s 82(b) is not violative of art 14, because the object of s 82 is one and indivisible in that it is incumbent upon any person coming to court to challenge an election to come with clean hands and not attempt to prevent a full and complete enquiry or, perhaps dictated by his own interests, to thwart fair trial by picking and choosing the parties to the petition. The Supreme Court further laid down that it is incumbent upon the high court, where the allegation is that the requirements of s 82 are not complied with, to determine that issue as a preliminary issue. If the allegations made in the petition constitute a corrupt practice, s 82(b) is attracted even if the source of information relating to that corrupt practice is not disclosed.

Plea of Non-Joinder of Party, When Can be Raised

The Supreme Court further laid down in the above case of *Udhav Singh v Madhav Rao Scindia* that an objection, as to non-joinder of a necessary party could be raised by a respondent at any stage during the trial of the petition, even after the close of the petitioner's evidence, and not necessarily, at the earliest opportunity, or in his written statement in answer to the petition. The Court proceeded to observe:

> Considered in the light of the above enunciation, the respondent was not precluded from raising the objection as to non-joinder, merely because he had done so after the close of the petitioner's evidence, and not, at the earliest opportunity.
>
> Nor was the respondent obligated to raise this objection only by his written statement, and in no other mode. Rule 2 of Order 8 of the Code of Civil

94 53 ELR 289.

Procedure is a rule of practice and convenience and justice. This procedural rule is to subserve and not enslave the cause of justice. It lays down broad guidelines and not cast-iron traps for the defendant in the matter of drawing up his statement of defence. It says:

> The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and *all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise* or would raise issues of fact not arising out of the plaint, as for instance fraud, limitation, release, payment, performance, or facts showing illegality.

The key-words are those that are in italics. These words indicate the broad test for determining whether a particular defence plea or fact is required to be incorporated in the written statement. If the plea or ground of defence 'raises issues of fact not arising out of the plaint,' such plea or ground is likely to take the plaintiff by surprise, and is therefore required to be pleaded. If the plea or ground of defence raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises. Nothing in the Rule compels the defendant to plead such a ground, nor debars him from setting it up at a later stage of the case, particularly when it does not depend on evidence but raises a pure question of law turning on a construction of the plaint. Thus, a plea of limitation that can be substantiated without any evidence and is apparent on the face of the plaint itself, may be allowed to be taken at any stage of the suit.

An objection on the ground of non-compliance with the requirement of s 82(b) is a plea of this category. It arises out of allegations made in the petition itself. Such a plea raises a pure question of law depending on a construction of the allegations in the petition and does not require evidence for its determination. Such a plea, therefore, can be raised at any time even without formal amendment of the written statement.

But in *Shiv Chand v Ujagar Singh*,[95] the Supreme Court held that if the allegation of corrupt practice is made in the election petition against a defeated candidate and he has not been impleaded as a respondent under s 82(b), the election petition shall not be liable to be dismissed summarily under s 86(1) for non-compliance with s 82(b), if such unimpleaded candidate makes an application for being impleaded as a respondent under s 86(4) within the time prescribed therein.

Mis-Joinder of Unnecessary Party, Effect of

Whereas, the non-joinder of a necessary party may prove fatal to the maintainability of the election petition, it is not so when a person is mis-joined as a party, when he is

95 AIR 1978 SC 1583.

not a necessary party to the petition. Such mis-joinder of an unnecessary party has not been treated as non-compliance with s 82 and the election petition was held to be maintainable in *Murarka Radhey Shyam Ram Kumar v Roop Singh Rathore*.[96] It was held that it was open for the election tribunal to strike out the name of the party who was not a necessary party under s 82 and was additionally impleaded.

Presentation of Petition

An election petition has to be 'presented' under s 81(1) to the high court either by a candidate at the election or by any elector within the prescribed period as discussed above. The high courts have framed their own rules for the presentation of election petitions to them. As those rules vary, it is essential that any person intending to file an election petition must study and familiarise himself with those rules of the high court concerned, lest an election petition is held to have not been properly presented to the high court. Any improper presentation of the election petition may result in its summary dismissal under s 86(1) for non-compliance with the provisions of s 81.

In *Hukumdev Narain Yadav v Lalit Narain Mishra*,[97] the Supreme Court held that though r 6 of the Patna High Court Rules provided that the election petition should be presented to the judge in open court, it could be presented to the Registrar of the high court under r 26 where the judge was not sitting on the last date for filing petitions. The presentation of the petition to the judge on the following day was held to be time-barred. But in *Chandra Kishore Jha v Mahavir Prasad*,[98] the Supreme Court, dealing with the r 6 of ch 21E of the Patna High Court Rules, held that the high court rules do not prescribe any other mode of presentation of an election petition, except before the designated election judge in open court, or in his absence—to the bench hearing civil applications and motions, and that the presentation of an election petition to the Registrar of the high court has not been prescribed as a mode of presentation of an election petition by the high court rules. The Supreme Court held that an election petition could, under no circumstances, be presented to the Registrar to save the period of limitation. In the instant case, the election petition was presented to the bench clerk of the designated election judge on the last date for filing election petitions, as the high court did not sit after 3:15 pm, on that day. The Supreme Court held that the presentation of the petition before the bench clerk was not a valid one, but, as the petition was

96 AIR 1964 SC 1545; See also *BS Yadiyurappan v Mahalingappa* AIR 2001 SC 4041.

97 AIR 1974 SC 480.

98 AIR 1999 SC 3558, [2000] 1 LRI 1108.

presented before the designated judge on the following day, it was deemed to be validly presented within the prescribed period by virtue of the provisions of s 10 of the General Clauses Act 1897. In *Jamal Uddin Ahmad v Abu Saleh Najmuddin*,[1] the Supreme Court held the presentation of election petition to the stamp reporter of the Gauhati High Court as valid presentation of the petition. The apex court observed:

> The jurisdiction to try an election petition has been conferred by the parliament on the High Court so as to carry out the mandate of Article 329 of the Constitution. Neither the Parliament nor the Central government have exercised their power by designating an authority to whom the election petition can be presented. There is a void left open by legislation. The gap is not to be found in the jurisdiction created nor in the substantive provision; the gap is in the field of procedural law, for failure to specifically enact an incidental or ancillary provision which would enable the statutory right of an election petitioner being exercised so as to enable the election petition, in the hands of the election petitioner reaching the High Court—the competent jurisdiction, for being subjected to hearing and trial. We have to attribute an intention to the Parliament that the High Court having been conferred with the substantive jurisdiction to head and try an election petition, the making of provision for all incidental and ancillary matters was left to the High Court which can either continue with the existing practice of receiving petitions and documents, just as in other civil jurisdictions exercised by it, or could make or devise convenient and workable procedure of receiving election petitions and other documents presented to it in exercise of the jurisdiction conferred by the Act.

There was some controversy on the question whether the election petition should be 'presented' by the election petitioner in person or it can be filed through an advocate. The Rajasthan High Court has taken the view in *Bhanwar Singh v Navrang Singh*[2] that, under r 4 of the high court rules, an election petition may be presented either by the petitioner in person or by an advocate duly authorised by him in this behalf. The high court also held that there was no inconsistency between r 4 of the high court Rules and s 81(1) of the 1951 Act. The Allahabad High Court and the Andhra Pradesh High Court have also taken a similar view that an election petition can be presented by an advocate of the petitioner.[3] But in *Sheodan Singh v Mohan Lal Gautam*,[4] the presentation of election petition by the advocate of the

1 AIR 2003 SC 1917, 2003(4) SCC 257.
2 84 ELR 20.
3 *Ram Harsh Mishra v Sukhad Rai Singh* AIR 1976 All 47, *Janardhana Reddy v YC Ranga Reddy* 46 ELR 374 (AP).
4 AIR 1969 SC 1024.

petitioner was held to be valid, as it was presented in the immediate presence of the petitioner. This creates a doubt as to what view would have been taken, if the petitioner was not present at the time of the presentation of the petition. The Madhya Pradesh High Court seems to have taken the view that the election petition should be presented by the petitioner in person and not through the advocate.[5]

The controversy now appears to have been resolved by the Supreme Court in *GV Sreerama Reddy and another v Returning Officer and others*[6] that the election petition is required to be presented by the petitioner personally and not by or through his advocate. The Supreme Court observed that an election petition is a serious matter with a variety of consequences and since such a petition may lead to the vitiation of a democratic process, any procedure provided by an election statute must be read strictly. The Supreme Court also observed that s 81(1) has five components, (i) the qualification of the petitioner, ie, he/she must be either "a candidate at such election or an elector"; (ii) the petition must be presented "by the petitioner"; (iii) the petition must be based "on one or more of the grounds specified in sub-section (1) of s 100 and s 101; (iv) it must be presented in the High Court; and (v) it must be presented within 45 days from the date of declaration of result. Therefore, the Legislature has provided that the petition must be presented "by" the petitioner himself, so that at the time of presentation, the High Court may make preliminary verification which ensures that the petition is neither frivolous nor vexatious.

Copies of Petition, Number of Copies to be Filed

Apart from the original election petition filed before the high court, it must be accompanied by as many copies thereof, as there are respondents mentioned in the petition [s 81(3)]. The object of the provision is that the high court registry is in a position to issue a notice to the respondents as soon as may be after the presentation of the election petition, without loss of time in preparing the copies of the petition, for service on the respondents.[7]

It must be remembered that the requisite number of spare copies of the petition to be filed with the petition for service on respondents must 'accompany' the original petition at the time of the filing of the petition itself. Any deficiency on account of the number of copies of the petition filed may also prove to be fatal to the very maintainability of the petition, particularly, where the required number of spare copies of the petition are not filed within the prescribed period of 45 days for filing the election petition. In *Satya Narain v Dhuja Ram*,[8] the requisite number of copies of the petition was not filed and the Deputy Registrar of the high court

5 AIR 1978 NOC 182.
6 *GV Sreerama Reddy and another v Returning Officer and others* 2009(7) SCJ 432 – see also *Sheo Sadan Singh v Mohan Lal Gautam* (1969 (1) SCC 408).
7 *Satya Narain v Dhuja Ram* AIR 1974 SC 1185.
8 Ibid.

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7 *Satya Narain v Dhuja Ram* AIR 1974 SC 1185.
8 Ibid.

granted certain time to the petitioner for making good the number of required copies. The period so granted fell outside the period of limitation of filing the election petition. Though the petitioner filed the additional copies before the time granted by the Deputy Registrar for the purpose, it was held by the high court, and later confirmed by the Supreme Court, that the Deputy Registrar had no authority to grant such time to the petitioner and the petition was dismissed *in limine* for non-compliance with the provisions of s 81(3). The Supreme Court held that the first part of s 81(3), which requires that the election petition should be accompanied by as many copies thereof as there are respondents to the petition, was mandatory entailing the dismissal of the petition under s 86(1) for any non-compliance therewith.

Copies of Petition, Each Copy to be Attested True Copy

The law further requires that every copy of the election petition filed with the original election petition shall be attested by the petitioner under his own signature to be a true copy of the petition [s 81(3)]. But such signature need not be in original on each copy and the copying of signatures by means of carbon paper, etc, would suffice.[9]

In *Anup Singh v Abdul Ghani*,[10] each of the copies of the election petition filed contained the signature of the petitioner in original, but the words 'true copy' were not written in the copies which were carbon copies of the original petition. The Supreme Court held the presence of original signature on each copy as substantial compliance of s 81(3). But in *Sharif-ud-Din v Abdul Gani Lone*,[11] the copies of the petition were signed not by the petitioner but by his advocate. In was held to be a defect of substantial character and the petition was dismissed *in limine* for non-compliance of s 89(3) of the Jammu and Kashmir Representation of the People Act 1957, which corresponds to s 81(3) of the 1951 Act. The Supreme Court observed that the object of the requirement of attestation of the petition by the petitioner under his own signature was that the petitioner should take full responsibility for its contents, and the possession of such copy by respondents prevented any unauthorised alteration or tampering of the contents of the original petition, after it was filed in the court.

In *M Kamalam v Dr VA Syed Mohammed*,[12] the election petition contained certain allegations of corrupt practices against the returned candidate and it was supported by an affidavit containing particulars of corrupt practices alleged. The petitioner had signed at the end of the affidavit but not at the end of the petition. Such signature of

9 *Ch Subbarao v Member, Election Tribunal, Hyderabad* AIR 1964 SC 1027.
10 AIR 1965 SC 815; See also *Bhagwan Rambhau Karankal v Chandrakant Batesingh Raghuwanshi* 2001 (5) JT 245.
11 AIR 1980 SC 303.
12 AIR 1978 SC 840.

the petitioner at the foot of the affidavit was held to be a substantial compliance of the requirement of s 81(3), as the election petition consisted of two parts, one being the election petition proper and other being the affidavit annexed thereto, and the signature at the end of the affidavit was considered to be clearly referable to the entire copy preceding it and authenticating the whole of the copy of the petition.

Meaning of 'True Copy'

The Supreme Court held in *Ch Subbarao v Member, Election Tribunal, Hyderabad*[13] and *Murarka Radhey Shyam Ram Kumar v Roop Singh Rathore*[14] that the expression 'copy' in s 81(3) does not mean an exact copy, but only a copy so true that nobody can possibly misunderstand it being not the same as the original. The test is whether any variation from the original is calculated to mislead an ordinary person. In *Rajendra Singh v Usha Rani*,[15] the copy of the election petition served on the respondent contained one page extra which was not contained in the original petition filed in the high court. It was held that the copy served on the respondent was not a true copy of the original petition and the petition was liable to be dismissed *in limine* under s 86(1) for non-compliance with s 81(3). The petitioner was not permitted to amend the copy of the original petition by adding the missing page thereto. The Supreme Court observed that the mandate of s 81(3) was that there should be no difference of any kind whatsoever, barring some typographical or insignificant omissions, between the petition filed and the copy served on the respondent.

Around the same time, the Supreme Court laid down in *Mithilesh Kumar Pandey v Baidyanath Yadav*[16] that a true copy of an election petition means a copy which is wholly or substantially the same as the original petition. Where there are insignificant or minimal mistakes or only clerical or typographical mistakes which are of no consequence, the same might be overlooked; but where the copy served on the respondent contains important omissions or discrepancies of a vital nature, which are likely to cause prejudice to the defence of the respondent, the same will tantamount to non-compliance of the provisions of s 81(3) and attract the provisions of s 86(1) for summary dismissal of the petition.

In *Shipra (Dr) v Shanti Lal Khoiwal*,[17] the election petition was accompanied by an affidavit in Form 25, in support of the allegations of corrupt practices made in the petition. The copy of the affidavit served on the respondent along with the copy of the main petition did not contain a verification by the notary who had attested the original affidavit, filed along with the original petition in the high court. It was

13 AIR 1964 SC 1027.
14 AIR 1964 SC 1545.
15 AIR 1984 SC 956.
16 AIR 1984 SC 305.
17 (1996) 5 SCC 181.

held by the Supreme Court that the copy of the petition along with the said affidavit was not a true copy of the original election petition and the election petition was dismissed *in limine*. The same rule was applied in *Harcharan Singh Josh v Hari Kishan*.[18] But when a similar case came up before the Supreme Court in *TM Jacob v C Poulose*,[19] the bench hearing that matter considered it appropriate to refer it to a larger bench for reconsideration of the decision in *Dr Shipra*'s case.[20] A Constitution Bench of the Supreme Court distinguished the instant case of *TM Jacob* from the case of *Dr Shipra* and held that the decision in *Dr Shipra*'s case was confined to the 'fact situation' as it existed in that case and that the wide observations made in that case were made in the context of facts of only that case.[21] The Court observed that the copy of the affidavit served on the respondent in *Dr Shipra*'s case did not show whether the petitioner had duly sworn and verified the affidavit, but, in the instant case, only the name and seal of the notary were absent on the copy of the affidavit, though it showed that it was notarised. The court further observed that the object of serving a true copy of the petition and the affidavit in support of the allegations of corrupt practices is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is, thus, of substance and not of form.

Meanwhile, in another case in *Anil R Deshmukh v Onkar N Wagh*,[22] though the copy of the affidavit served on the respondent initially suffered from the above-mentioned defect, true copy of the affidavit bearing the stamp, etc, of the notary was furnished to the respondent before the high court heard the preliminary objection of the respondent on this ground. The Supreme Court held it to be sufficient compliance of the provisions of s 81(3) and the election petition was accepted for trial.

The Supreme Court subsequently held in *Ram Prasad Sarma v Mani Kumar Subba*[23] that the law in *Dr Shipra's* case is not of binding nature in view of its decisions in the cases of *TM Jacob* and *Anil R Deshmukh* (above). The apex court observed that any defect of whatever nature in the true copy supplied to the respondent would not render the petition liable to be dismissed under s 86. Such defects in supply of true copies are not always incurable. The true copies supplied should reflect that the part of the petition containing the allegations of corrupt practices has been verified and sworn by the petitioner on oath. The fact that the name stamp, seal and signature of the notary are not indicated or missing in the true copy is not material nor the absence of stamp of attestation by the notary. The

18 AIR 1996 SC 3350.
19 AIR 1998 SC 2939.
20 (1996) 5 SCC 181.
21 *TM Jacob v C Poulose* (1999) 4 Supreme Today 59, [1999] 2 LRI 417.
22 (1999) 2 SCC 205, [1999] 1 LRI 1.
23 AIR 2003 SC 51.

endorsement of the notary administering the oath is not an integral part of affidavit of the petition. An election petition is not to be thrown at the threshold on this slightest pretext of one kind or the other which may and may not have any material bearing on the factors to be strictly adhered to in such matters. It is substance not form which would matter. The purpose of the law of the land cannot be to allow the returned candidate to avoid the trial of the issues of corrupt practices raised against him on the basis of any little defect which may not result in any vital variation between the original and the true copy so as to have the effect of misleading the returned candidate. The mere omission of indicating the name of the oath commissioner or an endorsement in the true copy that the affidavit was attested by an oath commissioner bearing his stamp and seal etc, would not be material. Once an averment is there that affidavit was being sworn in support of allegation of corrupt practices and that the petitioner has put his signature thereon, prima facie fulfillment of such a legal requirement is adequately reflected even in absence of name and seal etc, of oath commissioner in the true copy, the apex court observed.

Copies of Petition, Schedules and Annexures to Petition

Sometimes, the petitioner may enclose certain schedules and annexures to the petition. But sometimes the petitioner might overlook or fail to supply or attach copies of such annexures to the spare copies of the petition meant for service on respondents. Whether such copies of the petition without annexures can be considered to be true copies of the petition or not came to be considered by the Supreme Court in *Sahodrabai Rai v Ram Singh Aharwar*,[24] and *M Karunanidhi v HV Hande and Ors*.[25] In *Sahodrabai Rai's* case,[26] an election petition was filed, together with a pamphlet as an annexure thereto. A translation in English of the pamphlet was incorporated in the body of the election petition and it was stated that it formed a part of the petition. A preliminary objection was raised that a copy of the pamphlet had not been annexed to the copy of the petition served on the returned candidate and, therefore, the petition was liable to be dismissed under s 86(1). The Madhya Pradesh High Court accepted the preliminary objection and dismissed the election petition. On appeal, the Supreme Court held that the words used in s 81(3) were only 'the election petition' and there was no mention of documents accompanying the election petition. Since the election petition itself reproduced the whole of the pamphlet in translation in English, it could be said that the averments with regard to the pamphlet were themselves a part of the petition and, therefore, the pamphlet had in fact been served on the returned candidate, although in a translation and not in the original. The copy of the petition without the annexure in this case was held to

24 36 ELR 52.
25 72 ELR 94.
26 36 ELR 52.

be a true copy of the petition within the meaning of s 81(3) and the matter was remanded to the high court for trial.

But in *Karunanidhi's* case,[27] one of the allegations in the petition was that the appellant had erected fancy banners in the constituency, but had not shown the expenditure thereon in his return of election expenses, and in support of that allegation a photograph of one such banner was filed along with the petition. But, admittedly, a copy of the photograph was not annexed to the copy of the petition furnished to the appellant. The question was whether the copy of the petition sans the annexure could be considered to be a true copy of the petition, particularly, in view of the decision of the Supreme Court in *Sahodrabai Rai's* case.[28] The Supreme Court held in the instant case that the photograph, annexed to the petition was a part of the averment contained in the petition and in the absence of the photograph the averment in the petition would be incomplete. The photograph was an integral part of the election petition and the non-service of the copy of that photograph on the appellant was a failure to supply the true copy of the petition within the meaning of s 81(3) and the petition was liable to be dismissed *in limine* under s 86(1). Making a distinction from the decision in the *Sahodrabai Rai's* case,[29] the court observed that the test to be applied was whether an annexure referred to in the petition was an integral part of the petition or was merely a piece of evidence in proof of the allegations contained therein. Where an annexure formed an integral part of the petition, its non-service on the respondent would entail summary dismissal of the petition, as the respondent does not know exactly what case he has to meet or defend in the petition.

Following the law laid down in *Karunanidhi's* case,[30] the Supreme Court dismissed the election petition in *US Sasidharan v K Karunakaran*.[31] In this case, a copy of a video cassette containing the speeches of some government servants and showing progress in the constituency allegedly used at the instigation of the respondent, was filed in the high court in a sealed cover, but a copy of the cassette was not served on the respondent. The cassette was held to constitute an integral part of the election petition and its non-supply to the respondent was held to be non-compliance with the provisions of s 81(3). But in *Manohar Joshi v Nitin Bhaurao Patil*,[32] a reference was made to a video cassette in the petition but it was neither filed with the original petition nor served on the respondent and it was held that there was no violation of s 81(3). A similar view was taken in

27 72 ELR 94.
28 36 ELR 52.
29 36 ELR 52.
30 72 ELR 94.
31 AIR 1990 SC 924.
32 (1996) 1 SCC 169.

Ramakant Mayekar v Celine D'Silva,[33] where also reference was made to certain photographs and to a video cassette, but the copies thereof were neither filed with the petition nor supplied to the respondent.

In *Mulayam Singh Yadav v Dharampal Yadav*,[34] the particulars of corrupt practice of booth capturing, arson and violence were said to be contained in a video cassette which was verified as a schedule to the election petition and the video cassette was considered to be an integral part of the petition. But it was not filed with the original petition, though spare copies thereof for service on respondents were filed. The petition was dismissed under s 86(1) for non-compliance with the provisions of s 81(3). The Supreme Court observed whether or not a schedule forms integral part of the petition does not depend on whether or not the draftsman of the election petition has so averred; it has to be decided objectively, taking into account all relevant facts and circumstances.

Earlier, the Supreme Court had observed in *A Madan Mohan v Kalavakunta Chandrasekhara*[35] that where any schedules or annexures did not constitute an integral part of the petition and if they were not served on the respondent but filed in the court, it was always open to the respondent to inspect them in the court.

Security for Costs

At the time of presenting an election petition, the petitioner is required to deposit in the high court, a sum of Rs 2000 as security for costs of the petition. This security has to be deposited in accordance with the rules of the high court concerned [s 117(1)]. Accordingly, the election petitioner must find out the requirements and the procedure for making the security deposit laid down by the high court concerned in its rules.

Where an election petition is jointly filed by more than one petitioner, only one security deposit of Rs 2000 is sufficient and it is not necessary that each of the petitioners should make a separate deposit.[36] Whereas the deposit of sum of Rs 2000 as security while filing an election petition has been held to be mandatory by the Supreme Court in *MY Ghorpade v Shivajirao M Poal*,[37] the person through whom the amount will be deposited was not held to be mandatory. In this case, the receipt of deposit was in the name of one of the respondents but the evidence of that respondent and election petitioner showed that the deposit was made by the election petitioner and it was held to be sufficient compliance of the statutory provisions of making the deposit.

33 (1996) 1 SCC 399.
34 AIR 2001 SC 2565.
35 AIR 1984 SC 871.
36 *Yeshwant Sitaram Desai v Jaisingrao A Rane* AIR 1974 Goa 4.
37 AIR 2002 SC 3105.

It was held by the Supreme Court in *Aeltemesh Rein v Chandulal Chandrakar*,[38] that the provisions of s 117 requiring security deposit to be made are not *ultra vires* art 329(b), as the words 'in such manner' in that article are not limited in their operation to only procedural requirements but also cover substantive requirements. The provision of law which prescribes that an election petition shall be accompanied by a security deposit pertains to the area covered by the manner of making the election petition and is within the authority of Parliament.

The security so deposited by a petitioner may be used either for paying of costs awarded to any respondent by the high court at the conclusion of the trial, or, for meeting the expenses on witnesses summoned by the high court on behalf of the petitioner.

If during the course of the trial of the petition, the high court considers that the security deposit of Rs 2000 made by the petitioner is not adequate or has already been exhausted, the high court may, at any time, call upon the petitioner to give such further security for costs as it may deem appropriate.[39]

Non-Deposit of Security, Effect of

If a petitioner fails to make the security deposit under s 117, the election petition filed by him is liable to be dismissed *in limine* [s 86(1)].

It was held by the Supreme Court in *Charan Lal Sahu v Nandkishore Bhatt and Ors*[40] that the provisions of s 117 relating to the deposit of security for costs are mandatory and the non-compliance with those provisions will result in the dismissal of the petition even before the issue of notice by the high court to the respondent or the commencement of the trial.

It was further laid down by the Supreme Court in the instant case that the high court is not competent to reduce the amount of security deposit or to dispense with it. While there is a provision under s 117(2) empowering the high court to call upon the petitioner to give such further security for costs as it may direct, there is no provision similarly empowering it to absolve the petitioner from making any security deposit, or to reduce the amount required to be deposited under s 117(1).

But it was clarified by the Supreme Court in *M Karunanidhi v HV Hande and Ors*,[41] that only the first part of s 117(1) which prescribes the amount of security and its deposit is mandatory, whereas the second part of that section regarding the manner of deposit is directory and the mode of making deposit is an internal matter of the high courts concerned, governed by its own rules.

38 AIR 1981 SC 1199.
39 1951 Act, s 117(2).
40 53 ELR 284.
41 AIR 1983 SC 558.

CONTENTS OF ELECTION PETITION

Pleadings, Generally

It was observed by the Supreme Court in *Raj Narain v Indira Nehru Gandhi*,[42] that the rules of pleadings are intended as aids for a fair trial and for reaching a just decision. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, there lies a juristic principle. A person accused of a corrupt practice must know precisely what he is accused of, so that he may have the opportunity to meet the allegations made against him. If the accusation made is nebulous and capable of being made use of for establishing more than one charge or if it does not make out a corrupt practice at all, then the charge fails at the very threshold. But the apex court added that 'clumsy drafting' of an Election Petition should not, however, result in its dismissal so long as the petition could make out a charge of a head of corrupt practice when it is read as a whole and construed reasonably.

The pleadings of the petitioner in his election petition should be absolutely precise and clear, containing all necessary details and particulars as required by law. The allegations in the election petition should not be vague, general in nature or lacking in material particulars or frivolous or vexatious, as the court has the power to strike down or delete pleadings, if they suffer from the vice of not raising any triable issue at any stage of the proceedings.[43]

Where an election petition alleges the commission of a corrupt practice by a candidate, the pleadings must contain: (a) direct and detailed nature of the corrupt practice as defined in the 1951 Act; (b) details of every important particular giving the time, place, names of persons, use of words and expressions, etc. It must also clearly appear from the allegations that the corrupt practice was indulged in, either by the candidate himself, or by his election agent, or by any other person with the express or implied consent of the candidate or his election agent. Where the allegation is open to two equally possible inferences, the pleadings of corrupt practice must fail.[44] If an objection is raised as to the vagueness of pleadings, the test to decide is whether any relief prayed for can be granted if averments in the petition are proved to be true. For the purpose of considering such objection, the averments should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a triable issue. The court cannot probe at this stage into facts alleged or averred in the petition on the basis of the controversy raised in the counter filed by the opposite party.[45] The election petitioner is not supposed to anticipate the defence of the respondent and to state in the petition what he would

42 AIR 1972 SC 1302.
43 *Laxmi Narayan Nayak v Ramratan Chaturvedi* AIR 1991 SC 2001.
44 *Daulat Ram Chauhan v Anand Sharma* AIR 1984 SC 621.
45 *D Ramachandran v RV Janakiraman and Ors* [1999] 1 LRI 589.

have to say in answer to the respondent's defence.[46] But the question of vagueness of the pleadings should be raised at the earliest, and if no objection is raised in this behalf and the parties go to trial despite the vagueness of the pleadings, the respondent cannot thereafter have a grievance that the petition should have been dismissed for the above defect.[47]

Contents of Petition

An election petition shall contain a concise statement of material facts on which the petitioner relies [s 83(1)(a)]. It shall also set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible, of the names of the party alleged to have committed such corrupt practice, the date of the commission of the corrupt practice and the place at which the corrupt practice took place [s 83(1)(b)].

Clause (a) of s 83(1) refers to general allegations and requires a concise statement of material facts to be furnished, while cl (b) refers to allegations of corrupt practices and requires all details to be given.[48]

An election petition may be drawn up in Hindi language if the high court rules so permit.[49]

Meaning of 'Material Facts' and 'Material Particulars'

What is the meaning to be ascribed to the expressions 'material facts' and 'material particulars' in ss 83(1)(a) and 83(1)(b) was explained by the Supreme Court in *Samant N Balakrishna v George Fernandez and Ors*[50] as follows:

> Section 83 then provides that the election petition must contain a concise statement of the material facts on which the petitioner relies and further that he must also set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of

46 *Roop Lal Sathi v Nachhattar Singh Gill* AIR 1982 SC 1559.

47 *Abdul Hamid Choudhury v Nani Gopal Swami* 22 ELR 358 (SC), *Quamarul Islam v SK Kasu* AIR 1994 SC 1733.

48 *Arun Kumar Bose v Mohd Furkan Ansari* AIR 1983 SC 1311.

49 *Vijay Laxmi Sadho (Dr) v Jagdish* AIR 2001 SC 600.

50 41 ELR 260; see also *Hari Shankar Jain v Sonia Gandhi* AIR 2001 SC 3689; *Virender Nath Goutam v Satpal Singh and Ors* 2007 (3) SCC 617; *Jitu Patnaik v Sanatan Mohakud and Others* AIR 2012 SC 913, 2012 (4) SCJ 115 .

action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. Thus the material facts will mention that a statement of fact (which must be set out) was made and it must be alleged that it refers to the character and conduct of the candidate that it is false or which the returned candidate believes to be false or does not believe to be true and that it is calculated to prejudice the chances of the petitioner. In the particulars the name of the person making the statement, with the date, time and place will be mentioned. The material facts thus will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficacy of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the making of a false statement. That statement must appear and the particulars must be full as to the person making the statement and the necessary information.

The distinction between the meaning of the above expressions 'material facts' and 'material particulars' was further elaborated by the Supreme Court in *Udhav Singh v Madhav Rao Scindia*,[51] as follows:

> Like the Code of Civil Procedure, this section (83) also envisages a distinction between material facts and material particulars. Clause (a) of sub-section (1) corresponds to Order 6, r 2 while clause (b) is analogous to Order 6, Rules 4 and 6 of the Code (of Civil Procedure). The distinction between 'material facts' and 'material particulars' is important because different consequences may flow from deficiency of such facts or particulars in the pleading. Failure to plead even a single *material fact* leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under

51 AIR 1976 SC 744; see also *Ajay Kumar Poeia v Shyam amd Ors* AIR 2004 SC 1941; *Azhar Hussain v Rajiv Gandhi* AIR 1986 SC 1253; *LR Shivaramagowda v TM Chandrashekhar* (1999) 1 SCC 666; *VS Achuthanandan v TJ Francis* (1999) 3 SCC 737; *V Narayanaswamy v CP Thirunavukkarasu* (2000) 2 SCC 294; *Hari Shanker Jain v Sonia Gandhi* AIR 2001 SC 3689; *Mahadeorao Sukaji Shivankar v Ramratan Bapu* (2004) 7 SCC 181.

Order 6 Rule 16, Code of Civil Procedure. If the petition is based solely on those allegations which suffer from lack of *material facts*, the petition is liable to be summarily rejected for want of a cause of action. In the case of a petition suffering from a deficiency of *material particulars*, the court has discretion to allow the petitioner to supply the required particulars even after the expiry of limitation.

All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are 'material facts'. In the context of a charge of corrupt practice, 'material facts' would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner is bound to substantiate before he can succeed on that charge. Whether in an election-petition, a particular fact is material or not, and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are 'material facts' which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of s 83(1)(a).

'Particulars', on the other hand, are 'the details of the case set up by the party'. 'Material particulars' within the contemplation of clause (b) of s 83(1) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative.

All basic and primary facts to be proved for existence of cause of action are material facts; material facts are such facts which afford basis for allegations and bare allegations are never treated as material facts.[52]

In *Jaipal Singh v Sumitra Mahajan*,[53] the key issue was: whether the appellant held an office of profit on the date of scrutiny. For that purpose, the apex court observed, the appellant ought to have stated that on 13 March 2002 he had requested for waiver of the notice period; that the appointing authority had received the notice on the specified date and that his request for waiver stood granted on the date of scrutiny and he ceased to be a government servant. These were the material facts which the appellant should have pleaded so that the returned candidates would not be taken by surprise. They were material facts within his knowledge and ought to have been pleaded in the election petition. Even the letter of the appellant seeking the waiver of the notice period did not form part of the election petition. Hence, the

52 *Jitu Patnaik v Sanatan Mohakud and Others* AIR 2012 SC 913, 2012 (4) SCJ 115.
53 AIR 2004 SC 2066, (2004) 4 SCC 522.

high court was found right by the Supreme Court in dismissing the election petition for want of material facts.

The Supreme Court observed in *Mahendra Pal v Ram Dass Malanger*,[54] that whereas it may be permissible for a party to furnish particulars even after the period of limitation for filing an election petition has expired, with permission of the court, no material facts, unless already pleaded, can be permitted to be introduced, after the expiry of the period of limitation. The Supreme Court further observed in *Jeet Mohinder Singh v Harminder Singh Jassi*[55] that the material facts and particulars alleged for the first time in the replication and not forming part of averments made in the election petition cannot be tried and cannot be made subject matter of issues framed by the court.

In *Harkirat Singh v Amarinder Singh*,[56] the Punjab and Haryana High Court, at the preliminary stage, entered into the correctness or otherwise of the facts stated and allegations made in the election petition and rejected the petition holding that it did not state material facts, and thus did not disclose a cause of action. The Supreme Court held that the high court stepped into prohibited area of appreciating the evidence and by entering into merits of the case which would be permissible only at the stage of trial of the petition and not at the stage of consideration whether the petition was maintainable.

In the courts in India, a point of foreign law is a matter of fact and, therefore, a plea based on a point of foreign law must satisfy the requirement of pleading a material fact in an election petition.[57] Where material facts are disclosed in the election petition, the petition will be fit to go for trial. Whether those material facts are true or false are a matter of trial.[58]

Verification of Pleadings

Every election petition shall be signed by the petitioner and also verified in the manner laid down in the Code of Civil Procedure 1908, for the verification of pleadings [s 83(1)(c)].

The verification of the petition as required by s 83(1)(c) must be made in the manner laid down by O VI, r 15 of the Code of Civil Procedure 1908. The object of requiring verification of an election petition has been explained by the Supreme Court in *FA Sapa v Singora*.[59] The apex court has observed that the object of the above requirement is to fix the responsibility for the averments and allegations in the

54 AIR 2000 SC 16.
55 AIR 2000 SC 256.
56 AIR 2006 SC 713.
57 *Hari Shanker Jain v Sonia Gandhi* AIR 2001 SC 3689.
58 *Nandiesha Reddy v Kavitha Mahesh* 2011(6) SCJ 219.
59 AIR 1991 SC 1557.

petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts.

It has been consistently held by the Supreme Court that any defect in the verification of pleadings is curable and an election petition cannot be dismissed *in limine* for any defect in its verification.[60] But, while defective verification may not be fatal to the maintainability of the petition, the high court should ensure the compliance of s 83(1)(c) within a stipulated period before the parties go to trial, so that they know exactly what case they have to meet and are not taken by surprise at the actual trial.[61]

Where, however, an election petition has not been properly verified in the manner specified in Order VI Rule 15 of the Code of Civil Procedure and not accompanied by an affidavit as contemplated in s 83, it cannot be said that the cause of action was complete. Although, s 83 has not been mentioned in sub-s (1) of s 86, in the absence of proper verification it must be held that the provisions of s 81 had also not been fulfilled and the petition is liable to be dismissed, where the petitioner had the opportunity of curing the defection but it chose not to do so.[62]

Verification of Schedules and Annexures to Petition

If the petitioner has attached any schedule or annexure to the election petition in support of the statements made in the petition, each such schedule or annexure shall also be signed by the petitioner and verified by him in the same manner as he had signed and verified the main election petition [s 83(2)]. This is a mandatory requirement.[63] But any defect in such verification is curable like the defect in the verification of the main petition.

In *Haribhau Madhav Javale v Ramesh Vithal Choudhari*,[64] the xerox copies of the originals in Marathi of the annexures to the election petition that were furnished to the appellant (elected candidate) were duly signed, verified and endorsed. These xerox copies were accompanied by English translations, but the same were not signed, verified and endorsed. The Supreme Court held that the election petition would have been complete if served on the returned candidate without the translations and, therefore, the objection that the translations that were given were not signed, verified and endorsed could not be sustained or lead to the dismissal of the election petition. The Kerala High Court held in *TA Ahammed Kabeer v AA Azeez*,[65] that English

60 *Murarka Radhey Shyam Ram Kumar v Roop Singh Rathore* AIR 1964 SC 1545; *Poonsala Lakshmaiah v Kommuri Pratap Reddy* 2012(5) SCJ 575.
61 *FA Sapa v Singora* AIR 1991 SC 1557.
62 *PA Mohammed Riyas v MK Raghavan and Others* 2012(4) SCJ 615.
63 *Manohar Joshi v Damodar Tatyaba* (1991) 2 SCC 342.
64 (2002) 10 SCC 102.
65 AIR 2002 Ker 51.

translation of annexures to a petition which was not 'certified as true translation' by the petitioner's counsel was a curable defect.

Affidavit in Support of Allegation of Corrupt Practice

Where any allegations have been made in the petition of any corrupt practice having been committed at the election, the petition shall be also accompanied by an affidavit of the petitioner in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof [proviso to s 83(1)(c)]. The form of such affidavit has been prescribed under r 94A of the 1961 Rules and the relevant form is Form 25 appended to those rules. Thus, it was earlier held that such election petition should be accompanied by two affidavitsone under Order VI Rule 15(4) CPC and the other in Form 25.[66] However, it has now been clarified by the Supreme Court in *GM Siddeshwar v Prasanna Kumar*[67] that it is not imperative for election petitioner to file additional affidavit in terms of Order VI Rule 15(4) CPC to support averments in the petition, in addition to filing of an affidavit in the prescribed Form 25 as required under the proviso to s 83(1), where corrupt practices are alleged against the returned candidate. It has been further clarified that non-filing of an affidavit in Form 25 will not result in summary dismissal of the election petition, so long as there is substantial compliance with the statutory form; however, an opportunity must be given to the election petitioner to cure the defect. In the affidavit in Form 25, the petitioner has to specify which of the allegations about the commission of corrupt practice are true to his knowledge, and which of such allegations are true to his information. The petitioner has to do this with reference to the statements made in numbered paragraphs of the petition. The 'knowledge' of the petitioner here will mean his personal knowledge and the 'information' will mean the information received by him from other sources.

Form 25 in which the affidavit has to be given requires that it should be affirmed or sworn before a magistrate of the first class, or notary, or commissioner of oaths. The Supreme Court observed in *Kamal Narain Sharma v Dwarka Prasad Mishra*[68] that the affidavit may be affirmed or sworn before any commissioner of oaths duly appointed under any law. The Supreme Court observed in *T Phunzathang v Hangkhanlian*[69] that the proviso to s 83(1) requires an affidavit to be filed in prescribed form. An endorsement by the specified officer before whom the affidavit is sworn is not the requirement mentioned in that section. Rule 94-A can be dissected into two parts: (1) the affidavit shall be in Form 25, and (2) it shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths.

66 *PA Mohammed Riyas v MK Raghavan and Others* 2012(4) SCJ 615.
67 2013(3) SCJ 504.
68 AIR 1966 SC 436.
69 AIR 2001 SC 3924.

What is prescribed is the form of affidavit. Swearing in before one of the three officers is mode and manner of swearing in the affidavit. The later requirement does not relate to form of affidavit; it prescribes the person recognised by the Act and the Rules as competent to administer oath to the deponent of affidavit for the purpose of s 93(1) read with r 94-A and suggests, for the sake of convenience and consistency, the manner of endorsement to be made by the magistrate, notary or commissioner of oaths administering oath to the deponent. Such endorsement made by the officer administering oath to the deponent is not an integral part of the affidavit. Preparing, signing and swearing an affidavit are acts of the deponent; administering oath and making endorsement in proof thereof on the affidavit are acts of the officer administering the oath.

However, an affidavit in Form 25 is necessary only where an allegation of corrupt practice has been made in the petition. In *Narender Singh v Mala Ram*,[70] the allegation was that the nomination papers of two candidates were improperly rejected by the returning officer at the behest of the returned candidate and in collusion with him. It was contended that the election petition was liable to be dismissed for not filing an affidavit in support of the allegation of corrupt practice of procuring the assistance of the returning officer within the meaning of s 123(7). The Supreme Court held that the main thrust in the allegation was on improper rejection of nomination papers and the allegation of collusion with the returning officer was only an embellishment and not an allegation of corrupt practice, and that no affidavit was required in the case.

There has been some controversy on the point whether the affidavit in support of the allegations of corrupt practice should disclose the source or sources of information or not. The Supreme Court held in *Krishan Chander v Ram Lal*[71] that there is nothing in Form 25 which requires the petitioner to state the source or sources of information forming the basis for allegation of corrupt practice. An allegation of corrupt practice in an election petition cannot be ignored on the ground that the source of information has not been disclosed by the petitioner. When there are specific rules under the 1951 Act, which govern the filing of the affidavit in support of an allegation of corrupt practice in the election petition, no other rules are applicable. The Supreme Court observed that under O VI, r 15(2) of the CPC also, the disclosure of the source of information is not a requisite. But in several other subsequent cases, the Supreme Court has laid down that the grounds or sources of information should be set out in an affidavit whether the provisions of the CPC apply or not. The non-disclosure of grounds or sources of information will make the affidavit defective, as it will indicate that the petitioner did not come forward with the sources of information at the first opportunity. The real importance of disclosing the sources of information is to give to the respondent

70 AIR 1999 SC 3655.

71 53 ELR 289.

notice of the contemporaneous evidence on which the petition is based and that will give the other side an opportunity to test the genuineness and veracity of the sources of information and to discover any embellishment.[72] In *Jeet Mohinder Singh*'s case, the Supreme Court has observed that the sources of information must be disclosed by the petitioner so as to bind him to the charges levelled and to prevent any fishing and roving inquiry in the trial of the petition.

The law on the point has been further elucidated by the Supreme Court in *V Narayanswamy v C P Thirunavukkarasu*,[73] as follows:

> ...an election petition is based on the rights, which are purely the creature of statute, and if the statute renders any particular requirement mandatory, the court cannot exercise dispensing powers to waive non-compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a triable issue as such. Section 81, 83 (1) (c) and 86 read with Rule 94-A of the Rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. There is difference between 'material facts' and 'material particulars'. While the failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. 'Material facts' mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition, ie clause (a) of sub-section (1) of Section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded. A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or

72 *Virendra Kumar Saklecha v Jagjiwan* AIR 1974 SC 1957; *LR Shivaramagowda v TM Chandrashekar* (1999) 1 SCC 666; *HD Revanna v G Puttaswamy Gowda* (1999) 2 SCC 217; *Jeet Mohinder Singh v Harminder Singh Jassi* [1999] 4 LRI 956; *Ravinder Singh v Janmeja Singh* AIR 2000 SC 3026; *Kamalnath v Sudesh Verma* AIR 2002 SC 599.

73 2000 (1) Supreme Today 290.

conjecture for the court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the Court could not take cognizance thereof. Charge of corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is violation of the provisions of s 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in Section 83 of the Act on the other hand can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6, Rule 16 and Order 7, Rule 11 of the Code of Civil Procedure. Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. In such a case petition has to be rejected on the threshold for non-compliance with the mandatory provisions of law as to pleadings. It is no part of duty of the court *suo motu* even to direct furnishing of better particulars when objection is raised by other side. Where the petition does not disclose any cause of action it has to be rejected. Court, however, cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. Petition has to be considered as a whole. There cannot be a partial rejection of the petition.

But it has been held in all the above cases that a defect in the affidavit is curable even beyond the period of limitation for filing the election petition. Some defect in the affidavit or even the failure to comply with the requirement as to filing of an affidavit cannot be a ground for dismissal of the election petition *in limine* under s 86(1). The requirement of filing an affidavit is contained in s 83 and non-compliance with the provisions of s 83 does not attract the consequence of summary dismissal of the election petition under s 86(1).[74] Any such defect can be remedied in accordance with the principles of Code of Civil Procedure 1908 relating to

74 *Sardar Harcharan Singh Brar v Sukh Darshan Singh* AIR 2005 SC 22; *G Mallikarjunappa and Anor v V Shamanur Shivashankarappa and Ors* AIR 2001 SC 1121, 2001 (1) JT 38; *Vijay Laxmi Sadho (Dr) v Jagdish* 2001 Supp 2 JT 41.

verification of pleadings.[75] If the defects are construed to be of serious nature, the same should be brought to the notice of the petitioner for rectifying or curing the defects.[76] But such defect should be removed at the earliest opportunity. In *Quamarul Islam v SK Kanta*,[77] the high court permitted the filing of a second affidavit removing the defects in the earlier affidavit, after the arguments were over. The Supreme Court observed that that could not be permitted and also observed that the trial court had not applied its mind. In *RP Moidutty v PT Kunju Mohammad and Anor*,[78] and *Regu Mahesh v Rajendra Pratap Bhanj Dev*,[79] the Supreme Court held that where a petitioner did not cure the defect in affidavit despite being pointed out and persisted in pursuing the petition without proper verification, the petition could not have been tried. There is gulf of difference between a curable defect and defect continuing in the verification affidavit without any effort being made to cure the defect.

Reliefs That May be Claimed by the Petitioner

In an election petition, the election petitioner can pray for two types of reliefs. The first type of relief which he may claim is the relief simpliciter that the election of the returned candidate or candidates at the impugned election may be declared void. The second type of relief is a composite relief where, in fact, two reliefs are claimed, namely: (1) that the election of the returned candidate may be declared void; and (2) that, in place of the returned candidate, either the petitioner himself (if he was a candidate) or some other candidate may be declared as having been duly elected at the impugned election (s 84).

The Supreme Court held in *Viswanath Reddy v Konappa Rudrappa Nadgouda*[80] that where there are only two contesting candidates at an election and one of them is found to be suffering from a disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away votes, irrespective of whether the voters who voted for him were aware of the disqualification or not, and the second candidate can be declared elected straightaway, as such a case would be of an uncontested election under s 53. But the same rule will not apply where there were more than two contesting candidates in the field for a single seat and the returned candidate is found to be suffering from disqualification. In such a case, the candidate securing the next higher number of votes will not be declared elected and it will have to be proved that such candidate would have received the majority of votes if the disqualified returned candidate had not been in the field.

75 *Radhey Shyam Ram Kumar v Roop Singh Rathore* AIR 1964 SC 1545.
76 *Umlesh Challiyil v KP Rajendran* 2008(4) SCJ 625.
77 AIR 1994 SC 1733.
78 (2000) 1 SCC 481; see also *Vijay Laxmi Sadho (Dr) v Jagdish* AIR 2001 SC 600.
79 AIR 2004 SC 38.
80 AIR 1969 SC 604.

The perusal of the provisions of s 84 will show that an election petition can be filed only where the election of the returned candidate is called in question and a declaration is sought that his election be declared void or a further declaration is claimed that after declaring the election of the returned candidate as void some other candidate at the election be declared elected by the high court. In such an election petition, the question of commission of corrupt practices by any of the defeated candidates can also be made a subject of enquiry and trial by the high court. But an election petition will not lie where no relief is claimed affecting the returned candidate and grievances are sought to be raised only against the commission of corrupt practices by any of the defeated candidates. In such a case, the resort to corrupt practices by candidates who get defeated at the polls go as unchallenged, as no election petition will lie against a defeated candidate. This appears to provide an escape route, because the commission of corrupt practice not only vitiates the purity of election, but also entails disqualification for the candidates and also others indulging in corrupt practices.

Grounds of Challenge to Election

The grounds on which an election may be challenged by means of an election petition are covered by the provisions of s 100 of the 1951 Act. Under this section, the high court is empowered to declare the election of a returned candidate void on any of the grounds specified in this section. Thus, an election petition can also be filed on those very grounds on which the high court can declare the election of the returned candidate as void. This section states as under.

100. ***Grounds for declaring election to be void.***—(1) Subject to the provisions of sub-section (2), if the High Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act 1963 (20 of 1963); or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the High Court may decide that the election of the returned candidate is not void.

Where an election petitioner has claimed a further declaration in terms of s 84 that in addition to the election of the returned candidate being declared void, the petitioner or some other candidate may be declared duly elected in place of the returned candidate, the high court can give such relief, if it is of opinion: (a) that in fact the petitioner or such other candidate received a majority of the valid votes polled at the election, or (b) that, but for the votes obtained by the returned candidate by corrupt practices, the petitioner or such other candidate would have obtained a majority of the valid votes [s 101].

Distinction Between Clauses (a) to (c) and (d) of Section 100(1)

The perusal of the above-quoted provisions of s 100(1) will show that if an election is challenged on any of the grounds mentioned in cll (a), (b) or (c), the high court shall declare the election of the returned candidate void on the mere proof and establishment of any of those grounds. The petitioner has nothing to prove further as to the effect of any of those things on the result of the election, as the law presumes that any of those grounds are sufficient by themselves for the whole election to be declared void. For instance, if it is proved in the trial of election petition that the nomination paper of a candidate was improperly rejected within the meaning of s 100(1)(c), the election of the returned candidate will be declared void, notwithstanding that he may have won the election by the biggest of the margins and the candidate whose nomination was improperly rejected was a total non-entity and may not have polled any votes at all. There is a presumption in law that the

improper rejection of a nomination paper materially affects the result of election.[81] In such a case, no further question is required to be gone into by the tribunal and it has no other option but to set aside the election of the winning candidate.[82]

But if an election petition is filed in which any of the grounds mentioned in cl (d) of s 100(1) are taken as the basis for challenging the election, the petitioner has not only to prove and establish the facts alleged but has also to prove further that those facts had materially affected the result of the election in so far as the returned candidate is concerned. The meaning of the expression 'material effect' on the result of election has been discussed and explained in a subsequent paragraph in this chapter.

It has been held by the Supreme Court that where an election is challenged on any of the grounds under s 100(1)(d), it must be specifically averred and pleaded in the petition that the election of the returned candidate has been materially affected, apart from proving that fact in the trial of the petition. In the absence of such pleading in the petition, the petitioner cannot be permitted to adduce evidence to the effect that the election of the returned candidate was materially affected.[83] In *Charan Dass v Surinder Kumar*,[84] allegations of wrongful counting were made. It was held by the Supreme Court that even if the allegations were taken to be correct, the election of the returned candidate could not be set aside as there was no further allegation in the petition that the result of the election was materially affected by wrongful counting. But where an election is challenged on the ground under s 100(1)(d)(i) that the nomination paper of the returned candidate himself was improperly accepted, it need not be specifically averred that the result of the election was materially affected. In such a case, the conclusion is obvious that the result of the election, in so far as the returned candidate is concerned, has been materially affected, if his nomination paper is found to have been improperly accepted, as in that event he would not have been in the contest at all. But such averment will be necessary if the allegation is that the nomination of a defeated candidate has been improperly accepted. In such a case, a question will arise as to what would have happened to the votes which had been cast in favour of the defeated candidate whose nomination had been improperly accepted. It will be necessary in such case for the person challenging the election not merely to allege in the petition, but also to prove that the result of the election concerning the returned candidate has been materially affected by the improper acceptance of the nomination of the defeated candidate.[85]

81 *Surendra Nath Khosla v Dalip Singh* AIR 1957 SC 242; *Jugal Kishore v Ratnakar* AIR 1976 SC 2130; *Krishna Mohini v Mohinder Nath Sofat* (1999) 9 Supreme Today 69.

82 *Uttamrao Shivdas Jankar v Ranjitsinh Vijaysinh Mohite-Patil* 2009(7) SCJ 658.

83 *LR Shivaramagowda v TM Chandrashekar* (1999) 1 SCC 666; see also *Ram Sukh v Dinesh Aggarwal* 2009(10) SCC 541.

84 (1995) Supp 3 SCC 318.

85 *D Muthuswami v N Nachiappan and Ors* 53 ELR 85 (SC).

It will be further observed from cl (d) of s 100(1) that that clause enumerates three specific grounds in sub-cll (i), (ii) and (iii) and the sub-cl (iv) makes a general provision for questioning an election on the ground of any non-compliance with the provisions of the Constitution or of the 1951 Act or of any rules or orders made under that Act. The Supreme Court has held in Durga Shankar Mehta v Raghuraj Singh,[86] that s 100(1)(d)(iv) [which is a reproduction of s 100(2)(c) as it stood before 1956] is a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution, or of the 1951 Act, but which have not been specifically enumerated in the other portions of that clause. The Supreme Court observed that there is no material difference between 'non-compliance' and 'non-observance' or 'breach'. Quoting the above decision with approval, the Supreme Court held in Mohinder Singh Gill v Chief Election Commissioner and Ors,[87] that 'A generous, purpose-oriented, literally informed statutory interpretation spreads the wings of 'non-compliance' wide enough to bring in all contraventions, excesses, breaches and subversions'. The apex court observed that even if a power exists in the Election Commission under art 324, it will tantamount to non-compliance with the provisions of the Constitution, if such power is exercised illegally, arbitrarily or in violation of the implied obligation of audi alteram partem, ie, without following the principles of natural justice, and that such mal-exercise of power can be challenged under s 100(1)(d)(iv).

Suppression of information or furnishing wrong information in the affidavit filed by a candidate along with his nomination papers is not a specific ground for challenging election u/s 100(1)(d)(4), unless it is pleaded and proved that such suppression of information materially affected the result of election of returned candidate.[88] In this case, the returned candidate had suppressed the fact in his affidavit with regard to assets and liabilities of his first wife and dependent children born out of that wedlock, but there was no averment that such suppression of information materially affected the result of election.

Finality of Electoral Roll, not a Ground for Challenge

It will, however, be observed from s 100(1)(d)(iv) that any non-compliance with the provisions of the 1950 Act has not been provided as a ground for challenging an election. As already mentioned in the introductory part of this chapter, finality of electoral roll cannot be questioned in an election petition and the validity of an election cannot be called in question on the ground that the electoral roll was defective.[89] At the cost of repetition, it may be stated that the right of a person to be

86 AIR 1954 SC 520.

87 AIR 1978 SC 851.

88 *Mangni Lal Mandal v Bishnu Deo Bhandari* 2012 (3) SCJ 884.

89 *Indrajit Barua and Ors v Election Commission and Ors* AIR 1986 SC 103.

included in an electoral roll cannot be questioned in an election petition.[90] But where an illegality is alleged in the election petition that any name has been included or deleted in or from an electoral roll after the last date of making nominations when the roll becomes final under s 23(3) of the 1950 Act, the high court has the jurisdiction to go into that question to determine whether any vote has been improperly accepted or rejected.[91]

Again, where the question is whether a person's name has been wrongly enrolled in an electoral roll by treating him or her as a citizen of India by reason of a certificate granting citizenship by registration under s 5(1)(c) of the Citizenship Act 1955, such challenge to the entry in the electoral roll is not immune from adjudication in an election petition. The high court, while trying an election petition, can even adjudicate on the validity of the certificate under the said s 5(1)(c) of the Citizenship Act 1955.[92]

Additional Grounds, Not Taken Earlier Before Electoral Authorities

An election petition is an original proceeding and not a proceeding in the nature of an appeal against the order of the Election Commission, returning officer or any other election authority. Therefore, any matter connected with the conduct of election which falls under any of the grounds mentioned above for questioning an election can be raised in the election petition, irrespective of whether it was raised or agitated earlier or not before the concerned electoral authority. In the trial of election petition, it is open to both the parties to put forward all grounds in support of, or in negation of, a claim in the petition. For instance, while questioning the eligibility of a candidate to contest election on the ground of his disqualification under s 100(1)(a), it is not necessary that an objection on that ground should have been raised before the returning officer at the time of scrutiny of nomination papers; such objection can be raised in the election petition. Or, if the rejection of a nomination paper is objected to as improper rejection under s 100(1)(c) by the petitioner, the respondent will be entitled to defend the rejection on any new grounds which may not have been taken before the returning officer, that is to say, the grounds other than the grounds on which the returning officer rejected that nomination.[93]

90 *PR Belagali v BD Jatti* AIR 1971 SC 1348, *Wopansao v NL Odyuo* AIR 1971 SC 2123; *Hari Prasad Mulshankar Trivedi v VB Raju* AIR 1973 SC 2602; *Shyamdeo Prasad Singh v Nawal Kishore Yadav* AIR 2000 SC 3000.

91 *Baidyanath Panjiar v Sita Ram Mahto* AIR 1970 SC 314; *Kabul Singh v Kundan Singh* AIR 1970 SC 340; *Narendra Madivalapa Kheni v Manikarao Patil and Ors* AIR 1977 SC 2171.

92 *Hari Shanker Jain v Sonia Gandhi* AIR 2001 SC 3689.

93 *NT Veluswami Thevar v G Raja Nainar* AIR 1959 SC 422; See *Harikrishna Lal v Babu Lal Marandi* AIR 2004 SC 1067, (2003) 8 SCC 613.

Another important point which needs to be specially noted in the context of the provisions of s 100(1)(a) is that under this section, the election of the returned candidate can be called in question on the ground that he was not qualified or was disqualified on the date of his election, ie, on the date of declaration of result of the election. On the other hand, the returning officer, while scrutinising the nomination paper of a candidate under s 36(2), examines the question of qualification or disqualification of the candidate on the date of scrutiny of nominations. A candidate may not be disqualified on the date of scrutiny of nominations, but, subsequently, he may incur some disqualification before the date of his election. The question of such disqualification could obviously not be taken up before the returning officer; but it can be taken up before the high court in the election petition under s 100(1)(a). Conversely, a person may be suffering from some disqualification on the date of scrutiny of nominations, but that disqualification may stand removed on the date of his election.[94]

But in *JH Patel v Subhan Khan*,[95] the respondent (petitioner before the high court) was not allowed by the Supreme Court to raise a plea in support of his allegation that his nomination paper was improperly rejected by the returning officer. In the instant case, the nomination of the petitioner was rejected on the ground that he had not made and subscribed the requisite oath or affirmation within the time permissible. At the time of scrutiny of nominations, he did not disclose to the returning officer that he was also contesting from another constituency and he had taken the oath in that constituency in time and that, therefore, his nomination should not be rejected. When he took this plea before the high court, the high court held his nomination to have been improperly rejected by the returning officer and declared the election of the returned candidate (appellant before the Supreme Court) void. In appeal, the Supreme Court observed that the petitioner before the high court had deliberately not disclosed to the returning officer, a fact which was within his personal knowledge and whereby he engineered the rejection of his nomination. The Supreme Court held that in these circumstances the said petitioner had not come to the court with clean hands and was not entitled to seek indulgence of court and could not be allowed to raise a new point in the election petition. The Supreme Court reversed the decision of the high court, restoring the election of the returned candidate (appellant).

94 *Charan Shukla v Purshottam Lal Kaushik* AIR 1981 SC 547.

95 AIR 1996 SC 3439.

TRIAL OF ELECTION PETITIONS

Trial of Election Petition, When It Commences

In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial for making the case ready for trial. But the Supreme Court has held that this general rule is not applicable to the trial of election petitions, as in the case of election petitions all the proceedings commencing with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word 'trial'.[96]

Summary Dismissal of Election Petition in Specified Contingencies

As has been discussed above, an election petition shall be liable to be dismissed summarily *in limine* for non-compliance with any of the provisions of s 81 (relating to filing of petition within the prescribed period, presentation of petition in the manner prescribed, number of true copies to be filed with the petition, etc) or s 82 (relating to joinder of necessary parties to the petition) or s 117 (relating to the deposit of security for costs).

In *Charan Lal Sahu v Nandkishore Bhatt and Ors*,[97] it was contended that an election petition could not be dismissed under s 86(1) for non-compliance with the provisions of s 117 before the commencement of trial, as the marginal note of s 86 was 'Trial of Election Petitions'. The Supreme Court rejected that contention. The court observed that the marginal note of s 86 does not indicate that an election petition cannot be dismissed under s 86(1) before the commencement of trial, that the language of s 86(1) is clear and can admit of no other meaning, and that the marginal note cannot be so read as to control the power of the high court to dismiss the election petition *in limine*.

The provisions of s 86(1) were further elucidated by the Supreme Court in *Manohar Joshi v Nitin Bhaurao Patil*[98] in the following terms:

> Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provisions of s 81 or s 82 or s 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of section 81 requires the

96 *Harish Chandra Bajpai v Triloki Singh* AIR 1957 SC 444; *Kailash v Nankhu* AIR 2005 SC 2441.
97 53 ELR 284.
98 AIR 1996 SC 796.

checking of limitation with reference to the admitted facts and sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with Rules of the High Court. Thus, the compliance of ss 81, 82 and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of s 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of section 83 of the RP Act, which is a judicial function. For the reason, the non-compliance of section 83, is not specified as a ground for dismissal of the election petition under section 86.

An order of the high court dismissing an election petition *in limine* under s 86(1) on the ground of non-compliance with the provisions of ss 81or 82 or 117 shall be deemed to be an order dismissing the petition at the conclusion of its trial under s 98(a), though it may be made even before the commencement of the trial [explanation to s 86(1)]. Any such order shall be appealable before the Supreme Court under s 116A.[1] An election petition can also be dismissed summarily if no cause of action is furnished therein.[2]

Trial of Petition, Not Summarily Dismissed

As soon as may be after an election petition has been presented to the high court, it shall be referred to the judge or one of the judges assigned by the Chief Justice of the high court for the trial of election petitions [s 86(2)]. If in respect of the same election, more than one election petitions have been filed, all of those petitions shall be referred for trial to the same judge so that only one judge hears all such connected petitions [s 86(3)]. The underlying object appears to be that in some of these petitions common questions of fact or law might have been raised and it would not only facilitate the parties and the court in expeditious disposal of those questions but also avoid any conflicting or contradictory views being taken by different judges of the high court on the same questions of fact and law. But the judge may, in his discretion, try all those petitions separately or in one or more groups as may be deemed appropriate by him [s 86(3)].

1 *Chandrika Prasad Tripathi v Shiv Prasad Chanpuria* AIR 1959 SC 827; *Om Prabha Jain v Gian Chand* AIR 1959 SC 837; *Dipak Chandra Ruhidas v Chandan Kumar Sarkar* AIR 2003 SC 3701.
2 *Anil Vasudev Salgaonkar v Naresh Kushali Shigaonkar* (2009) 9 SCC 310.

Before proceeding further with the trial, the petition should be examined by the trial judge whether it complies fully with the provisions of ss 81, 82 and 117 in all respects.

Time Limit for Disposal of Petition

The law places an obligation on the judge trying an election petition to try it as expeditiously as possible and to make an endeavour to conclude the trial within six months from the date on which the election petition is presented to the high court for trial [s 86(7)]. To achieve this object, the law further provides that the trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day-to-day until its conclusion [s 86(6)]. Where the judge finds it necessary to adjourn the trial of the petition to a date beyond the following day of its hearing, he is obliged by law to record his reasons therefor [s 86(6)]. In *Makhan Lal Bangal v Manas Bhunia*,[3] the Supreme Court observed that 120 days were consumed by the high court in recording the evidence of 18 witnesses running into hundreds of pages. The apex court was of the view that if the conducting of examination-in-chief and cross-examination of witnesses would have been effectively controlled, the recording of evidence could have been concluded in less than half of the time than what had been consumed and the bulk of the evidence could have been reduced to one-third or one-fourth of what it was. The court was not amused with the reason given behind such extreme leeway in examining and cross examining the witnesses that in the trial of an election petition, the atmosphere is surcharged, the conducting counsel get over-zealous and it is not considered advisable by the trial court to interrupt the conducting of examination and cross-examination of the witnesses by the counsel. The apex court observed that curtailing delays is essential to expeditious disposal of the cases; that speedy disposal is the cry of the day and courts cannot act as silent spectators when evidence is being recorded. Judges must have full control over the file and effectively conduct proceedings keeping in view that no litigant has any such right as to waste the precious time of the court, the apex court advised. In *PH Pandian v P Veldurai*,[4] the Supreme Court observed that the high court, after reserving judgment on the conclusion of trial, took 22 months to pronounce it. The apex court did not consider it proper at all.

But it has been seen in actual practice that the above provisions of law have remained only a pious wish. Instances are not wanting where certain election petitions have remained undisposed of even beyond the expiry of the full term of five years for which a member whose election was challenged was elected and he served for the full term though remaining under a cloud. This aspect has not gone

3 AIR 2001 SC 490, (2001) 2 SCC 652.
4 (2001) JT 9-10.

unnoticed. The Election Commission has shown its concern in the matter and suggested in the past that the strength of the judges of the high courts may be increased so that the disposal of election petitions could be expedited, but such suggestion has its own financial and administrative implications for the government and the high courts. The Central Government invited the attention of the Law Commission in November 1995 to this aspect and desired the Commission to undertake a comprehensive study of the measures required to expedite the hearing of election petitions. Accordingly, the Law Commission, in its 170th Report submitted in May 1999, has suggested certain measures for the expeditious disposal of election petitions, like, fixing of some definite time-limits for issue of notice to the parties, filing of their written statements and rejoinders and framing of issues, recording of evidence through commissioners. Hopefully, necessary amendments to the law in the light of the recommendations of the Law Commission will be carried out soon to achieve the desired object.

Application of Civil Procedure Code to Trial of Election Petitions

Every election petition is to be tried by the high court, as nearly as may be, in accordance with the procedure applicable to the trial of civil suits under the Code of Civil Procedure 1908. But the Code of Civil Procedure (CPC) shall apply in such trial subject to the provisions of the 1951 Act and of the rules made thereunder [s 87(1)]. An election petition is a civil trial and if Parliament so wished, all aspects of trial could have been left to be taken care of by the pre-existing law, ie, CPC. However, Parliament has chosen to enact separate and independent provisions applicable to the trial of election petitions and placed them in the body of the 1951 Act. The applicability of CPC is circumscribed by two riders; firstly, the CPC procedure is applicable 'as nearly as may be'; and secondly, the CPC procedure would give way to any provisions of the 1951 Act and of any rules made thereunder.[5] In other words, where the 1951 Act or the rules made thereunder have made any special provision in relation to any matter for which the general provisions exist in the CPC, the provisions of the 1951 Act and the rules made thereunder will prevail upon those of the CPC. For instance, as discussed above, the concept of proper parties to a civil suit under the CPC is not applicable in relation to election petitions. Likewise, the high court cannot permit a necessary party to be joined as a respondent to an election petition beyond the period of limitation for filing the election petition, though under the CPC the court may allow it.

Application of the Indian Evidence Act 1872 to Trial of Election Petitions

The provisions of the Indian Evidence Act 1872, also apply to the trial of an election petition. But the application of this Act is also subject to the provisions of the 1951

5 *Kailash v Nankhu* AIR 2005 SC 2441, (2005) 4 SCC 480.

Act [s 87(2)]. For instance, no witness or other person shall be required to state in the course of his evidence for whom he voted at an election, except in the case of an election to the Council of States [s 94, as amended by the Representation of the People (Amendment) Act 2003].

Amendment of Pleadings

An election petition is not liable to be dismissed *in limine* merely because full particulars of a corrupt practice alleged in the petition are not set out therein. If the particulars of any corrupt practice alleged in the election petition are incomplete or defective, the high court may allow them to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition. But the high court cannot allow any amendment of the petition which will have the effect of introducing particulars of a new corrupt practice which was not previously alleged in the original petition [s 86(5)]. While allowing any such amendment of the petition, the court may fix such terms regarding the costs and otherwise, as it may deem fit [s 86(5)]. Non-supply of particulars where ordered by the court can lead to either striking off the pleadings or refusal to try the related instances of alleged corrupt practices.[6]

However, it is to be noted that any amendment to the pleadings under s 86(5) is permissible only in respect of the particulars of a corrupt practice alleged in the petition and not in respect of any material facts. The Punjab and Haryana High Court disallowed an amendment to thepleadings whereby the petitioner sought a change in the venue and date of an alleged speech by the respondent, as in the high court's opinion, it amounted to amendment in material facts.[7]

The courts possess general powers to allow the amendment of pleadings under the Civil Procedure Code 1908, but, such general powers are subject to the provisions of the 1951 Act and cannot be exercised so as to allow a new ground of challenge to the election, to be raised or inserted in an election petition, by way of amendment after the expiry of the period of limitation prescribed for filing the election petition.[8] The purpose is to see that every charge should be brought before the court before the prescribed period of limitation and none thereafter, so that the trial of the case may not be converted into a persecution by adding more and more charges or by converting one charge into another as the trial proceeds.[9] The amendment of the petition can also not be permitted so as to cure the defect of non-joinder of necessary parties, by way of withdrawal or abandonment of a part of the claim against the

6 *Sardar Harcharan Singh Brar v Sukh Darshan Singh* AIR 2005 SC 22.
7 *Surinder Pal v Gurpreet Singh Kangar and Ors* AIR 2005 P & H 251.
8 *Dhartipakar Madan Lal Agarwal v Rajiv Gandhi* AIR 1987 SC 1577.
9 *Raj Narain v Indira Nehru Gandhi* AIR 1972 SC 1302.

party which has not been joined as respondent.[10] It is well-established that parties cannot be allowed to adduce evidence beyond the pleadings in the petition. Therefore, any permissible amendment should be made in the pleadings before the parties go to trial. A pleading cannot be permitted to be amended after the evidence has been led so as to cure a defect in pleading and to bring it in conformity with the evidence adduced.[11] Likewise, a petition cannot be permitted to be amended by withdrawing a charge so as to remedy the defect of non-service of a true copy of the election petition on the respondent within the meaning of s 81(3).[12]

As mentioned above, the court has the power under s 86(5) to allow particulars to be amended only in respect of the corrupt practices alleged in the petition and not to permit any new grounds of charges to be raised or to so alter the character of the petition as to make it in substance a new petition.[13] The power of the court to allow amendments can be used to direct the furnishing of further and better particulars in respect of the corrupt practices already alleged in the petition.[14]

The provisions of s 86(5) were clarified by the Supreme Court in *Samant N Balakrishna v George Fernandez and Ors*[15] as follows:

> The power of amendment is given in respect of particulars but there is a prohibition against an amendment 'which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition'. One alleges the corrupt practice in the material facts and they must show a complete cause of action. If a petitioner has omitted to allege a corrupt practice, he cannot be permitted to give particulars of the corrupt practice. The argument that the latter part of the fifth sub-section is directory only cannot stand in view of the contrast in the language of the two parts. The first part is enabling and the second part creates a positive bar. Therefore, if a corrupt practice is not alleged, the particulars cannot be supplied. There is however a difference of approach between the several corrupt practices. If for example the charge is bribery of voters and the particulars give a few instances, other instances can be added: if the charge is use of vehicles for free carriage of voters, the particulars of the cars employed may be amplified. But if the charge is that an agent did something, it cannot be amplified by giving particulars of acts on the part of the candidate or vice versa. In the scheme of election law they are separate corrupt practices which cannot be said to grow out of the material facts related

10 *K Kamaraja Nadar v Kunju Thevar* AIR 1958 SC 687.
11 *Krishnaji Bapat v Dattaji Raghobaji Meghe* AIR 1995 SC 2284.
12 *US Sasidharan v K Karunakaran* AIR 1990 SC 924.
13 *Harish Chandra Bajpai v Triloki Singh* AIR 1957 SC 444; *DP Mishra v Kamal Narayan Sharma* AIR 1970 SC 1477.
14 *Raj Narain v Indira Nehru Gandhi* AIR 1972 SC 1302; *Roop Lal Sathi v Nachhattar Singh Gill* AIR 1982 SC 1559.
15 41 ELR 260.

to another person. Publication of false statements by an agent is one cause of action. Such a cause of action must be alleged in the material facts before particulars may be given. One cannot under the cover of particulars of one corrupt practice give particulars of a new corrupt practice. They constitute different cause of action.

The principle underlying s 86(5) was further elucidated by the Supreme Court in *Raj Narain v Indira Nehru Gandhi*.[16] The Supreme Court observed that the aim of that section is to see that a person accused of a corrupt practice must know precisely what he is accused of so that he may have the opportunity to meet the allegations made against him. Failure to plead even a single material fact would lead to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck out, but if material particulars are lacking, they may be supplied at a later date.[17] The Madhya Pradesh High Court, by its order dated 5 October 2009, in EP No. 22 of 2009, allowed the petitioner to amend the petition in the light of the objections raised by the appellant, beyond the period of limitation. On appeal, Altamas Kabir, J (as he then was) dismissed the appeal on the ground that the petitioner could be allowed to amend the petition to cure the defects in the public interest, even beyond the period of limitation. However, J Chelameswar, J, holding a different view allowed the appeal and dismissed the election petition before the High Court. In view of the difference of opinion between the two judges, the matter has been referred to the Chief Justice for placing it before the third judge, and the matter is not yet decided by the third judge or the larger bench.[18]

Striking Out Pleadings, Rejection of Petition if No Triable Issue Survives

Whereas the high court has the power under s 86(5) to allow an amendment of the election petition, it is also possessed of the power to strike out pleadings which in its opinion: (a) are unnecessary, scandalous, frivolous or vexatious; or (b) may tend to prejudice, embarrass or delay the fair trial; or (c) are otherwise abuse of the process of law. This power is available to the high court under O VI, r 16 of the CPC, which is applicable to the trial of election petitions under s 87(1). If after striking out such frivolous, vexatious pleadings, etc no cause of action survives, the high court is competent to dismiss the petition under O VII, r 11 of the above Code.

There was previously some doubt as to when any pleadings in the election petition could be struck out by the high court and whether it could be done only after the respondent had filed his written statement. The position has since been

16 AIR 1972 SC 1302.

17 *Ashwani Kumar Sharma v Yaduvansh Singh* AIR 1998 SC 337.

18 *Ishwardas Rohani v Alok Mishra & Ors* 2012 (4) SCJ 788.

clarified by the Supreme Court in *Dhartipakar Madan Lal Agarwal v Rajiv Gandhi*,[19] that this can be done by the high court even before the respondent has filed his written statement. The Supreme Court has further laid down in that case that, if, after striking out certain pleadings no cause of action survives as a triable issue, the court is empowered to reject the election petition under O VI, r 11 of the CPC. The apex court resolved the above controversy on this point by holding that:

> The first question which falls for our determination is whether the High Court had jurisdiction to strike out pleadings under Order VI, rule 16, CPC and to reject the election petition under Order VII, rule 11 of the Code at the preliminary stage even though no written statement had been filed by the respondent. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act before the High Court. Section 81 provides that an election petition may be presented on one or more of the grounds specified in s 100 by an elector or by a candidate questioning the election of a returned candidate. Section 83 provides that an election petition shall contain a concise statement of material facts on which the petitioner relies and he shall set forth full particulars of any corrupt practice that he may allege including full statement of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Section 86 confers power on the High Court to dismiss an election petition which does not comply with the provisions of sections 81 and 82 or section 117. Section 87 deals with the procedure to be followed in the trial of the election petition and it lays down that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable to the trial of suits under the Code of Civil Procedure 1908. Since provisions of Civil Procedure Code apply to the trial of an election petition, Order VI, rule 16 and Order VI, rule 17 are applicable to the proceedings relating to the trial of an election petition subject to the provisions of the Act. On a combined reading of sections 81, 83, 86 and 87 of the Act, it is apparent that those paras of a petition which do not disclose any cause of action, are liable to be struck off under Order VI, rule 16, as the Court is empowered at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. It is the duty of the court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court on examination of the plaint or the election petition finds that it does not disclose

19 AIR 1987 SC 1577; see also *Anil Vasudev Salgaonkar v Naresh Kushali Shigaonkar* 2009(9) SCC 310.

any cause of action it would be justified in striking out the pleadings. Order VI, Rule 16 itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by the respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the court finds that no triable issues remain to be considered it has power to reject the election petition under Order VII, rule 11.

In *Samar Singh v Kedar Nath*,[20] it was held that unnecessary pleadings can be struck out even after the settlement of issues or even after the issuance of summons to witnesses. The Supreme Court observed that it would be in the interest of the parties, and in public interest as well, if any preliminary objection in regard to unnecessary pleadings was disposed of at the earliest and the petition dismissed, if it did not disclose any cause of action. But any objection with regard to material facts or particulars should be raised at the earliest so that the trial does not unnecessarily drag. In *Jeet Mohinder Singh v Harminder Singh Jassi*,[21] the Supreme Court held that the respondent could not be permitted to raise such objection in the replication.

If any election petition is dismissed after striking out unnecessary pleadings and for not raising any triable issue, such dismissal of the petition will not be under any express provision, like, s 86, of the 1951 Act, but under O VII, r 11 of the CPC.[22]

However, the election petition cannot be dismissed under the said O VII, r 11, if after striking out unnecessary pleadings even if one cause of action or triable issue survives in the petition.[23] A claim disclosing some reasonable cause of action or raising some question fit to be decided by the court cannot be struck out on the ground that the case is weak and not likely to succeed. A reasonable cause of action is said to mean a cause of action with some chance of success, when only the allegations in the pleading are considered.[24]

Filing of Written Statement by Respondent

Order VIII, r 1 of CPC provides that the respondent shall, within thirty days from the date of service of summons on him, present a written statement of his defence: provided that where he fails to file his written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be

20 AIR 1987 SC 1926.
21 [1999] 4 LRI 956.
22 *Lalit Kishore Chaturvedi v Jagdish Prasad Thada* AIR 1990 SC 1731.
23 *Subhash Desai v Sharad J Rao* AIR 1994 SC 2277.
24 *Mohan Rawale v Damodar Tatyaba* (1994) 2 SCC 392.

specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons. Considering the object and purpose behind enacting O VIII, r 1, the Supreme Court held in *Kailash v Nankhu*,[25] that the provision has to be construed as directory and not mandatory. Ordinarily, the time schedule prescribed by O VIII, r 1 has to be honoured; but in exceptional situations occasioned by reasons beyond the control of the respondent, the court may extend the time for filing the written statement beyond the prescribed periods of thirty days and ninety days, by way of exception and for reasons assigned by the respondent and also recorded in writing by the court to its satisfaction. The apex court has laid down that a prayer seeking time beyond ninety days for filing the written statement ought to be made in writing and the court may put the respondent on terms including imposition of compensatory costs and may also insist on affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension so as to convince the court that the prayer was founded on grounds which do exist. Summing up the law on this point in the above case of *Kailash v Nankhu*, the Supreme Court held:

(I) The trial of an election petition commences from the date of the receipt of the election petition by the court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition affording opportunity to the defendant to file written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and Rules made for purposes of that Act and a resort to the provisions of the CPC is not called for. (ii) On the language of Section 87 (1) of the act, it is clear that the applicability of the procedure provided for the trial of suits or the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the CPC apply to the trial of election petitions under the act with flexibility and only as guidelines. (iii) In case of conflict between the provisions of the Representation of the People act, 1951 and the Rules framed thereunder or the Rules framed by the High Courtin exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter. (iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not

25 AIR 2005 SC 2441.

impose an embargo on the power of the court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the noncompliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away. (v) Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.

Framing of Issues and Evidence

An election petition is like a civil trial. The Supreme Court has observed in *Makhan Lal Bangal v Manas Bhunia*,[26] that the stage of framing the issues in an election petiton is important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the court reflecting the pleadings of the parties pinpoints into issues the disputes on which the two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. The scheme of O XIV, CPC dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by one party and denied by other should form the subject of a distinct issue. An obligation is cast on the court to read the plaint or petition and the written statement or counter affidavit, if any, and then

26 AIR 2001 SC 490.

determine with the assistance of the learned counsel for the parties, the material propositions of fact or of law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the court. It is for the presiding judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issues may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission. The petition may be disposed of at the first hearing if it appears that the parties are not at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues of fact and the pleadings. No evidence on controversies, not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of providing which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment then proceeding issue-wise would be able to tell precisely how the dispute was decided. Each one of the corrupt practices alleged by the petitioner and denied by the defendant should form the subject matter of a distinct issue sufficiently expressive of the material proposition of fact and of law arising from the pleadings.

The Supreme Court has reiterated in *Ananga Uday Singh Deo v Ranga Nath Mishra and Ors*[27] that no evidence can be allowed to be led relating to allegations about which no issue has been framed. Evidence can be allowed to be led on a plea properly raised and issue framed, and irrelevant, impermissible and inadmissible evidence cannot be allowed to be brought on record.

If the pleadings did not contain the necessary foundation for raising an appropriate issue, the same cannot go to trial. Any amount of evidence in that regard, however excellent the same may be, will be futile, the apex court observed in *TH Musthaffa v MP Varghese*.[28]

In *Kalyan Singh Chouhan v CP Joshi*,[29] the Supreme Court reiterated that court is not required to frame an issue which does not arise on pleadings and the court cannot decide a suit on a matter or point on which no issue has been framed. The object of framing issues is to ascertain and shorten the area of dispute and pin point the points required to be determined by the court. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. It was, however, further held that if the parties proceed to trial fully knowing the rival case and leading all evidence not only in support of their contentions but also in refutation thereof by the other side, in such an eventuality, absence of an issue would not be

27 AIR 2001 SC 2992.
28 AIR 2000 SC 153.
29 2011(2) SCJ 622.

fatal and it would not be permissible for a party to submit that there has been a mistrial and the proceedings stood vitiated.

Documentary Evidence

In the trial of an election petition, documentary evidence plays a vital role, because in many cases it may be a contemporaneous record of the events and facts as and when they took place. But it is an established proposition that no evidence can be led on a plea not raised in the pleadings and that no amount of evidence can cure defect in the pleadings.[30]

The 1951 Act says that a document shall not be inadmissible in evidence on the ground that it is not duly stamped with the requisite stamp duty or not registered under the provisions of Registration Act, even if under any other law such document would not have been admissible in evidence, for want of requisite stamp duty or registration (s 93).

High courts, trying an election petition, possess the power not only to admit documents tendered in evidence by the parties but also to summon the documents considered by them to be relevant for the determination of the issues in the petition. But such power of discovery and inspection of records available to the high courts under O XI r 14 of the Civil Procedure Code is to be exercised after due examination of expediency, justness and relevancy of the records in relation to the trial of the petition. The court will not exercise its discretion of summoning records where it may help the party seeking their discovery and production in making a roving and fishing inquiry. In particular, the court has to keep in mind that the secrecy of ballot is not violated by the inspection of the documents, like, ballot papers, marked copies of the electoral roll, counterfoils of the ballot papers containing the signatures or thumb impressions of voters, etc, unless their inspection is absolutely necessary in the consideration of an issue concerning the material effect on the result of election in so far as the returned candidate is concerned. The inspection of such documents should be allowed only very sparingly. For this also, the party praying for the discretion of the court must make out a cast-iron case by laying the actual foundation and producing necessary material in the course of the proceedings and not on the basis of bare allegations in the petition.[31] Any such order for the inspection of documents must be made by the court in writing and not by an oral direction.[32]

Secondary evidence is not admissible until the non-production of the primary evidence is satisfactorily proved. When the original is a public document, secondary evidence is admissible even though the original is still in existence and available and

30 *Ravinder Singh v Janmeja Singh* AIR 2000 SC 3026, (2000) 8 SCC 191.
31 *Hari Ram v Hira Singh* AIR 1984 SC 396; *Basanagouda v Dr SB Amarkhed* AIR 1992 SC 1163.
32 *A Neelalohithadasan Nadar v George Mascrene* (1994) Supp 2 SCC 619.

a certified copy of a document issued by the Election Commission is a public document.[33]

In *Quamarul Islam v SK Kanta*,[34] certain material was referred to and relied upon by the petitioner in his petition, but it was not filed along with the petition. Subsequently, after the recording of evidence had commenced, the petitioner sought to file that material stating that it was not earlier available with him, and the high court allowed the same to be filed. But the Supreme Court held that, on the facts of that case, the approach of the high court was erroneous and such additional material should not have been permitted to be brought on record.

In the same case of *Quamarul Islam*, the Supreme Court held that newspaper reports by themselves are not evidence of the contents thereof as these reports are only hearsay evidence and these have to be proved in the well settled manner of proving a newspaper report, like examining the reporter. Earlier, the apex court had held in *Samant N Balakrishna v George Fernandez and Ors*[35] that:

> A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well-known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible.

Though a video cassette is a public document, it cannot be read in evidence in the absence of any evidence regarding the source and the manner of acquisition of the cassette. Evidence like tapes or cassettes is more susceptible to tampering and alterations and such evidence has to be received with caution.[36]

Oral Evidence

All parties to an election petition are free to lead oral evidence of witnesses whose evidence in their opinion will prove or disprove the averments or allegations made in the petition. These witnesses will be subject to the same provisions of examination-in-chief, cross-examination and re-examination as in a civil suit tried under the provisions of the Civil Procedure Code 1908 and in accordance with the provisions of the Indian Evidence Act 1872. The Supreme Court has observed that in case of a living person, evidence in a judicial proceeding must be tendered by calling the witness in witness box.[37]

33 *Tukaram S Dighole v Manikrao Shivaji Kokate* 2010(4) SCJ 401.
34 AIR 1994 SC 1733.
35 [1969] 3 SCR 603.
36 *Tukaram S Dighole v Manikrao Shivaji Kokate* 2010(4) SCJ 401.
37 *Muneer Ahmed v State of Rajasthan* AIR 1089 Supreme Court 705.

But the high court has the discretion to refuse to examine any witness or witnesses, if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the election petition, or that the party tendering such witness or witnesses is doing so on frivolous grounds, or with a view to delaying the proceedings [*proviso* to 87(1)].

The Supreme Court has laid down in *Quamarul Islam v SK Kanta*[38] that the high court must carefully scrutinise the list of witnesses before summoning them for evidence. The parties should be required to submit their lists of witnesses indicating the relevance of their evidence to the issues under trial. This is necessary not only to put the opposite party on notice about the evidence sought to be adduced, but also to bind the summoning party to adduce relevant evidence as detailed in the list.

In *Makhan Lal Bangal v Manas Bhunia,*[39] the Supreme Court observed that the oral evidence of witnesses was recorded by the trial judge in the question-answer form. The apex court advised the trial courts to observe the following procedure while recording oral evidence in election petitions:

> In almost all the Courts in the country holding trials in civil and criminal cases, the oral examination of the witnesses though conducted in question-answer form by the counsel, is generally recorded in narrative by the presiding judges. The Court has power to regulate the manner of recording evidence. In spite of the manner of recording evidence being in narrative the presiding judge can wherever necessary direct a particular question or group of questions to be recorded in question-answer form. Wherever necessary a note as to demeanour of a witness can always be made by the presiding judge before whom the witness is being examined and such note on demeanour made in the presence of the witness and counsel for both the parties would be more useful to the trial Court itself while hearing arguments of the counsel for the parties at the end of the trial and also for the appellate Court rather than a mere record of the statement in question-answer form. Incidentally, and interestingly, it may be noticed that when the Code of Criminal Procedure, 1973 was enacted, repealing the 1898 Code, Section 276 was introduced providing for evidence to be ordinarily taken down in the form of question and answer but vesting a discretion in the presiding judge to record the evidence in the form of a narrative. Within three years the Law Commission of India found this system causing delay in trial and hence not workable and on its recommendation, by the Code of Criminal Procedure (Amendment) Act (45 of 1978), Section 276 was amended so as to provide that in trial before Courts of Session evidence shall ordinarily be taken down in the form of a narrative but the presiding Judge may in his discretion take down or cause to

38 AIR 1994 SC 1733.

39 AIR 2001 SC 490, (2001) 2 SCC 652.

be taken down any part of such evidence in the form of question and answer. Thus recording of evidence in narrative form is the rule. Such mode of recording evidence is statutorily provided for session trials where life and liberty of persons is at stake. We fail to understand why the recording of evidence in narrative cannot be a mode to be followed in the trial of election petitions. Assigning serial numbers to the witnesses on their depositions such as PW1 (and so on) for petitioners' witnesses and RW1 or DW1 (and so on) for the respondents' or defendants' witnesses would provide a convenient mode of referring to the witnesses during the course of hearing and while writing the judgment.

Expenses of Witness

A person may be given the reasonable expenses incurred by him in attending the court to give evidence (s 96). Normally, the expenses on witnesses will be borne by the party on whose behalf they have been summoned for the purpose of evidence. The high court may direct these expenses to be part of costs.

Secrecy of Voting Not to be Infringed in Oral Evidence

Secrecy of voting is sacrosanct and must be maintained at all stages, whether at the time of the election or thereafter, when an election is challenged and an election petition is being tried. Therefore, the law provides that no witness or other person shall be required to state for whom he has voted at an election (s 94). But this embargo on deposition by a witness is no longer applicable in the case of an election petition calling in question an election to the Council of States, where the votes are now taken by open ballot [s 94, as amended by the Representation of the People (Amendment) Act 2003].

However, it must be remembered that there is no prohibition under the law against a person willing to disclose voluntarily for whom he voted, either in the trial of an election petition or at any time after he has voted and come out of the polling station. Section 128 which requires secrecy to be maintained by every officer, clerk, agent or other person performing any duty in connection with the recording, or counting of votes at an election (other than an election to the Council of States), does not apply to the elector and he does not commit any offence under s 128, if he communicates any information calculated to violate the secrecy of his vote. Such question directly arose in *Raghbir Singh Gill v Gurcharan Singh Tohra,*[40] for the consideration of the Supreme Court. In this case, certain ballot papers sent by post were alleged to have been tampered with during transit to the returning officer. In the trial of the election petition, the respondent contended that the voters concerned could not state, even voluntarily, in evidence for whom they had voted as that would

40 AIR 1980 SC 1362.

violate the secrecy of their votes. The Supreme Court negatived that contention stating that secrecy of vote must yield to purity of election and held:

> Secrecy of ballot, though undoubtedly a vital principle for ensuring free and fair elections, it was enshrined in law to subserve the larger public interest, namely, purity of election for ensuring free and fair election. The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair election, viz, purity of election. They can co-exist but as stated earlier, where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election to unravel foul play.

The apex court held that the inescapable conclusion is that s 94 enacts a qualified privilege in favour of a voter not to be compelled to disclose for whom he voted, but if he chooses to volunteer the information, s 94 is not violated. The Supreme Court further held that 'Section 128 has nothing to do with the voter disclosing for whom he voted. It casts an obligation of secrecy on those connected with the process of election and not on the voter'.

Answering of Criminating Questions in Oral Evidence and Certificate of Indemnity

Though no witness can be asked, in view of s 94, in oral examination to disclose for whom he voted, a witness shall not be excused from answering any question as to any matter relevant to an issue in the trial of an election petition, upon the ground that by answering such question the witness may criminate himself or tend to criminate him. He can also not refuse to answer a question upon the ground that it may expose him or may tend to expose him to any penalty or forfeiture under some law [s 95(1)].

However, the law provides protection and grants indemnity to such witness who answers all questions truly [proviso to s 95(1)]. He shall be entitled to receive a certificate of indemnity from the high court, and any answer given by him to a question put by or before the high court shall not be admissible in evidence against him in any civil or criminal proceeding. But such indemnity shall not be available to him where any criminal proceeding is initiated against him for perjury in respect of the evidence in which he answered the criminating question.

Where a certificate of indemnity has been granted to any witness by the high court, it may be pleaded by him in any court and it shall be a full and complete defence to any charge of electoral offence either under ch IXA of the IPC or under Part VII of the 1951 Act, arising out of the matter to which such certificate relates. But such certificate shall not be deemed to relieve him from any disqualification in

connection with an election imposed by the 1951 Act or under any other law [s 95(2)].

Recounting of Votes Under Direction of High Court

In election petitions, where an election is challenged under s 100(1)(d)(iii) on the ground that the result of the election, in so far as it concerns the returned candidate, is materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, requests are often made by the petitioners to the high courts to direct a recount of the votes cast at the election. Such prayers are particularly made when a further declaration is claimed in the petition that some candidate, other than the returned candidate, may be declared elected under s 101(a), for having received a majority of the valid votes cast at the election. The Supreme Court has laid down certain principles[41] from time to time which the high courts should keep in mind and observe while considering the applications for recount in such cases. Those principles were summed up by the Supreme Court in *Bhabi v Sheo Govind*[42] as follows:

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;
(2) That before inspection is allowed the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
(3) The court must be *prima facie* satisfied on the materials produced before the court regarding the truth of the allegations made for a re-count;
(4) That the court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
(5) That the discretion conferred on the court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and
(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the *prima facie* satisfaction of the court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.

41 See *Ram Sewak Yadav v Hussain Kamil Kidwai* AIR 1964 SC 1249; *Ram Autar Singh Bhadauria v Ram Gopal Singh* AIR 1975 SC 2182, etc.
42 (1976) 1 SCC 687.

The above principles have been reiterated by the Supreme Court with approval in several subsequent cases,[43] and continue to guide the high courts in the matter. The above principles have been more succinctly restated subsequently by the Supreme Court in *VS Achuthanandan v PJ Francis*[44] as follows:

1. The secrecy of the ballot is sacrosanct and shall not be permitted to be violated and merely for asking or on vague and indefinite allegations or averments of general nature. At the same time purity of election process has to be preserved and therefore inspection and re-count shall be permitted but only on a case being properly made out in that regard.
2. A petition seeking inspection and re-count of ballot-papers must contain averments adequate, clear and specific making out a case of improper acceptance of rejection of votes or non-compliance with statutory provisions in counting. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted would not serve the purpose.
3. The scheme of the rules prescribed in Part V of the Conduct of Election Rules, 1961 emphasises the point that the election petitioner who is a defeated candidate, has ample opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly over-ruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related. It is in the light of this background that s 83 (1) of the Act has to be applied to the petitions made for inspection of ballot boxes. Such an application must contain a concise statement of the material facts.
4. The election-petitioner must produce trustworthy material in support of the allegations made for a re-count enabling the Court to record a satisfaction of a prima-facie case having been made out for grant of the prayer. The Court must come to the conclusion that it was necessary and imperative to grant the prayer for inspection to do full justice between the parties so as to completely and effectually adjudicate upon the dispute.
5. The power to direct inspection and re-count shall not be exercised by the Court to show indulgence to a petitioner who was indulging in a roving

43 *Jitendra Bahadur Singh v Krishna Behari and Ors* AIR 1970 SC 27; DP *Sharma v Commr and Returning Officer and Ors* 1984 SCC Supp 15; *PKK Shamsudeen v KAM Mappillai Mohideen and Ors* (1989) 1 SCC 52; *Dudhani v Uday Kumar Singh* (1993) Supp 2 SCC 82; *MR Gopalakrishnan v Thachady Prabhakaran* (1995) Supp 2 SCC 101; *VS Achuthanandan v PJ Francis and Anor* [1999] 2 LRI 400; *M Chinnaswamy v KC Palaniswamy and Ors* AIR 2004 SC 541; *Uday Chand v Surat Singh & Anr Civil Appeal* No.5462 of 2008 decided on 9 October 2009.

44 AIR 2001 SC 837, (2001) 3 SCC 81.

enquiry with a view to fish out material for declaring the election to be void.

6. By mere production of the sealed boxes of ballot-papers or the documents forming part of record of election proceedings before the Court the ballot papers do not become a part of the Court record and they are not liable to be inspected unless the Court is satisfied in accordance with the principles stated hereinabove to direct the inspection and re-count.
7. In the peculiar facts of a given case the Court may exercise its power to permit a sample inspection to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made in support of a prayer for re-count and not for the purpose of fishing out materials.

The Supreme Court has observed in *Udey Chand v Surat Singh and another*[45] that the petition for recount must contain adequate statement of material facts on which the election petitioner relies. A narrow margin of four votes does not *per se* give rise to a presumption that there had been an irregularity or illegality in the counting of votes. Also, recount of votes cannot be directed on the sole factor that the recount would not cause any prejudice to the respondent in the petition and that it would reinforce transparency in the election process, particularly when the margin of votes was very narrow. The onus to prove the allegation of irregularity, impropriety or illegality in the election process on the part of the election officer is on the election petitioner and not on the election officer.[46]

In *Sohan Lal v Babu Gandhi*[47] the Supreme Court added that it is not necessary that the candidate seeking recount before the high court must have applied for such recount before the returning officer also. In *Haribhau Madhav Javle v Ramesh Vithal Choudhari*,[48] the Supreme Court further clarified that the petitioner cannot be estopped from seeking recount in the election petition even if his election agent had stopped the recounting of invalid votes for the reason that he was satisfied that there could be no objection in that behalf.

In *Mahant Ram Parkash Das v Ramesh Chandra and Ors*,[49] the Supreme Court has added that the smallness of the victory margin may not by itself be a sufficient ground for recount. In this case, the victory margin was of 53 votes and the counting agents of the petitioner had signed certificates with regard to the proper counting at the end of each round of counting.

45 2010 (1) SCJ 208.

46 *Kattinokkula Murali Krishna v Veeramalla Koteswara Rao and other* [2010 (1) SCJ 978].

47 (2000) 1 SCC 10.

48 (2002) 10 SCC 102.

49 (1999) 9 Supreme Today 282.

In *Vadivelu v Sundaram and Ors*,[50] the appellant had secured 1010 votes, as against 1011 votes polled by the respondent, at the election for the office of the president of Vannavalkudi Village Panchayat in Tamil Nadu. On an election petition, the District Judge, Pudukkottai directed recount of votes and, on the basis of the recount done by a local commissioner appointed by that judge, he declared the appellant as elected for having secured the majority of votes at the election. The Madras High Court, however, struck down the order of the district judge in the revision petition, holding that the election petition was bereft of material fact or particulars and no order of recount could have been given by the district judge on the basis of the general and bald allegations and vague pleadings in the petition. On appeal, the Supreme Court also agreed with the high court and dismissed the election petition and the appeal. Analysing the past cases on this aspect, the apex court observed that the view consistently taken by that court is that recount of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting, that the petitioner who seeks recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes which materially affected the result of election, and that recount should be ordered only if the court is satisfied about the truthfulness of the above allegation. The Supreme Court further observed that secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election, whereby the defeated candidate is seriously prejudiced, the court can resort to recount of votes under such circumstances to do justice between the parties, the apex court added.

In *Shradha Devi v KC Pant*,[51] it was held by the Supreme Court that where the petitioner seeks relief of scrutiny and recount of votes on the allegations of miscount or improper rejection of valid votes, the petitioner has to prima facie establish errors in counting and show that the errors are of such magnitude that the result of election, in so far as the returned candidate is concerned, is materially affected. If proof is furnished of some errors in respect of some ballot papers, the court cannot limit the scrutiny or recount in respect of those ballot papers only. The law does not require that a specific averment must be made in respect of each ballot paper which is alleged to be improperly rejected and recount allowed only in respect of those ballot papers which can be correlated to the allegations in the petition. The court held that a general recount of all disputed ballot papers should be allowed in such a case, and remanded the case to the high court as it had allowed recount of only four of eleven disputed ballot papers in the case.

50 AIR 2000 SC 3230.
51 AIR 1982 SC 1569.

In *Mahendra Pal v Ram Das Malanger and Ors*,[52] the returned candidate had won the election just by three votes. It was shown to the high court that eight ballot papers were counted extra by the returning officer as per the result sheet in Form 20, but the recounting was not allowed by the high court on the ground that the serial numbers of those extra ballot papers were not given. The Supreme Court struck down the order of the high court and remanded the case to the high court for further trial, holding that it was not necessary to mention the serial numbers of the disputed extra ballot papers. On retrial, the high court again dismissed the election petition on the ground that the petitioner had failed to establish that there was any irregularity or illegality in counting of votes which could justify a direction to recount the votes. The Supreme Court also dismissed the further appeal holding that recount cannot be ordered merely on ground of discrepancy in number of votes found and number of ballot papers issued; discrepancy could be attributed to accidental slip or clerical or arithmetical mistake.[53] However, inspection of register of voters in Form 17A by the court was held to be permissible where a clear case was made out for such inspection as that official record would be the most reliable evidence where there was impersonation.[54] But, the Supreme Court in this case did not approve of the order of the High Court which was passed without assigning any reason whatsoever in support of its conclusion permitting the parties to inspect the registers as a matter of course, observing that such laconic and unreasoned order could have a serious bearing on the questions that arise for consideration in the main election petition under adjudication.

In *Azmat Khan v Khillan Singh*,[55] the Punjab and Haryana High Court ordered a recount of votes, by agreement of both the parties, as a result of which the petitioner was declared elected on having been found to have polled the majority of votes. However, it was contended before the Supreme Court by the respondent who had been unseated that the high court could not have directed a recount on the agreement of parties. The Supreme Court did not agree with the contention of the appellant and dismissed his appeal.

In *TA Ahammed Kabeer v AA Azeez and Ors*[56] also, the Supreme Court held that the pleadings and proof in the matter of recount have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recounting. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to. The court cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount

52 AIR 2000 SC 16.
53 *Mahendra Pal v Ram Dass Malanger* AIR 2002 SC 1291.
54 *Fulena Singh v Vijoi Kumar Sinha* 2009 (3) SCJ 339; 2009 (5) SCC 290.
55 74 ELR 39 (SC).
56 AIR 2003 SC 2271, (2003) 5 SCC 650.

though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. There may not be any specific allegation in the pleading in respect of certain ballot papers, but the absence of specific averments in the pleadings is no bar to inspect such ballot papers. In the very nature of things, the allegation can be not on each specific instance of any error of counting or miscount but broad allegations indicating error in counting or miscounting necessitating a recount. The expression 'refusal' implies 'refuse to accept' and the expression 'reception' implies 'refuse to reject'. The expressions 'improper reception' and 'improper refusal' of votes have to be interpreted as would carry out the purpose underlying the provision contained in s 100 specifying grounds on which an election may be declared void.[57]

Where the counting of votes was done under two officers and they adopted different standards for acceptance and rejection of ballot papers—one accepting a ballot paper if the voting seal was found partially on the candidate area and partially in the shaded area, and the other accepting the ballot paper only if more than 50 percent of the voting seal was found on the candidate area and rejecting it if the voting seal was less than 50 percent on that area—a recount of all the rejected ballot papers was directed as the number of rejected ballot papers was much more than the margin of votes between those of the returned candidate and of the next candidate.[58] However, the fact that some ballot papers without the signature of presiding officer were found in the ballot box of one polling station was not considered sufficient justification for the inspection of ballot boxes in other polling booths to find out whether there was such omission by the presiding officers in other booths as well, as it would amount to allowing the fishing out of evidence to support the contention of the petitioner.[59]

Counting of Tendered Ballot Papers

Under the 1961 Rules, the tendered ballot papers, that is to say, the ballot papers cast by the electors in whose place someone else has voted by impersonation, are not counted by the returning officer at the time of counting of votes. But the high court may count the votes cast by means of such tendered ballot papers, where the allegation is that the result of election of the returned candidate has been materially affected by improper reception or improper rejection of votes at the election. The circumstances in which tendered ballot papers should be counted by the high courts

57 *S Raghbir Singh Gill v Gurucharan Singh Tohra* AIR 1980 SC 1362; See also *Vadivelu v Sundaram* AIR 2000 SC 3230; *VS Achuthanandan v PJ Francis* AIR 2001 SC 837; *PH Pujar v Kanthi Rajashekhar* AIR 2002 SC 1368; *Mahender Pratap v Krishan Pal and Ors* AIR 2003 SC 304; *Chandrika Prasad Yadav v State of Bihar* AIR 2004 SC 2036.

58 *PH Pujar v Kanthi Rajashekhar* AIR 2002 SC 1368.

59 *Rajankumar Shankarrao Taware v Ajit Anantrao Pawar* AIR 2003 SC 1554.

were explained by the Supreme Court in *Wilfred D'Souza v Francis Menino Jesus Ferrao*,[60] as follows:

> Before however, a tendered ballot paper can be taken into account during the proceedings of election petition, evidence would have to be led on the following two points:
>
> (1) The person who cast the initial vote as a voter on a particular serial number in the electoral roll was someone other than the genuine voter mentioned at that number.
>
> (2) It was such genuine voter who marked the tendered ballot paper.
>
> So far as the first point is concerned, the evidence of the genuine voter that he had not cast such initial vote would normally and in the absence of any circumstance casting doubt regarding its veracity be sufficient. Once the above two points are proved, the following consequences would follow:
>
> (a) The court would exclude the vote initially cast by the person other than the genuine voter from the number of votes of the candidate in whose favour it was cast; and
>
> (b) The court would further take into account the tendered ballot paper in favour of the candidate in whose favour it is duly marked.
>
> It may also be mentioned that the proper occasion for scrutinising tendered ballot papers would normally arise only when the difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is a possibility of that difference being wiped out and the result of election being thus materially affected if the court takes into account the tendered ballot papers and excludes from consideration the corresponding votes which were cast by persons other than the genuine voters.

In this case, the appellant had lost the election to the Goa legislative assembly from Benaulim assembly constituency only by two votes and 10 tendered votes which were cast had not been counted by the returning officer under the relevant rules [proviso to r 56(6), 1961 Rules]. As a result of the counting of tendered votes by the high court in pursuance of the above decision of the Supreme Court, an equality of votes was found between the appellant and the respondent. On drawing of lot by the high court, the appellant got elected as the lot favoured him.[61] In *Kalyan Singh Chouhan v CP Joshi*,[62] it was alleged by the election petitioner that ten tendered votes had been cast at various polling stations; however, in the election petition, allegations of irregularity/illegality in counting were made only in respect of six tendered votes. The Supreme Court held that the court could look into the question

60 59 ELR 232 (SC).

61 *Wilfred D'Souza v Francis Menino Jesus Ferrao* 59 ELR 292.

62 2011(2) SCJ 622.

of counting of only six tendered votes and not all the ten, even though it was contended that for resolving the controversy the examination of other four tendered votes was also necessary. The court held that no roving and fishing enquiry would be permitted during the trial of an election petition and that a relief had to be founded only on the pleadings.

Meaning of 'Result of Election Materially Affected'

Under s 100(1)(d), the high court is empowered to declare the election of the returned candidate void if it is satisfied that the result of election, in so far as it concerns the returned candidate, has been materially affected on any of the grounds specified in sub-cll (i)–(iv) of that section. What is meant by the 'result of election materially affected' was explained by the Supreme Court as early as in 1954 in *Vashisht Narain Sharma v Dev Chand and Ors*,[63] as there was much controversy on the meaning of that expression and no uniform or consistent view had been taken by the election tribunals. Explaining the meaning of that expression in s 100(1)(d), the Supreme Court held that:

> These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate.

In other words, it will have to be proved to the satisfaction of the court by adducing evidence to the effect that the returned candidate had in fact received lesser number of votes than some other candidate or the candidate in whose favour the declaration that he was actually elected is being sought in the petition. In this case, the returned candidate had won by a margin of votes which was less than the votes polled by another candidate whose nomination paper was found to have been improperly accepted and the court held that, in the absence of proof, it was not possible for anyone to predicate how many or which proportion of the wasted votes of the latter candidate would have gone to one or the other remaining candidates.

The Supreme Court has itself observed in *Samant N Balakrishna v George Fernandez and Ors*[64] and *Paokai Haokip v Rishang*[65] that it is a very difficult burden for the petitioner to discharge but he cannot be relieved of that burden in view of the specific requirements of s 100(1)(d). The apex court has observed that it is for Parliament to resolve the difficulty.

63 AIR 1954 SC 513.
64 41 ELR 260.
65 AIR 1969 SC 663.

In *Chhedi Ram v Jhilmit Ram*,[66] the respondent had won the election by a margin of 373 votes. Here also, the nomination of one of the candidates was found to have been improperly accepted, who had polled 6,710 votes. The Supreme Court observed that the candidate whose nomination was improperly accepted had obtained votes almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes and bore a fairly high proportion, a little over one-third, to the number of votes secured by the successful candidate. The Supreme Court held that in such a situation the result of the election may safely be said to have been affected, and accordingly declared the election of the returned candidate as void. The Supreme Court also observed that if having regard to the facts and circumstances of a case, the reasonable probability is all one way, a court must not lay down an impossible standard of proof.

But the view taken in *Chhedi Ram*'s case,[67] has not been followed in the subsequent cases which have come up before the Supreme Court on the same issue. The Supreme Court has decided those cases in the light of the law laid down in *Vashisht Narain Sharma*'s case,[68] holding the decision in *Chhedi Ram*'s case to be applicable on its own facts, and insisting upon the proof of the result having been materially affected as in the former case.[69] In *Shiv Charan Singh*'s case, the margin of votes between the winning and the next highest candidate was 4,497 and the number of wasted votes polled by candidate whose nomination was found to have been improperly accepted was 17,841; but the Supreme Court did not declare the election of the returned candidate to be void as it observed that it could not be held on the basis of surmises or conjectures that the election of the returned candidate had been materially affected.

In *Dile Ram v Tek Chand*,[70] the Himachal Pradesh High Court, by its order dated 24 March 2000, declared the election of the returned candidate void on the ground that the nomination paper of a defeated candidate was improperly accepted, as he was a government servant. In this case, the victory margin was of 759 votes, whereas the candidate whose nomination was improperly accepted had secured 2,287 votes. Evidence was led before the high court to the effect that the said candidate was an active worker of the Rashtriya Swyamsevak Sangh and had cut deeply into the votes of the defeated candidate of the Bharatiya Janata Party, as a parallel candidate of that party. The high court, relying on the decision in *Chhedi Ram*'s case (above), came to

66 84 ELR 102 (SC).
67 84 ELR 102 (SC).
68 AIR 1954 SC 513.
69 See *Shiv Charan Singh v Chandra Bhan Singh* AIR 1988 SC 637, *Lata Devi v Haru Rajwar* AIR 1990 SC 19, *J Chandrasekhara Rao v V Jagatha Rao* (1993) Supp 2 SCC 229, *I Vikheshe Sema v Hokishe Sema* AIR 1996 SC 1842 *Uma Ballav Rath v Maheshwar Mohanty* AIR 1999 SC 1322.
70 Election Petition on No 2 of 1998.

the view that the election of the returned candidate had been materially affected by the improper acceptance of the nomination of the above candidate who had secured 2,287 votes as against the winning margin of the elected candidate of 759 votes. On appeal, however, the Supreme Court did not agree with the view of the High Court and, applying the law laid down by it in the earlier cases of *Vashisht Narain Sharma, Samant N Balakrishna,* etc, reversed the decision of the high court and restored the election of the appellant.[71]

The law on the subject has been succinctly summed up by the Supreme Court in *Santosh Yadav v Narender Singh*[72] as follows:

(1) A case of result of the election, in so far as it concerns the returned candidate, having been materially affected by the improper acceptance of any nomination, within the meaning of Section 100(1) (d) (i) of the Representation of the People Act 1951 has to be made out by raising specific pleadings setting out all material facts and adducing cogent evidence so as to enable a clear finding being arrived at on the distribution of wasted votes, that is, the manner in which the votes would have been distributed if the candidate, whose nomination paper was improperly accepted, was not in the fray.

(2) Merely because the wasted votes are more than the difference of votes secured by the returned candidate and the candidate securing the next highest number of votes an inference as to the result of the election having been materially affected cannot necessarily be drawn. The issue is one of fact and the onus of proving it lies upon the petitioner.

(3) The burden of proving such material effect has to be discharged by the election petitioner by adducing positive, satisfactory and cogent evidence. If the petitioner is unable to adduce such evidence the burden is not discharged and the election must stand. This rule may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but the Court is not concerned with the inconvenience resulting from the operation of the law. Difficulty of proof cannot obviate the need of strict proof or relax the rigour of required proof.

(4) The burden of proof placed on the election petitioner is very strict and so difficult to discharge as nearing almost an impossibility. There is no room for any guesswork, speculation, surmises or conjectures i.e. acting on a mere possibility. It will not suffice merely to say that all or majority of wasted votes might have gone to the next highest candidate. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature.

(5) The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. It is not permissible to accept the 'ipse dixit' of witness coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground.

71 *Tek Chand v Dile Ram* AIR 2001 SC 905; See also *Prakash Khandre v Vijaya Kumar Khandre* AIR 2002 SC 2345.

72 AIR 2002 SC 241.

At the time of general election to the Assam Legislative Assembly in 2006, polling station No. 124 in Dibrugarh Assembly Constituency was not set up in the school notified as a place of poll under s 25 of the 1951 Act and, instead, the poll was conducted in another nearby school which was admittedly not a notified polling station. One of the defeated candidates who lost the election by 175 votes filed an election petition on the ground that there was confusion and chaos amongst the voters and about 200 to 300 voters went away without casting their votes and that materially affected the result of election of the returned candidate. The Supreme Court, however, rejected the contention of the election petitioner on the ground that the burden of proving that the votes not cast would have been distributed in such manner between the contesting candidates as would have brought about the defeat of the returned candidate was not discharged by the petitioner.[73] But a Constitution Bench of the Supreme Court had earlier held in *Konappa Rudrappa Nadgouda v Vishwanath Reddy*[74] that where there are only two candidates who contested for the election, and if it is found that elected candidate was disqualified for one or other reason for being declared to be elected then his election would be set aside and the unsuccessful candidate, if otherwise eligible, could be declared as elected and that relief could be granted in view of s 53 read with s 84 of the Act.

Appraisal of Evidence and Proof

An election petition shall be tried, as nearly as may be, in accordance with the provisions of the Civil Procedure Code 1908, and the provisions of the Indian Evidence Act 1872 also apply to such trial. But the application of the CPC and the Indian Evidence Act 1872 is subject to the provisions of the 1951 Act, as has been discussed and explained above. Though an election petition is tried in accordance with the provisions of the CPC, giving an indication that it is in the nature of a civil proceeding, any charge of corrupt practice made in an election petition has always been considered by the Supreme Court and high courts as a quasi-criminal charge,

73 *Kalyan Kumar Gogoi v Ashutosh Agnihotri and another* 2011(2) SCJ 418.

74 AIR 1969 SC 447. See also *Joseph M Puthussery v T S John and Others* 2011(1) SCJ 599 and *Govind Singh v Harchand Kaur* 2011(1) SCJ 645.

because of the serious consequences and the disqualifications which follow the establishment of any such charge in the petition. Therefore, the Supreme Court has laid down very strict standard of proof of a charge of corrupt practice, as in a criminal charge, and it has to be brought home beyond any doubt and not on the preponderance of probabilities. Though a trial of an election petition on grounds of corrupt practices is not a criminal proceeding, the standard of proof for proving corrupt practices is the same as in the case of criminal trial.[75] Allegation must be proved beyond reasonable doubt and if two views are possible, then the benefit of doubt should go to the elected candidate.[76] The Supreme Court has observed in *Borgaram Deuri v Premodhar Bora*[77] that the difference between an election petition and a criminal trial is that, whereas an accused has the liberty to keep silence in a criminal trial, during the trial of an election petition the returned candidate has to place before the court his version and to satisfy the court that he had not committed the corrupt practice as alleged in the petition. The burden of the election petitioner, however, can be said to have been discharged only if and when he leads cogent and reliable evidence to prove the charges levelled against the returned candidate. For the said purpose, the charges must be proved beyond reasonable doubt and not merely by preponderance of probabilities as in civil action. The Supreme Court also observed in *Gopal Krishanji Ketkar v Mahomed Haji Latif and Ors,*[78] that if a party who is in possession of best evidence which would throw light on the issue in controversy withholds such evidence, an adverse inference under s 114 (g) of the Indian Evidence Act 1872 ought to be drawn against such a party, notwithstanding that the onus of proof may not lie on him. A party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce such evidence. In *Balwan Singh v Lakshmi Narain and Ors,*[79] also, the apex court observed that the facts which are in the special knowledge of the other party could not be pleaded by the election petitioner.

The Supreme Court laid down in *Rahim Khan v Khurshid Ahmed and Ors*[80] that:

> An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby

75 *Tukaram S Dighole v Manikrao Shivaji Kokate* 2010(4) SCJ 401.

76 *MC Jacob v A Narayanan and others* 2009(3) SCJ 177.

77 AIR 2004 SC 1386, (2004) 2 SCC 227; See also *Gajanan Krishnaji Bapat and Anor v Dattaji Raghobaji Meghe and Ors* AIR 1995 SC 2284; *Surinder Singh v Hardial Singh and Ors* [1985] 1 SCR 1059; *RP Moidutty v PT Kunju Mohammad and Anor* (2001) 1 SCC 481; *Mercykutty Amma v Kadavoor Sivadasan and Anor* AIR 2004 SC 342; *MJ Jacob v A Narayanan and Ors* 2009 (14) SCC 318; *Baldev Singh Mann v Surjit Singh Dhiman* 2009 (1) SCC 633.

78 AIR 1968 SC 1413 at 1416.

79 AIR 1960 SC 770.

80 AIR 1975 SC 290.

> introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official but the collective will of the whole constituency. Courts naturally must respect this public expression sacredly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed, election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded.

Suspicion, however strong, cannot take the place of proof, whether the allegations in the election petition are sought to be established by direct evidence or by circumstantial evidence.[81] It was suggested in *Gadakh Yashwantrao Kankarrao v Balasaheb Vikhe Patil,*[82] that in view of the mud-slinging in elections becoming common place, the courts should adopt a liberal construction of the election law relating to corrupt practices. The Supreme Court, however, rejected that suggestion and observed that it cannot be accepted that appreciation of evidence for determining the commission of a corrupt practice should be made liberal because of the lower values in the arena of elections and the election scene having degenerated over the years. The court observed that if the rule of law has to be preserved as the essence of democracy, of which purity of elections is a necessary concomitant, it is the duty of the courts to appreciate the evidence and construe the law in a manner which would subserve this higher purpose and not even imperceptibly facilitate acceptance, much less affirmance, of the falling electoral standards. Even in *Quamarul Islam v SK Kanta*[83] also, the Supreme Court observed that there is an increase of electoral malpractices and the purity of election which is an essence of democracy is under a threat of erosion on account of such malpractices and that the courts owe a duty to the nation to see that such objectionable assaults wounding the purity of elections do not go unpunished. But the courts can act only on the evidence led in the case and not on what ought to have been led. The courts in their zeal to maintain purity of elections cannot ignore defects in the pleadings or fail to analyse the evidence in its proper perspective. The apex court added in *VS Achuthanandan v PJ Francis and Anor,*[84] that the law relating to the accomplishment of the democratic process by holding the elections is not required to be so liberally construed as to frustrate the will of the people expressed at the elections, and not too rigidly applied which may result

81 *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe* AIR 1995 SC 2284; see also *Abubucker Siddique and another v State rep. by the Deputy Superintendent of Police, CBI/SCB/Chennai, Tamil Nadu* 2011(2) SCJ 40.

82 AIR 1994 SC 678.

83 AIR 1994 SC 1733.

84 [1999] 2 LRI 400.

in shaking the confidence of the common man in the institution entrusted with the noble task of establishment of the rule of law. It has always to be kept in mind that the law relating to elections is the creation of the statute, which has to be given effect to strictly in accordance with the will of the legislature.

In the matter of appreciation of evidence, particularly oral evidence, the Supreme Court has given certain pieces of advice to the high courts, from time to time. There should not be a mechanical acceptance of the oral and documentary evidence given to support the charge of a corrupt practice. The ordinary presumption in law is that a witness deposing solemnly on oath before a judicial tribunal is a witness of truth, unless the contrary is shown. Where a witness is shown to be an interested witness by reason of his having acted as an agent or worker of the candidate, the testimony of such witness cannot be rejected only for that reason. An interested witness is not necessarily a false witness. But the oral testimony of such a witness should be scrutinised closely and the court may in a given case be justified in rejecting that evidence unless it is corroborated from an independent source. But the reasons for corroboration must arise out of the context and texture of the evidence. Even the interested witnesses may be interested in telling the truth to the court and it must, therefore, assess the testimony of each witness and indicate its reasons for accepting or rejecting it.[85] Further, in case of a witness, part of whose testimony is not accepted, it does not follow that his entire testimony must be discarded.[86] It is not the requirement of law of evidence that a witness must be proved to be perjurer before his evidence is discarded. It may be enough to discard his evidence, if it appears to be quite improbable or to spring from such tainted or biased or dubious a source as to be unsafe for acting upon without corroboration from evidence other than that of the witness himself. But it is not reasonable to carry a suspicion to the extent of attributing to every witness appearing in support of the case of a party to commit perjury.[87] However, in *Thakur Singh Negi v Dev Raj Negi*,[88] the Supreme Court added a word of caution that in election disputes, the evidence is ordinarily of partisan witnesses, and rarely of independent witnesses, and the courts should, therefore, be slow in accepting oral evidence, unless it is corroborated by reliable and dependable material.

In the appraisal of the evidence, the courts have also to closely scrutinise the same so as to ensure that the evidence led by the parties has not gone beyond their pleadings or a new case has been sought to be made out on the basis of the evidence adduced or in the arguments which is not pleaded in the petition.[89]

85 *Birbal Singh v Kedar Nath* AIR 1977 SC 1.
86 *Ambika Sharan Singh v Mahant Mahadev Nand Giri* 41 ELR 183 (SC).
87 *Pratap Singh v Rajinder Singh and Anor* 56 ELR 135 (SC).
88 AIR 1994 SC 2526.
89 *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe* AIR 1995 SC 2284; *Ajit Singh v Banta Singh* (1995) 4 SCC 758.

In an election petition alleging the commission of a corrupt practice, the allegation will not be taken by the courts as having been proved on the ground that there was no specific denial thereof in the written statement of the respondent. The provisions of the whole of the CPC are not fully applicable to the trial of election petitions and, therefore, a charge of corrupt practice cannot be accepted to have been proved, because of the mere absence of the denial of the charge by the respondent in the written statement, even though in an ordinary civil suit such inference by the court would have been permissible under O VIII r 5 of the CPC, and such charge must be proved to the satisfaction of the court.[90]

Where on the appraisal of evidence, two inferences are possible to be drawn, the inference which is favourable to the returned candidate whose election is under challenge should be preferred by the courts.[91]

RECRIMINATORY PETITION

Recriminatory Petition, Circumstances in which may be Filed

It has been mentioned above that a composite relief may be sought in an election petition to the effect that, in addition to the election of the returned candidate being declared void, some other candidate at the election may be declared elected in place of the returned candidate. In the case of such an election petition, the returned candidate whose election has been challenged or any other respondent to the petition may recriminate and give evidence to prove that the election of such other candidate in whose favour the further declaration has been claimed would have also been void, had he been the returned candidate and had a petition been presented calling in question his election [s 97(1)]. Such recrimination will not lie in an election petition where the only relief claimed is that the election of the returned candidate may be declared void.

Explaining the nature, scope and applicability of the provisions of s 97, a Constitution Bench of the Supreme Court, by a majority decision (4 : 1), held in *Jabar Singh v Genda Lal*:[92]

> ...it seems to us that in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of s 100 (1) (d) itself. The enquiry is limited not because the returned candidate has not recriminated under s 97(1); in fact, s 97(1) has no application to the case falling under s 100(1)(d)(iii), the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been

90 *Singh (Dr) v Giani Kartar Singh* AIR 1966 SC 773.
91 *Ram Singh v Col Ram Singh* (1985) Supp SCC 611.
92 AIR 1964 SC 1200.

materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition.

There are, however, cases in which the election petition makes a double claim: it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that s 100 as well as s 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that s 97 comes into play. Section 97 (1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate. The result of s 97 (1), therefore, is that in dealing with a composite election petition, the Tribunal enquire into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. That being the nature of the proceedings contemplated by s 97 (1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified in s 97(1) proviso and s 97(2). If the returned candidate does not recriminate as required by s 97, then he cannot make any attack against the alternative claim made by the petition. In such a case an enquiry would be held under s 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate.

...Section 97(1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected; but if by his failure to make recrimination within time as required by s 97 the returned candidate is precluded from raising any such plea at the hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under s 101(a) on the basis that the other votes counted by the returning officer were valid votes and that votes in favour of the returned candidate, if any, which were rejected, were invalid.

In the instant case, the appellant had won the election by two votes. At the recounting ordered by the election tribunal in the trial of the election petition, it was found that 10 ballot papers in favour of the respondent had been improperly rejected and four ballot papers in favour of the appellant had been improperly accepted. At this stage, the appellant urged before the tribunal that there had been improper rejection of his votes and improper acceptance of the votes of the respondent as well and that such votes should also be scrutinised. In the absence of any recriminatory petition from the appellant, his prayer was not accepted and the respondent was declared elected by a margin of 12 votes. The Supreme Court also upheld the view of the tribunal.

The same law was applied by the Supreme Court in the cases of *P Malaichami v M Andi Ambalam and Ors*,[1] *Anirudh Prasad v Rajeshwari Saroj Das and Ors*,[2] *Bhag Mal v Ch Parbhu Ram*.[3] In *Bhag Mal's* case, Sabyasachi Mukherji J, as he then was, dissented with the majority view, observing:

> The purpose of the Act is to safeguard that one who obtains majority of valid votes by proper and due process of law alone should represent the constituency and will of the people. All the legal provisions and the procedures of the enactment should be so construed as to ensure that purpose. It would really be a mockery to the procedure of law in a situation where it is demonstrated duly in the Court that a person who obtained four votes less than the other next candidate should be declared elected in preference to the other and allowed to represent the constituency. It is not an appeal to any abstract justice nor an appeal to equity but is to emphasize that procedure should be so construed that these rules of procedure such as s 97... subserve the wishes of the voters.

A Division Bench of the Supreme Court comprising ES Venkataramiah and KN Singh JJ, as they then were, in *N Gopal Reddy v Bonala Krishnamurthy*[4] expressed their agreement with the above view of Sabyasachi Mukherji J, and directed, on 10 February 1987, that the matter be placed before the Chief Justice for being referred to a larger bench, preferably of seven judges, for reconsideration of the view taken by the five-judge Constitution Bench in *Jabar Singh*'s case. But the Supreme Court subsequently dismissed that appeal on 22 November 1995, by a decision of a three-judge bench, considering the appeal to have become infructuous, as meanwhile fresh elections had been held to the Andhra Pradesh legislative assembly to which the election petition and election appeal related in that case. The result is that the view taken by the Supreme Court in *Jabar Singh*'s case (supra) still

1 53 ELR 57.
2 58 ELR 285.
3 AIR 1985 SC 150.
4 84 ELR 85.

holds the field in so far as the interpretation and application of s 97 are concerned. However, a Division Bench of the Supreme Court (comprising VS Sirpurkar and Dr. Mukandakam Sharma, JJ) has again referred the matter to the Chief Justice for placing before a bigger Bench in the case of *Md. Alauddin Khan v Karam Thamarjit Singh* on 22 July 2010.[5]

Analysing the majority decision of the Constitution Bench in *Jabar's* case (above) in the light of the cases of *Anirudh Prasad v Rajeshwari Saroj Das*,[6] *Bhagmal v CH Prabhu Ram*,[7] *Arun Kumar Bose v Mohd Furkan Ansari*,[8] *NE Horo v Leander Tiru and Ors*,[9] etc, the Supreme Court summed up the latest position of the law on the subject in *TA Ahammed Kabeer v AA Azeez and Ors*[10] as follows:

> ...we sum up the law as under: (1) In an election petition wherein the limited relief sought for is the declaration that the election of returned candidate is void on the ground under section 100(1)(d)(iii) of the Act, the scope of enquiry shall remain confined to two questions: (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in regard to the returned candidate. (2) A recrimination by the returned candidate or any other party can be filed under section 97(1) in a case where in an election petition an additional declaration is claimed that any other than the returned candidate has been duly elected. (3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the election court shall acquire jurisdiction to do so only on the two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) the recrimination petition under section 97(1) is filed. (4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition is required to fulfil within the meaning of section 83 of the Act and must be accompanied by the

5 2010 (6) SCJ 945(The matter is still pending before the Supreme Court).
6 [1976] Supp SCR 9.
7 AIR 1985 SC 150.
8 [1984] 1 SCR 11.
9 1989 (3) JT 59.
10 AIR 2003 SC 2271, [2003] 5 SCC 650.

security or the further security referred to in sections 117 and 118 of the Act. (5) The bar on enquiry enacted by section 97 read with section 100(1)(d)(iii) of the Act is attracted when the validity of the votes is to be gone into and adjudged or in other words the question of improper reception, refusal or rejection of any vote or reception of any vote which is void is to be gone into. The bar is not attracted to a case where it is merely a question of correct counting of the votes without entering into adjudication as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a recount the election judge finds the result of recount to be different from the one arrived at by the returning officer or when the election judge finds that there was an error of counting the bar is not attracted because the court in a pure and simple counting carried out by it or under its directions is not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or recounting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of sub-clause (iv), and not sub-clause (iii) of clause (d) of sub-section (1) of section 100 of the Act.

It was further laid down by the Supreme Court in *Ram Autar Singh Bhadauria v Ram Gopal Singh*[11] that the pleas of the returned candidate under s 97 have to be tried after a declaration has been made under s 100 that the election of the returned candidate is void. The apex court held that the trial judge of the high court was in error in ordering general inspection and recount of the total votes polled at the election, merely because the returned candidate had also in his recrimination petition alleged about the wrong reception and rejection of votes during the counting.

It was also clarified by the Supreme Court in *Janardan Dattuappa Bondre v Govind Prasad Shivprasad Choudhary*,[12] that s 97 does not apply where the order of recount given by the high court is only for 'physical' count of votes cast in favour of the returned candidate and only mechanical recount of votes was intended, and not a full recount involving re-examination and re-scrutiny of votes. In this case, 250 votes cast in favour of the appellant had got exchanged by mistake with the same number of ballot papers of another candidate. It was held that the appellant was entitled to have the 250 ballot papers wrongly placed along with the ballot papers of another candidate counted in his favour, though he had not given any notice of recrimination under s 97.

11 AIR 1975 SC 2182.
12 AIR 1979 SC 1617.

In *Smt Neena Vikram Verma v Balmukund Singh Gautam and Ors*,[13] the appellant had won the election from 201-Dhar assembly constituency at the general election to the Madhya Pradesh legislative assembly in 2008, just by one vote. Her election was challenged, and in that election petition she also filed a recriminatory petition against the first respondent (petitioner before the High Court). The single judge trying the election petition dismissed the recriminatory petition holding that the pleadings in that petition did not raise any cause of action. On the matter being taken by the returned candidate to the Supreme Court, the apex court restored the recriminatory petition by the consent of the parties. During the trial of the petition, the single judge again dismissed the recriminatory petition on an application being filed by the petitioner before the High Court under O 6 r 16 CPC. The returned candidate again approached the Supreme Court and the apex court again restored the recriminatory petition, observing that the single judge should not have entertained the first respondent's application for dismissal of the recriminatory petition when the Supreme Court had restored it by consent order and directed the single judge of the High Court to decide the recriminatory petition.

Recriminatory Petition, When to be Filed

Any notice of such recrimination as aforesaid must be given to the high court by the returned candidate or any other respondent within 14 days from the date of commencement of the trial of the election petition [*proviso* to s 97(1)]. For this purpose, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the high court and answer the claims made in the election petition [Explanation to s 86(4)]. But the Supreme Court has held in *Sreekumar Mukherjee v Zainel Abedin and Ors*,[14] that where a high court, after having fixed a date for appearance of the original respondents, fixes a fresh date for their appearance on account of their non-appearance on the date originally fixed for want of service of court's notice on them, the period of 14 days referred to in s 86(4) will be counted from the subsequent fresh date and not from the earlier date fixed by the court. However, in *Anwari Basavaraj Patil v Siddaramaiah*[15] the Supreme Court held that the notice for recriminatory petition must be filed within 14 days from the commencement of trial and that s 5 of the Limitation Act 1963 does not apply in relation to such notice, as the 1951 Act equates recrimination notice to an election petition and the recriminatory notice being thus comparable to an election petition, any notice given beyond the said period of 14 days shall be summarily rejected by the court.

13 2013(4) SCJ 7.
14 (1999) 2 Supreme Today 217.
15 AIR 1994 SC 512.

As observed in *Jabar Singh*'s case (above), any delayed notice will disentitle the party to give any evidence in recrimination. The same view was reiterated by the Supreme Court in *Anwari Basavaraj Patil v Siddaramaiah*. (supra)

If in the original petition, a further declaration has been claimed and the returned candidate gives notice to lead evidence to prove that the other candidate had also indulged in corrupt practices, the election petitioner cannot be permitted to abandon the claim for further declaration so as to shut the returned candidate from adducing evidence against him.[16]

Recriminatory Petition, Form, Verification and Security

Every notice of recrimination shall be accompanied by a petition, in the same form as an election petition, and shall also be signed and verified in like manner as the election petition [s 97(2)]. A security deposit of Rs 2000 will also have to be made by the party filing the recriminatory petition within the aforesaid period of fourteen days from the date of commencement of the trial. He shall also be liable to make such further security deposit as the high court may deem necessary during the course of the trial [proviso to s 97(1)].

The initial security of Rs 2000 should be deposited by the recriminator at the time of giving the notice of recrimination itself. Though the taking of evidence in recrimination may be postponed, preliminary directions for discovery, inspection of documents, etc are given long before the evidence is taken. The proviso to s 97(1) expressly provides that the recriminator shall not be entitled to adduce evidence unless, inter alia, he makes the security deposit referred to in s 117.[17]

Allegations of Corrupt Practices Against Third Persons

Right of Such Third Person to be Heard

If an allegation has been made in an election petition that a corrupt practice has been committed by a person, who was not a candidate at the election and who could thus not be joined as a respondent to the election petition, such person has a right to be heard by the high court before any adverse order is made against him by the court. He has to be given a notice by the high court before any guilt is fastened upon him and a finding recorded that he has been guilty of commission of the alleged corrupt practice [*proviso* to s 99]. By such notice, he shall be asked to appear before the high court and show cause why should he not be named for having committed the corrupt practice [cl (a) of *proviso* to s 99].

If such person appears before the high court in pursuance of its notice, he has to be given an opportunity of cross examining any witnesses who may have already

16 *Inamati Mallappa Basappa v Desai Basavaraj Ayyappa* AIR 1958 SC 698.
17 *Ravindra Nath v Raghubir Singh* AIR 1968 SC 300.

been examined by the high court and who have given evidence against him. Further, he will also be entitled to call evidence in his defence and of being heard by the high court [cl (b) of proviso to s 99].

The Supreme Court held in *Makhan Lal Bangal v Manas Bhunia*[18] that where a person who is not a party to the election petition is found at the trial to be guilty of commission of corrupt practice but he is not given notice and order declaring the election of the returned candidate is issued, such order suffers from a serious lacuna going to the root of matter and cannot be sustained.[19] In *Mercykutty Amma v Kadavoor Sivadasan and Anor*,[20] the Kerala High Court had named a person under s 99 but without giving any notice to him. The Supreme Court struck down the order of the Kerala High Court as being impermissible without complying with the mandatory provisions under s 99.

Notice to Such Third Person, When to be Given

A notice contemplated under the proviso to s 99 to a person who is not a party to an election petition but against whom allegations of corrupt practice have been made in the petition is thus a must, if the high court proposes to name him under s 99 as being a party to the commission of the corrupt practice. But such notice may not be given to the said third person at the commencement of the trial of the petition itself. It should be given when the judge trying the election petition is prima facie of the view that the commission of the corrupt practice has been proved and the involvement of the said person is also proved. In *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar Kashinath Kunte*,[21] allegations were made that Shri Balasaheb Thackeray, leader of the Shiv Sena, had committed the corrupt practices under ss 123(3) and 123(3A) by having made some inflammatory speeches. After the entire evidence had been recorded in the election petition, the judge trying the petition formed the prima facie opinion that the corrupt practices alleged to have been committed appeared to have been proved and Shri Balasaheb Thackeray was likely to be named along with the returned candidate to be guilty of the commission of those corrupt practices. The high court, thereupon, gave a notice to Shri Thackeray, which was accompanied by the copies of pleadings and the entire evidence adduced at the trial for proving those corrupt practices. The notice further clearly stated that the noticee would have an opportunity to cross examine such witnesses as had already been examined and of calling evidence in his defence and of being heard. The Supreme

18 AIR 2004 SC 342.
19 AIR 2001 SC 490.
20 AIR 2004 SC 342.
21 AIR 1996 SC 1113; See also *Manohar Joshi v Nitin Bhaurao Patil* (1996) 1 SCC 169; *Moreshwar Save v Dwarkadas Yashwantrao Pathrikar* (1996) 1 SCC 394; *Vimal (Dr) v Bhaguji* AIR 1995 SC 1836.

Court held that Shri Thackeray could not have any grievance on account of having been named by the high court under s 99.

Analysing the provisions of s 99, the Supreme Court observed in the above case that:

> Sub-section (1) requires that at the time of making an order under Section 98, the High Court shall also make an order recording the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. In other words, while deciding the election petition at the conclusion of the trial and making an order under Section 98 disposing of the election petition in one of the ways specified therein, the High Court is required to record the names of the persons guilty of any corrupt practice which has been proved at the trial. Proviso to sub-section (1) then prescribes that a person who is not a party to the petition shall not be so named unless the condition specified in the proviso is fulfilled. The requirement of the proviso is only in respect of the person who is not a party to the petition and is to be named so that he too has the same opportunity which was available to a party to the petition. The requirement specified is of a notice to appear and show cause why he should not be named and if he appears in pursuance of the notice, he has to be given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him and also the opportunity of calling evidence in his defence and of being heard. In short, the opportunity which a party to the petition had at the trial to defend against the allegation of corrupt practice is to be given by such a notice to the person of defending himself if he was not already a party to the petition. In other words, the noticee has to be equated with a party to the petition for this purpose and is to be given the same opportunity which he would get if he was made a party to the petition.
>
> This is the pragmatic test to be applied for deciding the question of compliance of Section 99 of the RP Act. If the noticee had the opportunity which he would have got as a party to the petition, then there can be no case of non-compliance of Section 99. The opportunity required to be given by the proviso to sub-section (1) of Section 99 is the same and not more than that available to a party to the petition to defend himself against the charge of corrupt practice.

Withdrawal or Abatement of Election Petition or Dismissal for Non-prosecution

Procedure for Withdrawal

An election petition may be withdrawn before the conclusion of the trial, but such withdrawal can be made only by leave of the high court [s 109(1)]. The permission of the high court to withdraw the petition has been considered necessary to ensure that the withdrawal is bona fide and there is no inducement by any bargain or consideration [s 110(2)]. But where more than one relief has been claimed in a petition and the prayer for the reliefs other than the main relief that the election of the returned candidate should be declared void is given up during the trial of an election petition, that would not amount to withdrawal of the petition as the main petition still survives for consideration.[22]

As an election petition is a proceeding in which the whole constituency is interested and not merely the parties thereto, a detailed procedure has been prescribed for allowing an application for the withdrawal of petition. If an election petition has been filed by more than one petitioner, an application for withdrawal can be made only with the consent of all the petitioners [s 110(1)]. On receipt of an application for withdrawal, the high court has to fix a date for the hearing of the application, give a notice of such hearing to all other parties to the petition, and also cause it to be published in the official gazette, ie, Gazette of India, if the petition relates to an election to either House of Parliament, and the state government gazette, if the petition relates to an election to any house of the state legislatures [s 109(2)]. If after hearing the application, the court grants the permission to withdraw the petition, another notice of withdrawal of petition shall be published in the official gazette and also in such other manner as the high court may specify, like, the publication of the notice in the newspapers, etc [s 110(3)(b)]. Upon such publication of the notice, any person who could have initially filed an election petition relating to that election, that is to say, any elector or a candidate at the election, may apply to the high court for being substituted as a petitioner in place of the petitioner or petitioners withdrawing. Such application for substitution must be filed within fourteen days of the publication of the above notice. The substitute petitioner shall be entitled to continue the proceedings after making such security deposit as the high court may direct and upon such further terms as the high court may deem fit [s 110(3)(c)].

The Supreme Court has held in *Mohd Abubakkar Siddique v Mustafa Shahidul Islam*[23] that the publication of notice of withdrawal of election petition under s 110(3)(b) in the official gazette is mandatory and the publication of notice in

22 *P Nalla Thampy Terah v BL Shanker* AIR 1984 SC 135.

23 (2000) 1 Supreme Today 194, AIR 2000 SC 731; (2000) 2 SCC 62.

newspapers, etc, is in addition to the publication in the official gazette. The apex court has further held in this case that, where the date of publication of notice in the newspaper or in any other manner precedes the date of its publication in the official gazette, the period of 14 days prescribed under s 110(3)(c) for applying for substitution as a petitioner will be reckoned from the date of publication of the notice in the official gazette.

If no person applies for substitution as a petitioner within the prescribed period or where the application of a substitute petitioner has not been granted for failure to make the security deposit or to comply with the other directions of the high court, the election petition shall be dismissed by the high court as withdrawn. A report of the fact of withdrawal shall be sent by the high court to the Election Commission and, thereupon, the Election Commission shall publish the report in the official gazette [s 111].

An election petition was filed before the Bombay High Court (Aurangabad Bench) by Y on the ground that his nomination was wrongly rejected by the Returning Officer. Subsequently, he moved an application for withdrawal of the petition under s 109 and that application was allowed by the High Court. Within 14 days of such order of the High Court, another elector B in the constituency applied for substituting his name as election petitioner in place of Y under s 110(3)(c). The High Court accepted B's application and substituted him as the election petitioner. However, on appeal, the Supreme Court held that B could not be substituted as the election petitioner as he was not entitled to file the election petition under s 81 by invoking any of the grounds set out in ss 100(1) and 101. The Supreme Court held that s 110(3)(c) permits 'a person, who might himself have been a petitioner', to apply for substitution as a petitioner in place of the party withdrawing, but the said expression cannot be held to apply across the board in all cases, but has to fit in the facts of each case. In the instant case, the election petition filed by Y was an action *in personam* and was therefore confined to his own situation and that the petition was not an action *in rem*.[24]

Dismissal for Non-Prosecution

There is no express provision in the 1951 Act for the dismissal of an election petition for non-prosecution by the petitioner, and the only provision made is for its withdrawal in the manner aforesaid, if any petitioner is not interested in prosecuting the petition. But instead of following the lengthy procedure prescribed for the withdrawal of election petitions, petitioners often choose not to prosecute the petition by simply not appearing before the court or by not adducing any evidence. The question as to what should be done by the high courts in such circumstances has now been settled by a catena of the decisions of the Supreme Court that the

24 *Chaugule v. Bhagwat* 2012 (4) SCJ 932.

election petitions can be dismissed by the high courts for non-prosecution under the provisions of the Civil Procedure Code 1908. The Supreme Court observed in *Sushila Balraj v Ardhendu Bhushan*[25] that if the petitioner refused to give evidence and did not examine any witnesses, the tribunal could not have adopted any other course than to dismiss his petition for non-prosecution. The Supreme Court held that the power of dismissal in such cases was implicit in the election tribunals.

It is submitted with respect that the dismissal of an election petition for non-prosecution defeats the purpose underlying the provisions of ss 109 and 110 of the 1951 Act, inasmuch as a petition may not be prosecuted by a petitioner because of some inducement, bargain or consideration and the constituency may be taken for a ride, which mischief is sought to be checked by the wholesome provisions of the above sections. This very question was raised before the Supreme Court in *Dhoom Singh v Prakash Chandra Sethi*.[26] It was alleged by several interveners before the high court in this case, that the petitioner and the returned candidate had colluded and got the election petition dismissed for non-prosecution and they applied for substitution as petitioners. The high court rejected their prayer. On appeal, the Supreme Court also could not provide any relief to them observing that the legislature in its wisdom had chosen to make special provisions for the continuance of the election petition only in cases of its withdrawal or abatement and not in other contingencies of failure of election petitioner to prosecute either due to collusion or fraud of the petitioner or otherwise. The apex court did not consider it appropriate to express any opinion as to whether the omission in law to do so was deliberate or inadvertent.

Abatement of Petition on Death of Petitioner

If an election petition has been filed by only one petitioner, the petition shall abate on the death of the sole petitioner. It shall also abate where it has been filed by more than one petitioner and the sole survivor of those petitioners also dies [s 112(1)]. In such event, the fact of the death of the sole petitioner or the sole surviving petitioner shall be published in such manner as the high court may deem fit [s 112(2)]. Upon such publication of the above fact, another person may apply for substitution as petitioner in the same manner and during the same period which is prescribed for the substitution of the petitioner, in the case of withdrawal of petition as explained above [s 112(3)].

It will be observed from the above that the right to apply to be substituted as a petitioner accrues on fulfillment of two conditions, namely, (i) that the person applying for substitution is one who might have himself been a petitioner in the first instance; and (ii) that the application is made within 14 days of the publication of

25 26 ELR 146.
26 56 ELR 143.

the notice by the high court under s 110(3)(b) or, as the case may be, under s 112(2). But he becomes entitled to be substituted as petitioner only upon compliance with the conditions, if any, of the high court as to the deposit of security for costs. Such deposit is, however, not to be made along with the application for substitution and it shall be made when the high court grants the prayer for substitution and according to the terms as may be fixed by the high court in this behalf.[27]

In *Satwant Kaur v Sohan Singh (D)*,[28] the arguments in the election petition were heard on 14 December 1999 and judgment was reserved. Subsequently, the election petition was listed for re-hearing on 30 May 2000 and again on 1 June 2000. An issue in the election petition was then re-framed and counsel were given the opportunity of leading further evidence and addressing the court. On 23 November 2000, the judgment was delivered, the appellant was unseated and the election petitioner was declared elected. But, meanwhile, the petitioner had already died on 27 December 1999. The high court gave the judgment relying on the provisions of O XXII, r 6, CPC, which says that 'there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death'. Setting aside the order of the high court, the Supreme Court held that the hearing had not concluded on the date of death of the election petitioner and, therefore, the provisions of O XXII, r 6 had no application. The Supreme Court declared that the election petition abated with effect from 27 December 1999 and that, as a result, proceedings under s 112 of the 1951 Act were required to be taken and remanded the matter to the high court for the purpose.

Abatement of Petition on Death of Respondent

If before the conclusion of the trial of an election petition, the sole respondent dies or gives notice to the high court that he does not intend to oppose the petition, the high court shall cause a notice of such event to be published in the official gazette. A similar notice will also be published in the official gazette where any of the respondents to the petition dies or gives notice of his intention not to oppose the petition and there is no other respondent who is opposing the petition. In such circumstances, any person who could have filed an election petition in the present case may, within 14 days of the publication of the court's notice, apply for substitution as respondent to oppose the petition. He shall be entitled to continue the proceedings upon such terms as the high court may think fit [s 116].

27 *Manohar Joshi v Bhaurao Ragoji Patil* AIR 1992 SC 1449.
28 2001 (10) JT 196.

No Abatement of Petition on Resignation or Dissolution of House Concerned

An election petition abates only in the contingencies specified in s 112, and not on the resignation of the seat by the respondent or on the dissolution of the House concerned.[29]

However, going by the observations of the Supreme Court in *Dharatipakar Madan Lal Aggarwal v Rajiv Gandhi*[30] that the courts go into live issues between the parties and do not undertake to decide an issue which is purely academic or has become infructuous on account of any supervening event, an election petition may become infructuous, though may not abate, on the resignation of the person whose election is challenged or on the dissolution of the House concerned, except where his election is called in question on the ground that he had committed some corrupt practice at the impugned election which, if proved at the trial of the election petition, would attract disqualification in his case for future elections.

DECISION OF THE HIGH COURT

Procedure in Case of Equality of Votes

During the trial of an election petition, if it appears to the high court that there is an equality of votes between two or more candidates at the election and the addition of one vote would entitle any of those candidates to be declared elected, then the high court shall decide by lot and the candidate on whom the lot falls shall be declared the winner as having received the required additional one vote [s 102(b)]. But where such matter has already been determined by the returning officer at his level by drawing lot at the time of declaration of result, his decision shall be effective for the purposes of the petition also [s 102(a)].

As mentioned above, the Bombay High Court, in an election petition relating to an election to the Goa legislative assembly from Benaulim assembly constituency, found as a result of the counting of tendered votes an equality of votes between the appellant and the respondent. On drawing of lot by the high court, the appellant got elected as the lot favoured him.

In *Kalyan Singh Chouhan v CP Joshi*[31], the appellant had won the election just by one vote from Nathdwara assembly constituency at the general election to the Rajasthan legislative assembly in 2008. His election was challenged and the Supreme Court directed the Election Commission to recount certain votes and to count certain tendered votes. After conducting that exercise, both appellant and the respondent were found to have secured equal number of votes. The Supreme Court, however, did not consider it necessary to draw lots and dismissed the election

29 *Sheodan Singh v Mohan Lal Gautam* AIR 1969 SC 1024.
30 AIR 1987 SC 1577.
31 Civil Appeal No. 6885 of 2012 decided on 11 April 2013.

petition upholding the election of the appellant on the ground that the petitioner had not set up, in his petition, the grounds for declaring him as duly elected candidate in place of the appellant.

Orders at the Conclusion of Trial

At the conclusion of the trial of an election petition, the high court can make three types of orders, namely:

(1) the high court may dismiss the election petition [s 98(a)]; or
(2) the high court may declare the election of all or any of the returned candidates to be void [s 98(b)]; or
(3) the high court may declare the election of all or any of the returned candidates to be void, and also declare the petitioner or any other candidate to have been duly elected at the election [s 98(c)].

In a democratic country, the will of the people is paramount and the election of elected candidate should not be lightly interfered with. At the same time, it is also the bounden duty and obligation of the court to ensure that purity of election process is duly safeguarded and maintained.[32]

A mention has been made above that the dismissal of an election petition for any non-compliance with the provisions of ss 81, 82 or 117, *in limine* even before the commencement of the trial, shall also be deemed to be dismissal under s 98(a) [explanation to s 86(1)].

While disposing of an election petition, it is open to the high court to issue two documents—one, embodying the reasons for its decision, and the other, the formal expression of its decision. The former will be its judgment and the latter its order. But the court may also embody both the judgment and its order in the same document.[33]

The Supreme Court has held in *Satrucharla Vijaya Rama Raju v Nimmaka Jaya Raju*,[34] that the finding given by the high court in an election petition does not operate as res judicata in a subsequent election petition. The apex court had earlier observed in *CM Arumugam v S Rajgopal and Ors*[35] that every election furnishes a fresh cause of action for a challenge to that election and an adjudication in a prior election petition cannot be conclusive in the subsequent proceeding. The Supreme Court also held that a judgment in an election petition is not a judgment in rem under s 41 of the Indian Evidence Act 1872.

32 *Baldev Singh Mann v Surjit Singh Dhiman* 2009(2) SCJ 386.
33 *Vidyacharan Shukla v Khubchand Baghel* AIR 1964 SC 1099.
34 (2006) 1 SCC 212, AIR 2006 SC 543.
35 (1976) 1 SCC 863.

Naming of Persons Found Guilty of Corrupt Practice

In addition to the orders to any of the above effects, where the charge of any corrupt practice has been proved in an election petition, the high court shall also record the names of all persons who have been proved at the trial to be guilty of the commission of such corrupt practice [s 99(1)(a)]. As has been discussed above, a person who is not a party to the election petition shall be so named, only after he has been given due notice of the proposed action in relation to him, and also given the opportunity of rebutting the evidence against him [proviso to s 99(1)].

The persons so named may be disqualified by the President, on the opinion of the Election Commission, for contesting elections and for voting for a period not exceeding six years under the provisions of s 8A. The further procedure to be followed in such cases has already been explained in ch 8.

Awarding and Payment of Costs

Furthermore, the high court shall also fix the total amount of costs payable and specify the persons by whom such costs are payable and to whom the same shall be paid [s 99(1)(b)].

Awarding of costs shall be in the discretion of the high court [s 119]. But where an election petition is dismissed, the returned candidate shall be entitled to the costs incurred by him in contesting the petition and, accordingly, the high court shall make an order for costs in his favour [proviso to s 119]. It was observed by the Supreme Court in *Mahender Pratap v Krishan Pal and Ors,*[36] that in an election petition, if the parties are found to have made incorrect statements in their pleadings, affidavits or depositions and there is thereby an intention on their part to mislead the court, appropriate deterrent action like dismissal of their cases with costs, prosecution for perjury or initiation of contempt proceedings should be taken by the court lest the judicial process would continue to be polluted and misused by undeserving parties who have no real grievance or cause for seeking aid of judicial forums. Such false cases not only contribute to the work load of the court and kill its precious time but create hurdles in the ways of genuine litigants who sincerely need assistance of the court for obtaining justice.

Any person in whose favour any costs have been awarded can apply to the high court for payment of such costs to him, from out of the security deposit made by the petitioner. Such application should be made to the high court within one year from the date of the order of the high court, failing which the security deposit shall be refunded to the person who made that deposit on an application made by him. If any balance is left, the same shall also be refunded to the depositor, or to his legal representative in the case of his death [s 121].

36 AIR 2003 SC 304.

Any order as to costs, or balance of the amount of costs awarded, is also executionable, like a decree for the payment of money made in a civil suit, by the principal civil court within whose territorial jurisdiction the payee has a place of residence or business [s 122].

Communication of Orders of High Court

After the trial of an election petition has been concluded and appropriate orders issued by the high court under ss 98 and 99, the high court shall, as soon as may be thereafter, intimate the substance of its decision to the Election Commission, and also to the Speaker or Chairman, as the case may be, of the House of Parliament or of the state legislature concerned [s 103]. The high court shall also send an authenticated copy of its judgment and order to the Election Commission.[37]

Publication of Order of High Court and its Transmission to Appropriate Authority

On receipt of copy of the judgment and order of the high court, it is the duty of the Election Commission to forward copies of the same to the Speaker or Chairman of the House concerned, and also to the Central Government, in the case of an election to either House of Parliament, or to the state government, in the case of an election to the state legislature. In addition, it is also the duty of the Election Commission to cause the publication of the judgment and order of the high court in the Gazette of India, if it relates to an election to a House of Parliament, or in the official gazette of the state concerned, in the case of an election to the state legislature [s 106]. The object of publication in the official gazette of the decision of the high court is to give information to the constituency about the outcome of the election petition.

Effect of Orders of High Court

Every order made by the high court dismissing or allowing an election petition shall take effect as soon as it is pronounced by the high court [s 107(1)].

Where a high court declares the election of any returned candidate as void, the acts and proceedings in which such candidate has participated as a member of Parliament or of a state legislature before the declaration of his election as void shall not be invalidated by reason of the high court's order. Such candidate shall also not be subjected to any liability or penalty on the ground of such participation [s 107(2)].

Further, where the high court declares the election of a returned candidate as void and also declares any other candidate as duly elected, the order of the high court becomes operative automatically and such elected candidate can be administered

37 AIR 2003 SC 304.

oath or affirmation for the purpose of taking his seat in the House concerned on the basis of the high court's order, without any further notification or order of the Election Commission or the appropriate government in this behalf, unless such order of the high court is stayed as explained below.

Stay of Operation of Order of High Court

The order of the high court under ss 98 and 99 shall take effect under s 107(1) as soon as it is pronounced. But the high court has the power to stay its operation, if an application is made to it for the purpose before the expiration of the time allowed for filing an appeal from that order to the Supreme Court. However, no application for stay shall be made to the high court after an appeal has been preferred to the Supreme Court. The high court may grant the stay order on sufficient cause being shown and on such terms and conditions as it may think fit [s 116B(1)].

Where an appeal has been preferred against the order of the high court to the Supreme Court, the Supreme Court may stay the operation of the order appealed from, on sufficient cause being shown to it and on such terms and conditions as it may think fit [s 116B(2)]. The order of the Supreme Court in this behalf will supersede the order of the high court, if any, under s 116B(1).

Where the election of a returned candidate is declared void, the operation of such order of the high court is invariably stayed, if prayed for, either by the high court itself to enable the candidate to file an appeal before the Supreme Court or by the Supreme Court on the filing of the appeal. Such stay during the pendency of the appeal is considered necessary, as otherwise the seat of that member in the House concerned shall become vacant and the vacancy may be filled by holding a bye-election, in which event a situation defying solution may arise if the Supreme Court allows the appeal and restores the election of the original returned candidate. By the stay order in such cases, the high courts and Supreme Court normally allow the candidate concerned only to sign the attendance register of the House concerned but not to participate or vote in the proceedings of the House or to draw any salary, etc. as member of the House. But the Supreme Court observed in *Kirpal Singh v Uttam Singh*[38] that:

> Where an election is set aside for no fault of his (candidate), such as a corrupt practice committed by him or his agent or a disqualification suffered by him, but on the ground that someone else's nomination had been improperly rejected, the more appropriate order would perhaps be to grant an absolute stay so that the Constituency may not go unrepresented for no fault of either the elected or those who elected.

38 AIR 1986 SC 300.

Election Appeals

Election Appeal, to Whom Lies

Every order of the high court disposing of an election petition under ss 98 and 99 is appealable before the Supreme Court [s 116A(1)]. Such appeal lies both on questions of law and fact. As has been explained hereinbefore, an order dismissing an election petition *in limine* under s 86(1) is also appealable before the Supreme Court under s 116A. No petition for special leave to appeal under art 136 lies before the Supreme Court in such a case.[39]

Originally, when the election petitions were tried by election tribunals, it was provided that every order of the tribunal shall be final and conclusive [s 105]. But the various high courts took the view that the orders of the election tribunals could be called in question before them under arts 226 and 227. In 1956, the law was amended to provide for appeals from the orders of election tribunals to high courts [s 116A, as inserted by the Representation of the People (Amendment) Act 1956].

In 1966, when the jurisdiction to try election petitions was transferred from election tribunals to the high courts, the appellate jurisdiction against the orders of the high courts in election petitions was also transferred and conferred on the Supreme Court [s 116A, as amended by the Representation of the People (Amendment) Act 1966].

No Appeal to Division Bench of High Court

Normally, an order of a single judge of a high court is appealable before a Division Bench of the high court under cl 15 of the Letters Patent of the high court. But it has been held by the Supreme Court in *Upadhyaya Hargovind Devshankaran v Dhirendrasinh Virendrasinhji Solanki*[40] that no appeal lies to the Division Bench against the order, whether interim or final, of a single judge trying an election petition, as the Division Bench has not been prescribed as the appellate authority in election petitions under the 1951 Act.

Election Appeal, Matter of Right

An election appeal to the Supreme Court against the final order of the high court under ss 98 and 99 can be filed as a matter of right. No certificate of fitness for appeal to the Supreme Court is required under art 134A, nor is any special leave of the Supreme Court necessary under art 136, for filing an appeal against the final order of the high court in an election petition. Where, however, any interlocutory order of the high court on any question arising in the course of the trial of the

39 *Dipak Chandra Ruhidas v Chandan Kumar Sarkar* AIR 2003 SC 3701, (2003) 7 SCC 66.
40 AIR 1988 SC 915.

election petition is sought to be challenged, special leave of the Supreme Court under art 136 will be needed. But, as a matter of general policy, the Supreme Court rarely interferes with the interlocutory orders of the high courts in election petitions and advises the aggrieved parties to come to the apex court only after the petition has been finally disposed of by the high court. However, the Supreme Court may, in its discretion, entertain an appeal against an interlocutory order where it is of the view that the trial of the petition will be severely jeopardised if allowed to proceed in accordance with the order under challenge. Such intervention is normally made by the Supreme Court in those cases where the high court has taken an incorrect view on a question of law; the questions of fact are left to be taken up in the regular appeal.

Time Limit for Election Appeal

Every appeal to the Supreme Court from a final order of the high court shall be preferred within a period of 30 days from the date of the order of the high court [s 116A(2)].

But the Supreme Court may, in its discretion, entertain an appeal after the expiry of the period of 30 days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period [proviso to s 116A(2)].

It will be observed from the foregoing discussions that whereas an election petition cannot be entertained if filed beyond the period of limitation of 45 days prescribed under s 81(1), the law itself gives a discretion to the Supreme Court to entertain an election appeal filed beyond the prescribed period of 30 days, if it is satisfied with the reasons explained by the appellant for not being able to prefer the appeal within the prescribed period. Even when the appellate jurisdiction was vested in the high courts, they were held competent to entertain election appeals beyond the prescribed period of limitation. In *Vidyacharan Shukla v Khubchand Baghel*,[41] it was held that the time taken by the appellant in obtaining copy of the order of the election tribunal should be excluded from the prescribed period of limitation in view of s 12 of the Limitation Act 1963, as a party could reasonably decide whether to file an appeal or not after studying the order and that, therefore, there was sufficient cause for not presenting the appeal within the period of limitation of 30 days. The same view was reiterated by the Supreme Court in *DP Mishra v Kamal Narayan Sharma*.[42] In this case, after excluding the time taken for obtaining a copy of the order of the election tribunal, the period of limitation expired during the summer recess of the high court. The appeal filed on the day of reopening of the high court was held to be admissible.

41 AIR 1964 SC 1099.
42 AIR 1970 SC 1477.

Supreme Court Rules Applicable to Election Appeals

The Supreme Court has observed in *Bolin Chetia v Jogadish Bhuyan and Ors*[43] that the Supreme Court Rules 1966 framed by the Supreme Court under art 145 do not make express provisions for dealing with election appeals under s 116A of the 1951 Act. The apex court has, however, clarified that these appeals are to be treated as civil appeals and the jurisdiction to be exercised for the disposal of election appeals is as extensive as in the case of an appeal from a matter disposed of by the high court in exercise of its original jurisdiction.[44]

The Supreme Court has laid down certain rules for filing of civil appeals containing provisions as to the furnishing of security, form of appeal memorandum, number of copies of appeal memorandum to be filed, manner of service of notice to respondents, printing of relevant record and other allied matters in Part II (Civil Appellate Jurisdiction) of the Supreme Court Rules, 1966. The same rules apply to the election appeals and provisions of these rules should be strictly adhered to. These rules, inter alia, provide for an extra copy of the appeal memorandum to be filed for the record of the Election Commission, though there is no similar provision for filing an extra copy of the election petition for the record of the Commission.

Parties to Election Appeal, Locus Standi of Appellant and Third Parties

The 1951 Act does not prescribe expressly as to who can file an election appeal and who should be joined as respondents thereto, under s 116A against the order of a high court in an election petition. But the Supreme Court has laid down in *Thammanna v K Veera Reddy*,[45] that looking to the analogous provisions of s 96(1) of the Code of Civil Procedure 1908 and the other general principles which govern the right of appeal thereunder, it could be said that an election appeal could be filed by such person who was aggrieved by the order of the high court. The Supreme Court observed that a 'person aggrieved' is one who was a party to the election petition and who has been adversely affected by the determination of the rights of the parties by the high court. Normally, a person aggrieved must be a man who has suffered legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. In the instant case, the appellant was a party to the election petition before the Andhra Pradesh High Court, but had not participated in the proceedings before the high court. The Supreme Court held that he had no locus standi to maintain the election appeal before it, as he could not be considered to be a person aggrieved. The Supreme Court also did not accept the argument that as an election petition was in the nature of a representative action on

43 AIR 2005 SC 1872.
44 *Surinder Singh v Hardial Singh and Ors* (1985) 1 SCC 961.
45 AIR 1981 SC 116.

behalf of the whole body of electors of the constituency, any elector could file an election appeal, if the petitioner before the high court did not choose to file an election appeal.

The Supreme Court laid down, in the above case, the following conditions as a general proposition in the matter of filing of election appeals:

(i) That the subject matter of the appeal is a conclusive determination by the high court, of the rights with regard to all or any of the matters in controversy, between the parties in the election petition;
(ii) That the person seeking to appeal has been a party in the election petition; and
(iii) That he is a 'person aggrieved', ie, a party who has been adversely affected by the determination.

A person who has been named under s 99 as having been found guilty of commission of a corrupt practice is not a necessary party to be joined, as a respondent to an election appeal.[46] But such person has a right to file an appeal in his own individual capacity, if he so chooses.[47]

New Grounds in Appeal

Normally, in an appeal no new grounds are allowed to be taken which were not raised or argued before the lower court. But election appeals are filed before the Supreme Court and the provisions in the 1951 Act do not affect the powers of the Supreme Court to allow a new point to be taken up by the parties before it, if considered appropriate in the interest of justice. In *KK Khader Hussain Khan v S Nijalingappa*,[48] the Supreme Court allowed the appellant to raise an alternative plea in support of his allegation that the nomination of the respondent was improperly accepted as he had not taken a valid oath under the Constitution, though the same was not raised before the high court. But the respondent was also given an opportunity to counter that new point by putting forward an alternative case in reply. *TN Angami v Ravoluei a/s Rani Shaiza*,[49] a Constitution Bench of the Supreme Court held that, in election appeal, the Supreme Court could go into all questions raised in the election petition and that, in a suitable case, the respondent, supporting the judgment of the high court in the election petition, could be allowed to raise a point found against him in the judgment, even if he has not filed a cross appeal against that point.

46 *Dal Chand Jain v Narayan Shankar Trivedi* 41 ELR 163 (SC).
47 *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar Kashinath Kunte* AIR 1996 SC 1113.
48 AIR 1969 SC 1034.
49 AIR 1972 SC 43.

Procedure in Appeal

On an appeal being preferred, the Supreme Court may stay the operation of the order of the high court appealed from, if the appellant makes an application therefor. This aspect of the matter has already been discussed above in a foregoing paragraph.

Every election appeal shall be heard and determined by the Supreme Court, as nearly as may be, in accordance with the same procedure as is applicable in relation to an appeal from any final order of a high court passed by it in the exercise of its original civil jurisdiction. All the provisions of the Code of Civil Procedure 1908 and of the Supreme Court Rules also apply in relation to such appeal [s 116C(1)].

Though it is provided in s 116C(1) that the hearing of an election appeal shall be subject to the provisions of the 1951 Act and of the rules, if any, made thereunder, the 1961 Rules made under the 1951 Act do not make any provision for dealing with election appeals by the Supreme Court. As mentioned in an earlier paragraph, the Supreme Court's own rules apply to election appeals.

Unlike the provisions of s 86(7) envisaging the disposal of an election petition within six months from the date of its presentation, no such time limit is envisaged under the law, for the disposal of an election appeal.

Summary Dismissal of Election Appeal

As mentioned above, an election appeal from the final order of the high court in an election petition lies to the Supreme Court as a matter of right. But it does not follow that every election appeal must be disposed of by the Supreme Court after notice to respondents and detailed consideration. In an appropriate case, the Supreme Court may dismiss the appeal summarily, even if the appeal is statutory and filed as of right. The Supreme Court has held in *Bolin Chetia v Jogadish Bhuyan and Ors*,[50] that it has inherent power to summarily dismiss an election appeal at the admission stage and that s 116A of the 1951 Act does not take away such inherent power of the court. The Supreme Court, however, added a word of caution that such power should be exercised only by way of exception, such as on the court feeling convinced that the appeal does not raise any question of fact or law as would persuade it to put the respondent on notice before hearing.

Interference with High Court's Findings of Fact

Now that the election appeals are heard by the Supreme Court, its powers as an appellate court are plenary and very wide. As the Supreme Court is the first court of appeal in the matter of an election petition, there is no limitation on it to reverse a

50 AIR 2005 SC 1872.

finding of fact or law by the High Court in the election petition.[51] It can reappraise the evidence and reverse a finding of the high court, on questions of fact or law, which has been recorded on a misreading or wrong appreciation of the evidence, or the law. But the Supreme Court observes restraint, a self-imposed limitation, while reversing the findings of the high courts, particularly on the questions of fact. The high courts, in the trial of election petitions, have the benefit of observing the demeanour of the witnesses appearing before them to give evidence, and the appreciation and appraisal of their evidence by the high courts is given a great weight by the Supreme Court. Generally, the findings of fact by the high courts are accepted by the Supreme Court, but not always so. The Supreme Court may interfere with a finding of fact, if it feels that the high court has not properly appreciated and appraised the evidence,[52] or there is some grave or palpable error in appreciation of the evidence on the basis of which the findings were arrived at.[53] On being satisfied of a wrong approach of the high court or injustice shown to be done, the Supreme Court would not only have power, rather, it would be its obligation, to rectify the mistake and dispense justice.[54] The normal practice of the Supreme Court is to call upon the party which attacks a finding of fact by the high court to show how and where the high court erred in the appreciation of the evidence.[55]

Withdrawal of Election Appeal

A detailed procedure is prescribed in the 1951 Act for the withdrawal of an election petition. But no such procedure is laid down for the withdrawal of an election appeal. Therefore, the provisions or principles governing the withdrawal of election petitions do not apply in relation to election appeals. An appellant has the right to withdraw his appeal unconditionally and the court has to grant it, if he makes an application to that effect. The power of the appellate court here being consistent with its power of dealing with an appeal from an original decree in a civil suit, the election appeal has to be allowed to be withdrawn, if so desired by the appellant, and the court cannot say that it will not permit the appeal to be withdrawn.[56]

Abatement of Appeal

An election appeal abates on the death of the appellant and a respondent cannot ask for being substituted as an appellant to prosecute the appeal.[57]

51 *Pradip Buragohain v Pranati Phukan* 2010(5) SCJ 815.
52 *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe* AIR 1995 SC 2284.
53 *Sumitra Devi v Sheo Shankar Prasad Yadav* AIR 1973 SC 215.
54 *Surinder Singh v Hardial Singh and Ors* (1985) 1 SCC 961.
55 *M Chenna Reddy v V Ramachandra Rao* 40 ELR 390.
56 *Bijayananda Patnaik v Satrughna Sahu* AIR 1963 SC 1566.
57 *Kashinath Sajan Patil v Dr Deshmukh Hemant Bhaskar* AIR 1993 SC 187.

Futile Appeals or Academic Questions

As a general principle, the courts look into live issues between the parties and do not undertake to decide an issue which is purely academic or has become infructuous on account of any supervening event. If during the pendency of an election appeal, the candidate whose election is under challenge dies or resigns his seat in the house concerned or the house concerned itself stands dissolved either by efflux of time or on premature dissolution, the Supreme Court treats the election appeal as having become infructuous and dismisses it as such, for any decision one way or the other would have no impact on the position of the parties and it would be a waste of public time by engaging in a fruitless exercise.[58] In *Romesh v Ramesh K Rana and Ors*,[59] the Punjab and Haryana High Court had, on recount of votes, declared the election of appellant as void and further declared the respondent as duly elected to the Haryana legislative assembly. During the pendency of the appeal before the Supreme Court, the Haryana legislative assembly was dissolved. The Supreme Court dismissed the appeal as infructuous holding that nothing further survived for consideration of the court.

But the situation may be different, where allegations of corrupt practice have been made against a candidate in the election petition and made a subject matter of election appeal. Such election appeal does not become infructuous in any of the above mentioned contingencies, and is heard and decided by the Supreme Court, as any decision in such appeal may have a future effect on the disqualification of the person found guilty of commission of corrupt practice. The appeal in *Dhartipakar Madan Lal Agarwal v Rajiv Gandhi*[60] related to Shri Rajiv Gandhi's election to the House of the People in 1981 and by the time the instant appeal was heard by the Supreme Court, Shri Gandhi had already been elected to the House of the People at a subsequent general election in 1984. But the instant appeal was heard and decided by the Supreme Court on merits, as certain allegations of corrupt practices had been made in the election petition against Shri Gandhi relating to his earlier election in 1981.

Decision of Supreme Court

As soon as may be after an appeal has been decided, the Supreme Court shall intimate the substance of the decision to the Election Commission, and also to the Speaker, or Chairman of the House of Parliament, or of the state legislature

58 *RS Nayak v AR Antulay* AIR 1984 SC 684; *Podipireddy Atchuta Desai v Chinnam Joga Rao* (1987) Supp SCC 42; *Dhartipakar Madanlal Agarwal v Rajiv Gandhi* AIR 1987 SC 1577.
59 AIR 2000 SCW 4665, (2000) 9 SCC 265.
60 AIR 1987 SC 1577.

concerned [s 116C(2)]. In addition, the Supreme Court shall also send to the Election Commission an authenticated copy of its decision.[61]

While deciding an election appeal, the Supreme Court may dismiss the appeal or allow it, either in part or wholly. For instance, where a high court has declared the election of the returned candidate as void and also declared some other candidate as duly elected while deciding an election petition, the Supreme Court may uphold the decision of the high court declaring the election of the returned candidate to be void, but may not agree with the further relief granted by the high court declaring some other candidate to be duly elected. In appropriate cases, where the Supreme Court is of the opinion that the trial of the election petition has not been properly conducted, it may even remand the matter to the high court for fresh or further trial in accordance with such directions as may be given by it.[62]

Publication of Decision of Supreme Court and Its Transmission to Appropriate Authority

As in the case of decisions of the high courts in election petitions, the copies of decision of the Supreme Court in election appeal are also forwarded by the Election Commission to the Speaker or Chairman of the House concerned, and also to the Central Government, in the case of an election to either House of Parliament, or to the state government, in the case of an election to the State Legislature [s 116C(2)(a)]. Such decision of the Supreme Court is also caused to be published by the Election Commission in the Gazette of India, if it relates to an election to a House of Parliament, or in the official gazette of the state concerned, in the case of an election to the state legislature [s 116C(2)(b)]. The object of publication in the official gazette of the decision of the Supreme Court is also to give information to the constituency about the final outcome of the election petition in the election appeal.

A decision given by the Supreme Court remanding a case to the high court for further trial and disposing of the appeal shall be deemed to be a final decision for the purposes of its publication in the official gazette, under s 116C(2), except where the Supreme Court directs the matter to be referred back to it by the high court after further trial.

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61 Ibid; s 116C (2).

62 *Pratap Singh v Rajinder Singh* AIR 1975 SC 1045; *Nathu Ram Mirdha v Gurdhan Soni* 44 ELR 161 (SC).