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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on : 13.07.2017

Judgment delivered on : 14.07.2017

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W.P.(C) 5825/2017

NAROTTAM MISHRA

..... Petitioner

Through Mr.Dhruv Mehta, Sr. Adv with
Ms.Vanshaja Shukla, Mr. Bharat
Singh and Mr.Anubhav Ray,
Advocates.

versus

THE ELECTION COMMISSION OF INDIA & ORS

..... Respondents

Through Ms.Anjana Gosain and Mr.Amit
Sharma, Mr.Pankaj Chopra and Mr.
Dipesh Sinha, Advocates for
R-1 and R-2/ECI.

Mr.Kapil Sibal, Mr.Vivek K.Tankha
& Mr. Mukul Gupta, Sr. Advocates,
Mr.Varun Chopra, Mr. Varun Tankha,
Mr.Naman Joshi, Mr.Sachin Pujari,
Mr. Yagyavalk Shukla, Mr.Sandeep
Pathak and Mr.Yashvardhan,
Advocates for R-3.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The petitioner (Dr. Narotam Mishra) is aggrieved by the order dated

23.06.2017 passed by the Chief Election Commission vide which the petitioner stood disqualified under Section 10-A of the Representation of People Act, 1951 (hereinafter referred to as the 'said Act'). This disqualification was for a period of three years to be counted from the date of the said order; this was under the provisions of Section 10-A read with Sections 77 & 78 of the said Act. The Commission was of the view that failure on the part of the petitioner to explain his account of election expenses in the manner required by law and having no good reason or justification for such a failure, he had incurred this disqualification.

2 The petitioner was aggrieved.

3 He filed legal proceedings in the High Court of Madhya Pradesh (W.P.(C) No.9704/2017 Dr. Narotam Mishra Vs. Rajender Bharti). SLP {(C) No.1608/2017 Rajender Bharti Vs. Dr. Narotam Mishra} and a Transfer Petition {(c) D-20213/2017} also came to be filed before the Apex Court. These petitions were disposed of on 12.07.2017. The parties agreed that W.P.(C) No.9704/2017 pending before the Bench of Madhya Pradesh be transferred for hearing and disposal on merits to the High Court of Delhi. The Apex Court had noted that the outcome of the proceedings in the aforementioned writ petition would have an important bearing on as to whether

the petitioner (in W.P.(C) No.9704/2017) continues to be a Member of Legislative Assembly of the State of Madhya Pradesh or not and hence if he could vote in the Presidential election scheduled for 17.07.2017. The Apex Court was of the view that this issue could be determined only after the challenge raised to the order passed by the Election Commission (23.06.2017) is decided by the High Court either finally or by an interim order.

4 Under the aforementioned order of the Apex Court (12.07.2017), the matter was transferred to the High Court of Delhi and under the orders of Hon'ble the Acting Chief Justice, the matter has been assigned to the Court of the undersigned.

5 Record evidences that:

- (i) The petitioner is an elected member from 22, Datia Assembly Constituency, District Datia, Madhya Pradesh.
- (ii) The present dispute relates to the general election of the Legislative Assembly of the said Constituency which election was held in November-December, 2008 and the tenure of which stood expired in the year 2013.
- (iii) Rajender Bharti (hereinafter referred to as respondent No.3), the defeated candidate had filed a complaint against the petitioner on

13.04.2009. Allegations were with respect to allegedly incorrect election expenses accounted for by the petitioner.

(iv) Petitioner submitted his election expenses within the time frame before the District Election Officer (DEO), District Datia to the tune of Rs.2,40,827/-. The complaint however alleged otherwise.

(v) Election Petition (No.26/2009) was filed by respondent No.3 before the High Court of Madhya Pradesh on 20.01.2009 (Gwalior Bench). The same allegations as in the complaint were leveled. Order dated 26.03.2010 was passed in the said petition. SLP No.14984/2010 was preferred against that order by the petitioner. An interim order dated 05.07.2010 was passed whereby the Election Petition was stayed. On 29.11.2012, the complainant-respondent No.3 moved an application seeking a withdrawal of the aforementioned Election Petition (No.26/2009). The proceedings before the Apex Court were also disposed of (SLP No.14984/2010).

(vi) Since no action was initiated against the petitioner; repeated complaints were filed by respondent No.3.

(vii) Respondent No.3 was aggrieved by the act on the part of the Election Commission for not deciding to proceed against the petitioner. He filed W.P.(C) No.7553/2010 before the High Court of Madhya Pradesh seeking a

direction to the Election Commission of India to proceed with the complaint filed by him under Section 10-A of the said Act.

(viii) On 15.01.2013, the Election Commission of India issued a show cause notice to the petitioner. In this notice, it was stated that the Media Committee constituted by the Election Commission had inter-alia held that 42 disputed news items are paid news items and not having been accounted for, the petitioner was asked to furnish his reply within a period of 20 days.

(ix) Meanwhile W.P.(C) No.3512/2011 also came to be filed by one Radhe Mohan Soni challenging the proceedings before the Election Commission.

(x) The petitioner also filed a separate writ petition bearing No.6023/2013 challenging the notice (15.01.2013) issued by the Election Commission.

(xi) Proceedings before the Election Commission progressed. The petitioner filed his detailed reply. He denied the allegations made in the complaint. He specifically denied that the petitioner had got published 42 disputed news items for which no money was paid by him in terms of his election identity; the Media Committee had in fact recorded a finding behind his back and the notice issued by the Election Commission was thus violative of Article 14 of the Constitution of India. The show cause notice has also been issued only on the recommendations of the Paid Media

Committee which was contrary to the law laid down by the Apex Court; once the tenure of the disputed election was over (end of 2013) and the petitioner stood re-elected; the action against him under Section 10-A of the said Act could not be taken.

6 The petitioner has challenged the impugned order passed by the Election Commission (23.06.2017) on various grounds which inter-alia are as follows:-

(a) The term of election of the petitioner stood expired in December, 2013; disqualification of three years after the aforementioned period would in fact frustrate the re-election which has already been taken place in favour of the petitioner. This aspect has not been considered by the Election Commission.

(b) Proceedings under Section 10-A of the said Act had been filed before the Election Commission (No.26/2009-filed by respondent No.3); it should have noted that till the disposal of the said election petition, proceedings before the Election Commission could not continue. This valid aspect has also been ignored by the Election Commission.

(c) 42 disputed news items were only photocopies of the newspapers; they could not be exhibited.

(d) Notice dated 15.01.2013 had been issued by the Election Commission

only on the basis of a media report which has even otherwise been challenged by the petitioner.

(e) The provisions of Section 10-A read with Sections 77 & 123 of the said Act and Rules 86 & 89 of the Conduct of Election Rules, 1961 (hereinafter referred to as the 'said Rules') have been given a go-bye; they have been violated.

(f) Election expenses (as defined in Section 77 of the said Act) means those expenses incurred by a candidate or by his authorized person or by his authorized agent; no such expenses stood proved before the Election Commission. There was no evidence to show that the petitioner, his agent or his authorized representative had incurred any expenditure on the publication of the aforementioned 42 news items.

(g) The impugned order passed by the Election Commission on 23.06.2017 being wholly illegal is liable to be set aside.

7 Respondent No.1 is the Election Commission of India. Respondent No.2 is the District Election Officer, Datia. Respondent No.3 in fact is the contesting party.

8 Respondent No.3 had filed his reply to the interim application. He denied all the averments made in the petition. Submission being that the

petitioner is trying to mislead the Court by suggesting that since his tenure stood completed, the provisions of Section 10-A of the said Act cannot be invoked. All issues now sought to be raised by the petitioner have been answered by the Election Commission in its order dated 23.06.2017. The Election Commission had rightly on the principle of preponderance of probabilities held that the 42 paid news items appearing in the media were for a price paid by the petitioner. This was in terms of an independent inquiry conducted by the Paid News Committee. In this inquiry, the petitioner had submitted his list of witnesses and he had sought permission to cross-examine the members of the Paid New Committee. He however thereafter chose to give up his witnesses for which an adverse inference has to be drawn against him. The petitioner had been given ample opportunity to address all his submissions before the Election Commission of India; however just one day before the judgment was to be delivered, he submitted another application seeking a re-hearing which was then rightly dismissed by the Election Commission. The judgment in (2014) 7 SCC 99 Ashok Shankarro Chavan Vs. Madhavroa Kinhalkar & Others lays down the law correctly in this regard. This has been followed by the Election Commission. The petitioner even otherwise has an alternate remedy under Section 11 of

the said Act which he has not availed. Petition is liable to be dismissed.

9 On behalf of the petitioner, arguments have been addressed by learned senior counsel Mr. Dhruv Mehta. Written submissions have also been filed. His foremost submission is on the aspect of delay. Submission is that there are two kinds of delay envisaged in the present case. Submission being that the petitioner had been elected in December, 2008 for a period of five years which period stood expired in the year 2013. The first show cause notice issued by the Election Commission to the petitioner was on 15.01.2013. The inordinate delay in the issuance of the said notice is unexplained. Attention has been drawn to Rule 89 of the said Rules. Emphasis is laid on the words “as soon as” appearing in Rule 89 (1)(iv) as also the word “immediately” as appearing in Rule 89 (3). Submission being that these expressions define the intent of the Legislature which is that action has to be taken with promptitude; the words “as soon as” amount to do something within the shortest possible time; the word “immediately” also has to be construed on the same parameters. This delay of four years in the issuance of the show cause notice on 15.01.2013 for an election held in the year 2008 is unexplained; it is an unreasonable time; it is de hors the promptitude or reasonable speed which is the necessary mandate which has to be adhered to

in terms of the aforementioned expressions as appearing in Rule 89. To support this argument reliance has been placed upon the judgments of the Apex Court in (2007) 12 SCC 354 General Insurance Council Vs. State of A.P., as also (2009) 17 SCC 690 Rosali V. Vs. TAICO Bank. For the same proposition reliance has also been placed upon another judgment of the Apex Court in 2014 (3) SCC 430 Godrej & Boyce Mfg. Co Ltd. Vs. State of Maharashtra as also a judgment of the Madhya Pradesh High 2005 1 MPLJ 245 Mahendra Vs. State Election Commission. Submission being reiterated that the impugned order is liable to be set aside on this ground alone.

10 Learned senior counsel for the petitioner has also canvassed the proposition of delay in the time period spent by the Election Commission in coming to a decision. Submission being that the show cause notice having been issued on 15.01.2013, the order of the Election Commission coming four years later i.e. being delivered on 23.06.2017 again suffers from delay and laches for which again there appears to be no answer by the answering respondent No.1 and respondent No.2. For this period of delay also, the impugned order cannot be sustained.

11 Learned senior counsel for the petitioner on the merits of the matter points out that the finding returned by the Election Commission that the

petitioner had given an “implied authorization” to expend money on his behalf is in fact not the case of the complainant. Attention has been drawn to the complaint made by respondent No.3. Submission being that the case of the complainant/respondent No.3 all along was that it was the petitioner who had spent this money which had not been accounted for by him and there being no reasonable justification on this count, he is liable to be disqualified under Section 10-A. It was never the case of respondent No.3 that there was any “implied authorization” given by the petitioner to any other person to carry out these acts on his behalf. There being a contradiction in the pleadings and the findings returned by the Election Commission, the impugned order is liable to be set aside on this ground as well. For this proposition, reliance has been placed upon a judgment of the Constitution Bench of this Court reported as 1975 Supp SCC 1 Indira Nehru Gandhi Vs. Raj Narain. Submission being that in this judgment, the Constitution Bench had noted that the proposition laid down in the judgment reported in (1975) 3 SCC 646 Kanwar Lal Gupta Vs. Amar Nath Chawla is no longer a good law; in Indira Nehru Gandhi’s case where the plea had not been set up that the local Congress Party expressed or implied about the party having spent the money on behalf of the candidate, such a finding could not be returned. For

the same proposition that the pleadings set up by respondent No.3 must match the findings and the Election Commission could not have set up a new case, reliance has been placed upon a judgment of the Apex Court in (2002) 5 SCC 337 A.V.G.P. Chettiar & Sons Vs. T. Palanisamy Gounder wherein the Apex Court had quoted with approval a paragraph from AIR p. 240 Trojan & Co. Vs. Rm. N.N. Nagappa Chettiar wherein the Court had held that the decision of a case cannot be based on the grounds outside the pleadings of the parties and the case has to be founded on its pleading. The impugned order is liable to be set aside on this ground as well. It is pointed out that the order of the Election Commission that the petitioner had knowledge of the publication; he took advantage of it and further that he failed to disallow the same leading to a conclusion that there was “implied authority” to allow this publication is again a misunderstood finding. Reliance has been placed upon the judgment of Indira Nehru Gandhi (supra) to support his submission that for the purpose of Section 77 of the said Act the expenditure must be incurred by the candidate himself and any expenditure in his interest by others or his agents (within the terms of the election law) is not to be taken note of; a voluntary expenditure incurred by friends, relations or sympathizers are not required to be included in the

candidate's expenses. It is pointed out that in AIR 1954 SC 749 Rananjaya Singh Vs. Baij Nath Singh, the Apex Court had an occasion to consider such a situation wherein the Court had held that where the Manager, Assistant Manager, Zila Officer and friends all worked for election of the candidate, the employment of such extra persons and incurring of extra expenditure by them was not by the candidate or by his election agents as he has not authorized them. Similarly in the case of (1969) 2 SCC 218 Ram Dayal Vs. Brijraj Singh where the election of the Maharaja and Rajmata of Gwalior was challenged, the Court returned a finding that even assuming the expenditure was incurred by the Maharaja and Rajmata for the party in the canvassing of votes in the absence of evidence that these persons had acted as election agents or incurred expenditure on behalf of the Maharaja or the Rajmata or were authorized by them, it was not to be included in the election expenses.

12 Submission being that in the instant case also , there was no evidence with the Election Commission to arrive at a wrong preponderance of probabilities and to conclude that the petitioner had not given his accounting correctly; there was no material whatsoever with the Election Commission which could in any manner lead the Election Commission to conclude that

the petitioner was guilty of having committed an offence under Section 10-A of the said Act. Submission being again reiterated that it was not the case of respondent No.3 that the petitioner had set up either 'A', 'B' or 'X' as his agent who in turn had been authorized by the petitioner to expend the expenses which are the subject matter of this petition and for which the petitioner has been wrongly held to be guilty.

13 It has lastly been pointed that the judgment relied upon in the impugned order i.e. judgments reported in (1996) 2 SCC 752 Common Cause Vs. Union of India and Ashok Shankarrao Chavan (supra) lay down a rule of presumption; these presumptions are rebuttable. Those judgments were in the context of a defence set up by the candidate that his political party has incurred the expenses. This is not so in the instant case. It was never the defence of the petitioner that his political party had incurred any expenditure on his behalf. The aforementioned judgments being distinct on facts, their ratio could not have been made applicable to the instant case.

14 On behalf of respondent No.3, learned senior counsel points out that the question of delay as has been canvassed by the learned senior counsel for the petitioner is not really an issue in the instant case. Section 10-A which is a legislative enactment clearly states that the disqualification has to be

incurred on the candidate from the date of the order; it does not relate to the time period within which date, the order has to be pronounced. Moreover this is not an adversarial litigation. It is not as if the defeated candidate (respondent No.3) is seeking a re-election or any benefit for himself; his duty is only that of an abiding citizen to bring certain faults of the petitioner on record by virtue of which he had to file repeated complaints and only then cognizance of the same had been taken by the Election Commission. Respondent No.3 is really in the nature of an informant of an FIR; there can be no time schedule laid down for such an information to be passed on to the Competent Authority who then has to hold an inquiry. The Election Commission had rightly appointed the "Paid News Committee" which was an expert body of 8 members who had conducted a preliminary inquiry to return a finding that the 42 newspaper reports pointed out by respondent No.3 appear to be appeals made by the petitioner, all for himself and for his own benefit and this expenditure not having been detailed by him in his accounting , this was a clear case where he was liable to be awarded the penalty of a disqualification under Section 10-A. It is pointed out that the Paid News Committee is a Committee which has been set up by the Election Commission under the superintendence, direction and control of Election

Commission which is vested with the Election Commission under Article 324 of the Constitution of India.

15 In this context, learned counsel appearing for respondents No. 1 & 2 has also drawn attention of this Court to the Compendium of Instruction on Media Related Matters. Submission is that the Paid News has been defined by the Press Council of India which definition has been accepted by the Election Commission; the Commission also has constituted a Committee at its level to examine references received from State level regarding paid news. This is a part of this Compendium which has been placed on record and perused by this Court.

16 Learned senior counsel for respondent No.3 further points out that the submission of the petitioner qua an inconsistent plea in the pleadings and the finding returned by the Election Commission on the question of “implied authority” is a misunderstood argument. There is no distinction in law between a person and his implied agent; the concept of agency necessarily envisages that it is the act of the person himself. That in fact is the crux of this principle. It has lastly been pointed out that the fact finding returned by the Election Commission after a detailed inquiry and several dates of evidence where the parties were permitted to cross-examine their respective

witnesses is a fact finding which unless wholly obnoxious or perverse cannot be interfered with by this Court in its writ jurisdiction. Petitioner even otherwise has an alternate remedy under Section 11 of the said Act.

17 In rejoinder learned counsel for the petitioner while reiterating the earlier arguments points out that the provisions of Section 11 of the said Act are not an alternative efficacious remedy. A decision already having been taken by the Election Commission, it would be an exercise in futility to go back to the same body; not being either equally efficacious and being only an empty formality, the petitioner has no other remedy but to file this petition. Reliance has been placed upon (1985) 3 SCC 267 Ram and Shyam Company Vs. State of Haryana and Others. Learned senior counsel for the petitioner points out that the repercussions which the petitioner will have to suffer in case this order is implemented would be large; he would have to vacate his office for an election for which he has been successfully elected in the subsequent election i.e. for the period between 2013 up to 2018. Learned senior counsel for the petitioner has highlighted the judgment delivered in 1987 (Supp) Supreme Court Cases 93 Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi; submission being that in that case the Apex Court was of the view that where an election relating to the year of 1981 was under challenge,

the respondent's subsequent election could not be set aside on the basis of an election held in 1981. By applying this analogy, the impugned order is liable to be set aside.

18 Arguments have been heard. Record

19 Record shows that the petitioner was a successful candidate in an election of the Madhya Pradesh Legislative Assembly, Constituency No. 22 of Datia. The result of this election was declared on 04.12.2008. The petitioner was a BJP candidate. He had disclosed an expenditure of Rs.2,40,827/- under Section 77 of the said Act. This was within the prescribed limit which at that point of time was Rs.10 lacs. Respondent No.3 had filed his first complaint against the petitioner on 13.04.2009. His contention was that the petitioner had published certain news advertisements which were solely for his benefit and which has worked to his advantage for which an amount of Rs.4,79,860/- has been spent by him. This amount has not been disclosed by the petitioner in the expenditure which had been incurred by him as is the requirement of Section 77 of the said Act. Respondent No.3 on the same date has also filed an election petition before the High Court seeking a declaration that the election of the petitioner be declared null and void. This petition later on came to be withdrawn by

respondent No.3 in September, 2016.

20 Record further discloses that after the first complaint on 13.04.2009, respondent No.3 filed several other complaints before the Election Commission. These complaints are dated 05.07.2009, 18.04.2010, 18.09.2010, 14.03.2011 as also a complaint dated 28.05.2012. These complaints contained an allegation that the petitioner had incurred expenditure on the publication of certain news items which was for his benefit and which were not accounted in his expenditure. The initial complaint disclosed that the advertisement were 35 in number but in the last complaint dated 28.05.2014, they had escalated to 40 such news items. Be that as it may, the gist of these complaints remained the same.

21 On 24.07.2009, the Election Commission had directed the Chief Electoral Officer (Statutory Body-CEO) to enquire into the allegations made by respondent No.3. The report submitted by the CEO on 12.08.2009 absolved the petitioner. It is an admitted fact. The CEO was of the view that the expenditure incurred by the candidate was accounted for as provided in law and it was disclosed within the time span as mandated in Section 77. The expenditure of Rs.2,40,827/- had been endorsed. On 20.06.2012, the Election Commission sent a letter to the District Electoral Officer (DEO)

asking for information regarding the various newspaper items and as to whether they had allegedly received any payment for publicizing those news items which had become the subject matter of the complaints. The DEO sent its report on 22.07.2012 to the Election Commission. This report also absolved the petitioner. This report stated that the media house had denied receiving any money for publication.

22 The Election Commission however thought it fit to refer these alleged news publications to the Committee on Paid News. This Committee on Paid News as has been pointed out by learned counsel for respondents No. 1 & 2 is a Committee which has been set up by the Election Commission in terms of its wide powers of superintendence which has been umbrellaed to it under Article 324 of the Constitution of India. The definition of 'paid news' which has been given by the Press Council of India has been accepted by the Election Commission. The Paid News Committee was a body comprising of 8 experts, details of which find mention at page 99 of the impugned order. The Committee had held its meeting on 05.09.2012 and again on 12.09.2012. The 42 paid news items in question which had been reflected in five newspapers i.e. Dainik Bhaskar, Gwalior, B.P.N. Times, Gwalio, Nai Duniya, Gwalior, Acharan Gwalior and Dainik Datia Prakash were

considered by this 8 member body. A perusal of this 8 member report show that they were all experts and in the category of Additional Secretary, Principal Secretary and Deputy Secretary to various Government bodies including the Election Commission of India. The Committee on the perusal of these 42 news items which had appeared daily from 08.11.2008 to 27.11.2008 held that all these news items carry information only about the petitioner namely Narottam Mishra. These appear to be appeals to the public to select the petitioner as their candidate; they were bias and one sided and aimed at the furtherance of the prospects of the petitioner.

23 The aforementioned news items have also been perused by this Court and the view formed by the Committee does appear to be prima-facie correct. The Committee had thus rightly concluded that these news items published in the newspapers appear to be surrogate items and thus fitted within the definition of “paid news”. Relevant would it be to give the definition of “paid news” (as per Press Council of India). It reads herein as under:-

“any news or analysis appearing in any media (Print and Electronic) for a price in cash or kind as consideration”

24 Respondent No.1/Election Commission of India on receipt of this report from the Committee on Paid News (12.09.2012) thought it a fit case

for further inquiry in the matter. It accordingly issued a show cause notice (dated 15.01.2013) to the petitioner. This was under Rule 89 (5) of the said Rules.

25 Contention of the learned senior counsel for the petitioner that there has been an inordinate delay in the issuance of this notice dated 15.01.2013 as the first complaint of respondent No.3 dates back to 13.04.2009 and is thus violative to Rule 89 of the said Rules is misunderstood. The Election Commission had sought a report from the Chief Electoral Officer on 24.07.2009 in terms of the allegations made by respondent No.3. The CEO had submitted its report before the Election Commission on 12.08.2009. They did not find any fault in the case of the petitioner. However on repeated complaints being filed by respondent No.3 which were between 12.08.2009 to 28.05.2012, a letter was issued to the DEO asking him for information as to whether the newspapers in question had received any payment for publishing the news items qua the petitioner. This report was received by the Election Commission on 25.07.2012.

26 In this intervening period i.e. between April, 2009 to 25.07.2012, a proxy litigation on behalf of the petitioner was endeavored by one Radhey Mohan Soni. Radhey Mohan Soni filed W.P. (C) No.3512/2011. His

contention was that the proceedings before the Election Commission initiated by respondent No.3 under Section 10-A of the said Act cannot continue. He managed to obtain an interim order on 30.05.2011. Proceedings before the Election Commission were stayed because of this confusion which was sought to be created by this proxy petitioner. This Court is inclined to accept the submission of respondent No.3 that Radhey Mohan Soni was in fact a proxy of the petitioner for yet another reason. After the show cause notice had been issued to the petitioner on 15.01.2013, Radhey Mohan Soni again filed an application on 24.01.2013 before the Election Commission stating that the show cause notice issued to the petitioner is bad in law. What could be the interest of Radhey Mohan Soni to seek a closure of the proceedings before the Election Commission qua the petitioner unless he was doing it for the benefit and at the behest of the petitioner? He obviously could have no personal interest but for the fact that he was appearing at the call of the petitioner. Thus the interim order obtained by Radhey Mohan Soni in W.P.(C) No.3512/2011 on 30.05.2011 which had led to the stalling of the proceeding before the Election Commission were largely at the beck and call of the petitioner. It this does not now lie in the mouth of the petitioner to state that the proceedings before

the Election Commission were inordinately delayed for which he should not be penalized. The petitioner cannot be absolved of the liability of delaying the proceedings.

27 Moreover the submission of the learned senior counsel for the petitioner that these proceedings have really no timeline laid upon them which again this Court is not inclined to brush aside. The repercussion and penalty which has to follow once the Election Commission concludes that an Offence under Section 10-A has been committed; would be a disqualification of the elected candidate; a person who is prima-facie guilty under Section 10-A cannot seek succor on the ground of delay. A complainant under Section 10-A would be in the same capacity as an informant of an FIR and if the police chooses to register the FIR after a delay that by itself would not fatalize the FIR. Each case would depend upon its own facts. In this case, delay was largely attributable to the proxy acts qua the petitioner.

28 The second submission of the learned senior counsel for the petitioner (again in the context of delay) that after the issuance of show cause notice on 15.01.2013, there has again been an inordinate delay of four years in the order being passed by the Election Commission which has been delivered on 23.06.2017 and for which there is no justification also appears to be

incorrect. It is not as if the Election Commission was not seized of the matter. The Election Commission after the issuance of its show cause notice had received a preliminary objection of the petitioner on 28.01.2013. His detailed objections were filed on 29.07.2013. Meanwhile the petitioner also chose to file W.P.(C) No.6023/2013 challenging this show cause notice issued to him under Section 10-A of the said Act. This writ petition was filed on 29.08.2013. He obtained an interim order wherein the proceedings before the Election Commission were stayed. It was only after respondent No.3 again moved the High Court of Madhya Pradesh and presented to them that the matter should not be stayed that a stern observation was made qua the petitioner and the matter was allowed to be proceeded with before the Election Commission. Proceedings before the Election Commission had again been stalled only at the behest of the petitioner.

29 There were five witnesses examined by the petitioner and one witness by respondent No.3/complainant. These witnesses were examined and cross-examined at length. The petitioner did not rest his case there. He again move an application seeking an amendment in W.P.(C) No.6023/2013. This was on 03.11.2014. This writ petition was finally dismissed on 23.01.2015. This again led to the delay in the final order passed by the Election Commission

which culminated on 23.06.2017.

30 The aforementioned narration of facts does not make out any argument in favour of the petitioner qua the aspect of delay.

31 The Apex Court in Ashok Shankarro Chavan (Supra) (2014) has upheld the vires of Section 10-A of the said Act. It was held that nature of an inquiry as in Section 10-A would be more or less of a civil nature and the principles of preponderance of probabilities alone would apply. The powers under Section 10-A of the Election Commission is to pass an order of disqualification of a candidate on his failure to lodge a true, correct and genuine account of his bonafide election expenses not exceeding the maximum limit which has been prescribed. Such an exercise has to be carried out by the Election Commission with utmost care and caution; a heavy responsibility is cast upon the Election Commission. For this purpose, the Election Commission can make an inquiry which is envisaged under Section 10-A.

32 Relevant extract of the said judgment reads herein as under:-

“...The only area of examination to be made in an inquiry under Section 10-A is with regard to the lodging of the account of election expenses and whether such lodgment was done in the manner and as required by or under

the Act. In the second place, when such an enquiry is held, the scope would be as contained in Sections 77(1) and (3) as well as Section 78. The said provisions require a contesting candidate to maintain a true and correct account of the election expenses to ensure that such expenses are within the limits prescribed under the Act and that a copy of such statement of accounts is filed within the time prescribed under Section 78. When it comes to the question of a corrupt practice under Section 123, it is needless to state that the scope of examination of the said issue would be within the four corners of an election petition, as has been prescribed in Chapter I of Part VI of the Act to Chapter V of the Act. At the risk of repetition it will have to be reiterated that the enquiry under Section 10-A would be more or less of a civil nature and therefore, the principles of preponderance of probabilities alone would apply and it is relevant to note that even after the order of disqualification, if any, is passed under Section 10-A, after following the requirement of issuance of show-cause notice, receipt of reply, etc., there is a further remedy available to the contesting candidate under Section 11 by which the aggrieved candidate can demonstrate before the Election Commission as to how the order of disqualification cannot stand and that it has to be varied. Even if by invoking Section 11 of the aggrieved candidate

is not able to get his grievance redressed, the constitutional remedy under Articles 32 and 226 of the Constitution is always available to question the correctness of any order that may be passed by the Election Commission under Section 10-A and 11 of the Act.”

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In the light of the above categorical statement made while holding that the rule of law and free and fair elections are the basic features and facts of our democracy. Article 324 should be interpreted in a wide perspective giving power to the Election Commission which has to be recognized in a broad sense and not in a narrow one. We fully approve of the submissions of Mr Ashok Desai, learned Senior Counsel on the above lines and we have already held that in order to ensure free and fair elections, the power vested with the Election commission under Section 10-A read along with the other provisions of the Act and the Rules, it should be held that the Election Commission does possess the requisite powers under Section 10-A to hold the necessary enquiry to ascertain the fact about the compliance of the statutory requirements in the matter of submission of accounts of the election expenses, i.e. the true, correct and bona fide expenses and that such expenses were within the prescribed limit of the Act.

33 The Apex Court while defining the powers of the Election Commission and area of inquiry which is envisaged under Section 10-A has largely relied upon the principle of preponderance of probabilities for the Election Commission to conclude as to whether the candidate in question is liable for a disqualification or not. The powers vested with the Election Commission are wide.

34 As way back as in the year 1996, in the judgment of Common Cause (supra), the Supreme Court had reiterated the powers of superintendence of the Election Commission holding that the superintendence and control over the conduct of an election include the scrutiny of all expenses incurred by a political party. The expression "Conduct of election" being vide enough to include in its sweep; the power to issue directions to the effect that the political parties would submit to the Election Commission for a scrutiny, the details of the expenditure incurred or authorized by the parties in connection with the election of their respective candidates. The rule of presumption has been envisaged in this concluding para. Direction 6 has been rightly highlighted by the learned counsel for the respondent. It reads herein as under:-

“That the expenditure, (including that for which the candidate is seeking

protection under Explanation I to Section 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 authorized 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). Only when the candidate discharges the burden and rebuts the presumption he would be entitled to the benefit of Explanation I to Section 77 of the RP Act.”

35 Submission of the learned senior counsel for the petitioner that this expenditure (as has been referred in this direction 6) only refers to an expenditure which has been incurred by a political party is a mis-interpretation of this direction; expenditure includes all other expenditure as well as that for which a candidate is seeking protection under Explanation 1 to Section 77 of the said Act. It very well includes all other expenditures as well. This direction given in this judgment in fact lays down the rule of presumption which is for the candidate to rebut. This presumption is a mandate; the word used is “shall”. Thus the presumption has necessarily to

be drawn against the candidate which the candidate can rebut. It is for the candidate to rebut that such an expenditure has not been incurred either by him or by his agent or authorized by him.

36 The Election Commission on a fact finding which was in terms of the report submitted by the Committee on Paid News as also by the evidence which had been led before it (which included the examination, cross examination of 6 witnesses qua both the parties) had returned a fact finding to the effect that the newspaper items in question disclosed that these newspapers were in the nature of appeals to the public asking them to vote for the petitioner; these articles promoted him; they were to his advantage; the petitioner had knowledge about them; he had not denied them in his cross-examination; his defence being that these newspaper articles had not been published at his behest. Drawing the analogy of the rule of presumption, it was for the petitioner to have rebutted this presumption and to set up his case that these newspaper articles were neither for his benefit and nor at his behest. He did not lead any such evidence on this score. The Election Commission holding that there was an “implied authorization” by the petitioner to publish these news items was thus a fair finding.

37 This Court also notes that the powers of superintendence as contained

in Article 226 of the Constitution are wide powers but at the same time these powers have to be exercised with care and caution. Unless and until, there is a wholesome perversity or obnoxiousity pointed out by the petitioner, this Court should be slow in interfering in its writ jurisdiction. This is a well settled proposition of law. This has been reiterated in several judgments. The jurisdiction of this Court under Article 227 of the Constitution is only to see whether the inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record; much less an error of law; it is not a reweighing the evidence upon which the inferior Court have passed their decision. The Apex Court in 2010 (5) SCC 501 Mohd. Shahnawaz Akhtar and Anr. Vs. First Additional District Judge, Varanasi & Others had inter-alia held as under:-

“5. In our view, the High Court has transgressed the limits of the jurisdiction under Article 226 of the Constitution of India by purporting to re-appreciate the evidence and coming to its own conclusion. The High Court has nowhere stated or concluded that the lower courts had committed an error of jurisdiction or that they had acted illegally and improperly. Further the high court failed to notice that a case of casual license was not pleaded or proved by Respondent No. 4. Therefore, it was not open to the High Court to make out a new case on behalf of the party in its writ jurisdiction under Article 226 of the Constitution”.

38 The Election Commission after weighing all the evidence on the principle of preponderance of probabilities which is mandated for an inquiry under Section 10-A of the said Act and being distinct from a quasi criminal proceedings which is the subject matter of proceedings under Section 8 (b) of the said Act, had returned its finding. Being based on fair discretionary principles and no perversity having been successfully pointed out by the learned senior counsel for the petitioner, this Court is not inclined to interfere with the impugned order. This Court is also not inclined to accept the submission of the petitioner that the judgment of Rajiv Gandhi (supra) would come in the way as impugned order has been passed qua a taint qua the petitioner for the election period (i.e. between 2008 to 2013) and this order having been passed in 2017 would have repercussion on the second election for which the petitioner has been successfully elected. The judgment of Rajiv Gandhi was for setting aside an election. If this proposition as has been canvassed by the learned senior counsel for the petitioner is accepted, it would make the provisions of Section 10-A of the said Act non-est and redundant. The language of Section 10-A is clear. It mandates that the disqualification incurred by a candidate has to be from the date of the order; what effect it may or may not have on a subsequent election is not what has

to be taken into account.

39 The Apex Court in AIR 1971 SC 40 Union of India Vs. J.N. Sinha had inter-alia noted as under:

“...if a statutory provision either specifically or by necessary implication excludes the application of any law or of the principles of natural justice, then the Courts cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provisions the principles of natural justice. In the present case, there is no question of imposition of any punishment or stigma on the basis of any disciplinary proceedings against the petitioner, as the disqualification contemplated by S.10A of the Act is a necessary consequences flowing from the failure of the petitioner himself from lodging the account of election expenses within the stipulated period and in the prescribed manner. In fact, the impugned action is not an adjudication of any dispute but the automatic result flowing from the non-observance of the statutory provisions which stand incorporated in the Act of the Parliament. Therefore, it is not the Election Commission which has disqualified the petitioner but the petitioner has himself incurred the disqualification under the statute. If a citizen wants to contest election for Parliament or State Assembly, he is supposed to comply with the election law

and if by his acts of omission or commission, a disqualification follows, then only he is to blame and none else. Therefore, all that is required to be done by the Election Commission by exercising jurisdiction under S.10A is to pass an order inviting the attention of the petitioner to the statutory provisions of S.10A which are mandatory in nature and no separate reasons are required to be recorded in the order. In fact, the reason for disqualification is inbuilt in the order of disqualification issued under S.10A of the Act itself, that is, failure to lodge the account of the election expenses. Beyond that the parliament never intended the Election Commission to record any reasons. This would be amply clear from the language employed by the Legislature in the very next section, that is, S.11, where the duty has been cast upon the Election Commission to record the reasons for the purpose of removing any disqualification or for reducing the period of such disqualification. The Parliament was fully alive and aware of the situation and thousands of contesting candidates who failed to lodge account of election expenses would necessarily and inevitably incur the disqualification on account of their failure to lodge election expenses under S.10A of the Act and if for some cogent and valid reasons shown by those candidates, the election Commission later on decides to remove the disqualification or reduce it, it

will have to record its reasons.”

40 Petition is without any merit. Dismissed.

41 Order be given dasti under signatures of the Court Master.

INDERMEET KAUR, J

JULY 14, 2017

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