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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 09.03.2018
Pronounced on: 18.05.2018

+ LPA 480/2017

DR. NAROTTAM MISHRA Appellant
Through: Mr. C.A. Sundaram, Sr. Adv. with
Ms. Vanshaja Shukla, Mr. Zafar Inayat,
Mr. Bharat Singh, Mr. Abhishek Gupta,
Ms. Rohini Musa, Mr. Apoorv Tripathi &
Mr. Akshat Bajpai, Advs.

versus

ELECTION COMMISSION OF INDIA & ORS Respondents
Through: Mr. Amit Sharma, Ms. Anjana
Gosain, Mr. Dipesh Sinha & Ms. Ayiala Imti,
Advs. for R-1 & 2.
Mr. Vivek Tankha, Sr. Adv. with Mr. Varun
Chopra & Mr. Naman Joshi, Advs. for R-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUNIL GAUR

S. RAVINDRA BHAT, J.

1. The appellant (hereafter called “Dr. Mishra”) appeals the final judgment and order dated 14.07.2017 in Writ Petition (Civil) No. 5825 of 2017, whereby the Single Judge dismissed Dr. Mishra’s writ petition. The impugned judgment, found no perversity in the findings of the Election Commission of India (also the “EC”) in holding that there was an “implied authorization” by Dr. Mishra to publish the allegedly paid news items and dismissed the petition.

Brief Facts:

2. Dr. Mishra is a five times elected Member of the Madhya Pradesh Legislative Assembly in the years 1990, 1998, 2003, 2008 and 2013 and has been Minister in the State Government since 2005. He was re-elected as an MLA in the 2013 election, is the Cabinet Minister for Parliamentary Affairs, Water Resources and Public Relations. In November 2008, elections for the Madhya Pradesh (MP) Legislative Assembly were held - including for constituency No.22 of Datia. The limit for expenditure for this election was ₹10 lakhs. Dr. Mishra, who contested on the ticket of the Bharatiya Janata Party ("BJP" hereafter), was declared the winning candidate. He had disclosed an expenditure of ₹2,40,827/- as required by Section 77 of the Representation of the People Act, 1951 (hereafter, also the "RP Act" or the "Act"). On 13.04.2009 the third respondent (Rajendra Bharti hereafter "Shri Bharti") filed a complaint with the Election Commission of India alleging that Dr. Mishra, during the elections held in 2008 had published certain news advertisements for ₹4,79,860/- and did not disclose the same in their expenditure incurred as required under Section 77 of the RPAct, 1951. On 24.07.2009, the EC directed the Chief Electoral Officer ("CEO") of Madhya Pradesh to inquire into the allegations of Respondent No.3 and submit a report. Subsequently, on 12.08.2009, the EC received a report from the CEO that all election expenditure incurred by Dr. Mishra was accounted for as provided in law and disclosed within time. The CEO endorsed the expenditure of ₹2,40,827/- as correct.

3. On 28.05.2012, Shri Bharti sent another representation to the EC. In this, he alleged that 42 news items were published in newspapers and that

the expenditure not disclosed by Dr. Mishra, amounted to ₹6,07,980/-. The EC on 20.06.2012 sent a letter to the District Electoral Officer (“DEO”) seeking information and specifically asking whether different newspapers had received any payment for publishing the news item as alleged by Shri Bharti. On 25.07.2012, the DEO sent a report to the EC that he had inquired into the matter and the editors of media houses had denied receiving any money for the publication from Dr. Mishra or his agent. On 15.01.2013, when the term of the Legislative Assembly of 2008 was about to end, the EC for the first time issued a show cause notice to Dr. Mishra alleging why he should not be disqualified under section 10A of the RPA, 1951. Dr. Mishra filed detailed objections to the show cause notice, *inter alia*, averring that despite the DEO Report no evidence was found that he or his agent incurred any expenditure for publication of any item.

4. The matter proceeded further, when the EC referred the complaint and Shri Bharti’s allegations to the “Paid News committee.” The committee held deliberations. Later its report was furnished to Dr. Mishra, who denied that any misreporting or suppression of election expenditure was involved, in his reply to the show cause notice issued. The EC thereafter proceeded to hear the complaint. EC passed its order, dated 23.06.2017 under section 10A of the RPA, 1951 disqualifying Dr. Mishra for three years from the date of order. The EC noted that there was no direct evidence that Dr. Mishra or his agent incurred the expenditure of publication of any item. However, it held that since Dr. Mishra had knowledge of those publications and he failed to disavow the same, it amounted to implied authorization.

5. Aggrieved, by the EC’s findings and order Dr. Mishra filed W.P. No.3875/2017 before the Madhya Pradesh High Court, Gwalior Bench,

together with an application of interim relief seeking suspension of the EC order dated 23.06.2017. Later, since Dr. Mishra became aware that the Principal Bench at Jabalpur had issued notice in W.P. (PIL) No.9414/2017 (which sought the implementation of EC order dated 23.06.2017); he filed an application before the Chief Justice seeking transfer of his Writ Petition No. 3875/2017 from the Gwalior Bench to the Jabalpur Bench to be heard together with it. That application was allowed and the W.P. 3875/2017 was transferred from the Gwalior Bench to the Jabalpur Bench to be heard together with Writ Petition (PIL) No.9414/2017, on 11.07.2017. The Public Interest Litigation being Writ Petition (PIL) No.9414/2017 and Appellant's Writ Petition No.3875/2017 were listed for hearing before the Division Bench presided by the Chief Justice. However, the Division Bench declined to hear Dr. Mishra's application for interim relief and adjourned the matter by two weeks awaiting the hearing of a Transfer Petition preferred by Shri Bharti. Aggrieved by the said order, Dr. Mishra filed SLP (C) No. 17608 of 2017 before the Supreme Court ("SC"), which by its order dated 12.07.2017, transferred the W.P. No.9704/2017 before this Court for hearing on 13.07.2017.

6. The Single Judge of this Court passed the final judgment and order dated 14.07.2017 in Writ Petition (Civil) No.5825 of 2017, whereby Dr. Mishra's writ petition was dismissed. Being aggrieved by this final judgment passed by the learned Single Judge, Dr. Mishra herein filed the present appeal.

7. Thereafter, by an order dated 16.07.2017, a Division bench of the Delhi High Court declined to stay operation in interlocutory application being C.M. No. 24866/ 2017, of the order of the Election Commission dated

23.06.2017, by which Dr. Mishra was found to have violated the mandate of section 10A of the RPA, 1951 and as a consequence, Dr. Mishra was declared to have been disqualified for three years from the date of the said order. After this, Dr. Mishra filed a special leave petition before the Supreme Court (SLP No. 18336/2017) against the impugned order of 16.07.2017 in CM No. 24866/2017 in LPA No. 480/2017, in which the Supreme Court stayed the EC order dated 23.06.2017 and opined that the matter involves substantial questions of law regarding the interpretation of various provisions of the RPA, 1951 (Sections 10A, 77, 78, 123 etc.) and disposed of the Petition.

Findings of the Election Commission

8. The EC's findings were based on primarily on two issues: first, whether the news publications are in the nature of paid news/advertisements; based on its Committee Report, the EC held that the news items are paid news/advertisements and secondly, whether Dr. Mishra or his agent incurred or authorized the expenditure for publications in newspapers.

Further, the EC returned the following findings against Dr. Mishra:

- i. There is high probability that Dr. Mishra had knowledge of the publications;
- ii. Dr. Mishra failed to disavow the said publications in newspapers;
- iii. Dr. Mishra knowingly took advantage of the expenditure.

The report of the EC of 12th September, 2012, observed as follows:

“(i) The items in question appeared nearly daily from 8th Nov

to 27th Nov, in 2008 in the five newspapers.

(ii) The news items earned information only about Dr. Narottam Mishra and appeared heavily in his favour. There were features and appeals as well, among these clippings. The news items appeared to read more like an election advertisement for the candidate than a news report.

(iii) One particular news items with same headline appeared on 15th Nov in Aacharan, on 11th Nov in Nai Duniya and on 9th Nov in Dainik Bhaskar, with the body of the news items, reproduced verbatim.

(iv) News items carried headlines like, 'Vikaskeliya Narottam Mishra ki JeetJaroori', 'Narottam Hi Pehli pasand', 'Datia mein Narottam ki jeet lagbhag Sunishchit' - which appeared to heavily promote Dr. Narottam Mishra."

9. The Election Commission relied on the report of the Committee on Paid News as well as the evidence led before it. The evidence included examination, and cross-examination of six witnesses of the parties). The EC found that the newspaper items in question contained materials in the nature of appeals to the public asking them to vote for Dr. Mishra. It held that the newspaper articles promoted him, were to his advantage and he had knowledge about those newspaper articles. It also held that Dr. Mishra did not deny the nature of the newspaper articles in his cross-examination rather his defense was that the articles were not published at his behest. The EC in effect relied on the rule presumption and held that having regard to these facts, Dr. Mishra should have rebutted the presumption and set up his defense 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 EC held that

there was an "*implied authorization*" by Dr. Mishra to publish these news items.

10. The EC concluded that even if the Dr. Mishra's contention were to be accepted that he never paid for any alleged advertisement (as the said advertisements furthered his candidature), he should have furnished notional estimates of the expenditure. Dr. Mishra had urged that since neither he nor his agent incurred nor authorized the expenditure the question of furnishing any notional estimate does not arise. The EC rejected Dr. Mishra's argument that it could not have belatedly entertained the complaint and adjudicated upon it, given that the complaint was made in 2011 after the abortive election petition. Dr. Mishra's argument that he could not be disqualified under Section 10A after the term of the Assembly he was elected to, ended, having regard to the provisions of the RP Act, too were rejected by the EC.

Findings of the learned single judge in the impugned judgment

11. After considering the reports and the news items produced before the Election Commission and its order, the Single Judge, held that these news items appeared to be appeals to the public to select Dr. Mishra as their candidate; further the court affirmed the Paid News Committee's findings, as endorsed by EC that these news items published in the newspapers appeared to be surrogate items and thus fitted within the definition of "paid news"; hence, they were held to be biased and one-sided and aimed at the furtherance of the prospects of Dr. Mishra.

12. In context of Dr. Mishra's assertion regarding inordinate delay in the issuance of the show cause notice dated 15.01.2013, the Single Judge cited

the alleged proxy litigation on behalf of Dr. Mishra, by Radhe Mohan Soni filed as W.P.(C) No. 3512/2011. The Single Judge held that the interim order obtained by Radhe Mohan Soni on 30.05.2011 led to the stalling of the proceedings before the Election Commission largely at the beck and call of Dr. Mishra and that Dr. Mishra cannot be absolved of the responsibility of delaying the proceedings. Similarly, in context of the submission of Dr. Mishra that there was an inordinate delay of four years in the order of the Election Commission of 23.06.2017, the Single Judge held that, *inter alia*, the delay in filing the objections by Dr. Mishra (filed on 29.07.2013), and his subsequent filing of W.P.(C) No. 6023/2013 challenging this show cause notice issued to him under section 10A of the Act by means of which he obtained an interim order, wherein, the proceedings before the Election Commission were stayed, were responsible for the stalling of the proceedings before the Election Commission, solely at the behest of Dr. Mishra.

13. Regarding the application of section 10A of the RPA Act, the Single Judge held that:

“The Apex Court in Ashok Shankarrao 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 bona fide 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.”

14. While emphasizing on the reliance on the principle of preponderance of probabilities by the Election Commission to conclude as to whether the candidate in question is liable for a disqualification or not, the Single Judge highlighted the judgment of *Common Cause (supra)*, where the Supreme Court 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 Single Judge went on to state that it is for the candidate to rebut that the expenditure in connection with his/her election has not been incurred either by him or by his agent or authorized by him. The Election Commission’s finding that there was thus an “implied authorization” by Dr. Mishra to publish these news items was held to be a fair finding in the Single Judge’s decision.

15. The Single Judge thereby upheld the Election Commission’s findings based on the enquiry conducted within the meaning of section 10A and dismissed the contention of Dr. Mishra that the impugned order of the Election Commission suffered, *inter alia*, from delay.

Contentions on behalf of Dr. Mishra:

16. Mr. C.A. Sundaram, learned senior counsel for the appellant, Dr. Mishra, argued that the EC’s order and findings were based, *inter alia*, on no evidence and only on conjectures and surmises. Countering the EC’s

reliance on the decision in *Kanwar Lal Gupta v. Amar Nath Chawla* (1975) 3 SCC 646 to hold that if any candidate knowingly takes advantage of an expenditure not incurred by him or his agent; it must be presumed to have been authorized by him, counsel for Dr. Mishra argued that after the said judgment, there was an amendment to section 77 of RP Act 1951 and in the case of *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, the Constitution Bench of the Supreme Court held that *Kanwar Lal Gupta* (*supra*) is no longer good law. Senior counsel highlighted how it was held that the candidate or his agent must incur expenditure and that any expenditure incurred by anyone else cannot be taken notice of. It was urged that *Indira Gandhi* (*supra*) clearly ruled that taking advantage of the expenditure or failure to disavow the same would not lead to a conclusion that either the candidate or his agent authorized the it. Thus, each and every finding of the EC was impeached as contrary to the law declared by Supreme Court. The relevant portion from *Indira Gandhi* (*supra*) that was cited, is as follows:

“491. The difficulty which faces the election petitioner at the outset; in taking up a case of implied authorisation, on the strength of anything observed or decided by this Court in Kanwarlal Gupta case is that no such case was set up here. The petition does not say that the local Congress (R) party was really an express or implied agent of the original respondent, or that it had acted in a manner from which it could be inferred that the funds were really being supplied by the original respondent and were merely being spent by the party or its workers for the election under consideration. No facts or circumstances were at all indicated either in the petition or in evidence from which such inferences were possible.”

17. Counsel submitted that reliance placed on the decision in *Kanwar Lal Gupta (supra)* is misconceived, as the ruling is no longer good law. Counsel highlighted how the Supreme Court, in *Shri Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe & Ors.* (1995) 5 SCC 347, referred to this legal position, reiterating that expenditure incurred for the benefit of the candidate, or his taking advantage of that, or being within his knowledge, with no attempt by him to prevent it are not sufficient to attribute to the candidate any corrupt practice. It was argued that the EC's finding that Dr. Mishra "impliedly authorized" the expenditure to be contrary to the law.

18. Citing *A.V.G.P. Chettiar & Sons v. T. Palanisamy Gounder* (2002) 5 SCC 337, learned senior counsel argued that the finding of the EC of "implied authorization" is contrary to the law laid down by the Supreme Court as the same was rendered even without a case being set up by Shri. Bharti in that regard. Counsel then submitted that the two decisions of *Common Cause v. Union of India* (1996) 2 SCC 752 and *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar & Ors.* (2014) 7 SCC 99 relied on by the EC have no application to the present case as both the cases pertain to a situation where the candidate defense was that his political party had incurred the expenditure, as Dr. Mishra had never taken a defense under Explanation 1 of Section 77 of RPA, 1951 that his political party incurred any expenditure on his behalf and his clear stand was that neither he nor his agent authorized any expenditure for any publication in any newspaper. Arguing further in a similar vein, senior counsel emphasized that the positive evidence on record clearly absolved any malpractice on part of Dr. Mishra. He relied on the statements of newspaper editors that no money was

received either from Dr. Mishra or his agents.

19. Mr. Sundaram then pointed out that he had filed accounts incurring expenditure of ₹2,40,827/-. Shri Bharti alleged expenditure of ₹6,07,980/- in publications. However, counsel urged, that *arguendo* even if that alleged expenditure were to be added to the declared expenditure, the limit prescribed by law of ₹10 lakhs would not be exceeded, or the law contravened. Thus, he submitted that the EC failed to consider this aspect and erroneously disqualified Dr. Mishra for three years. Counsel then cited Rule 89 of the Conduct of Elections Rules, 1961 (the “Rules”) framed under the RP Act which provides that “as soon as” the time prescribed under section 78 of the RPA, 1951 is over, the DEO shall report to the EC on whether the accounts have been lodged as per the Act and the EC has to act upon it “immediately”; counsel further cited the Supreme Court in *General Insurance Council v. State of A.P.*, (2007) 12 SCC 354 where it has been categorically held that the expression “as soon as” implied that the action has to be taken with promptitude. Then counsel argued that although Section 10A of the RPA, 1951 does not prescribe any limitation on the EC for passing an order under the said provision, reading Rule 89 with Section 10A of RPA, 1951, it can be concluded that the EC by law is obligated to act with promptitude and with all reasonable promptitude, under the circumstances.

20. It was contended that the EC issued the show cause notice on 15.01.2013, after a period of four years, when the term of the Assembly of 2008 elections were almost over, and passed the impugned order on 23.06.2017, after a period of another 4 years. Consequently, it was

submitted that the EC acted in violation of Rule 89 firstly in issuing notice after 4 years of the first filed complaint (by Shri Bharti on 13.04.2009) then and passing the order only on 23.06.2017, by taking action after about 9 years. Counsel cited, *inter alia*, *Mahendra v. State Election Commission* (2005) 1MPL 245 and *Godrej & Boyce Mfg. Co. Ltd. v. State of Maharashtra* (2014) 3 SCC 430 to emphasize this aspect. On the subject of delay, learned counsel for Dr. Mishra contended that under Rule 89 read with section 10A, RPA, 1951, the EC is obliged to act with promptitude and with reasonable speed under the circumstances.

21. Mr. Sundaram contended that Section 10A of the Act, is concerned only with the failure of the candidate in lodging/ filing of the account of expenses in the prescribed manner and time, as contemplated under Rule 86. It was argued that the provision does not deal with a situation of the lodging of incorrect/ fudged statement of accounts of expenses. Counsel averred that the parent provision was contained in section 78 (not Section 77) of the Act and submitted that Section 77 provides details on the mode and manner of keeping of a separate and correct account of all expenditure in connection with the election, incurred or authorized by the candidate, which position is fortified by Rule 86, which while dealing with the format and contents of such statement of election expenses, makes a reference to section 77; while section 78 deals with the actual physical act of filing/ lodging such statement of election expenses with the DEO.

22. Mr. Sundaram asserted that the show cause notice that contemplated the disqualification of the candidate under Section 77 could not be with respect to the delay/ non- filing of the election expenses. He also submitted

that in the present case, the enquiry has gone into the issue as to whether the expenses allegedly incurred were not accounted for, which cannot be a subject matter of Section 10A, but rather in an election petition under section 123 of the Act. Counsel proceeded to argue that the jurisdictional fact for the EC acting on Section 10A of the Act is violation (by the candidate) of Section 78 and not section 77.

23. Counsel then submitted that even otherwise, the EC's reliance on *Kanwar Lal Gupta (supra)* was erroneous because that judgment was rendered in the context of a candidate's defense that the expenses were incurred by his political party and not by him. Counsel drew attention to the ratio of the judgment found in paragraphs 13 and 14 of *Kanwar Lal Gupta*, which held that the mere incurring of expenditure by any other person in connection with the election of a candidate, in the absence of "something more" would not make the expenditure as having been authorized by the candidate. Mr. Sundaram argued that neither the EC nor the Single Judge gave any finding with regard to the "something more" that necessarily has to be akin to an implied authorization to such third party and cannot merely amount to taking advantage or even having knowledge of the same. He reiterated how the record showed that the editors of the papers themselves said that no payment had been received, and while so, even a third party had not paid for the same. Thereby, Mr. Aryama contended that the first requirement of expense incurred or such incurred expense being authorized was not proved; the incurring of such expenditure by either the candidate or his authorized agent or a third party with the implied authority of the candidate, too was not found either by the EC or the Single Judge.

24. Mr. Sundaram contended that the Single Judge erred in proceeding on a presumption of expenditure being incurred in the absence of any allegation or proof of expenditure, and instead of determining whether there is any evidence to show that the expenditure was with the knowledge and authorization of Dr. Mishra with the intention of reimbursement, applied the test of presumption found in the explanation to Section 77 regarding expenditure by a political party, and held that the presumption that it was with the knowledge and benefit of the candidate, which the candidate has to rebut.

25. Learned counsel then submitted that by the time the show cause notice was issued to Dr. Mishra, the Revised Guidelines issued under Article 324 of the Constitution with respect to “*Measures to Check ‘Paid News’ during elections i.e., advertisement in the garb of news in Media and Related Matters*” were in effect, and as such, the EC was expected to have forwarded the complaint of Shri. Bharti to the State Level Committee for initial consideration, where Dr. Mishra would have been given an opportunity to make submissions and lead evidence, which it did not do. Counsel asserted submitted that failure by EC was in violation of the principles of natural justice as Dr. Mishra was not afforded an opportunity of being heard. Counsel thus, submitted that the recommendations of the said Committee would, at best be an opinion, and could not be the valid basis of findings of the EC’s order. Counsel stated that assuming without admitting that authorization were proved, the same would at best be an authorization to the newspaper to include the news items; However, in the absence of even an allegation or any evidence to show that the candidate or his authorized

agent or even a third party had made any payments to the newspaper, the requirement of it being “paid news” for the purpose of expense incurred would not be made out. The counsel contended that the accepted evidence was in fact to the contrary and therefore, the very jurisdictional fact for news to be “paid news” had not been established.

26. Regarding the Single Judge’s inference about the alleged proxy litigation of Radhe Mohan Soni who filed W.P. No. 3512/ 2011 before the MP High Court which had issued stay of proceedings against Dr. Mishra, it was argued, *inter alia*, that the subject matter of the writ petition filed by Radhe Mohan Soni was challenging the issuance of notice dated 02.04.2011 by the EC against Ashok Chavan and not Dr. Mishra. The counsel pointed out that the aforesaid Guidelines of 2012 also indicate that cases of Paid News or advertisement or appeal would have to be considered within strict timelines.

27. Finally, Mr. Sundaram argued that after the term of the Assembly regarding whose elections the proceedings had been initiated had expired, and thereafter, Dr. Mishra had been elected to a subsequent Assembly whose term had also completed 4 years and the EC ought not to have passed orders disqualifying Dr. Mishra and ought to have been guided by the judgment in the case of *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* AIR 1987 SC 1577. This judgment was relied on in the peculiar facts and circumstances of the present case and the inordinate passage of time between the action complained of and the order passed after 9 years, coupled with the fact that even taking into account such expenditure, it was well within the prescribed limit under section 77(3), which, according to the counsel, would point to

the fact that the issue at stake was only a question of interpretation of the nature of expenditure, since, if it was taken to be an expenditure, it would not have prejudiced Dr. Mishra to disclose the same as he would not have been in violation of section 77(3) of the RPA, 1951.

Contentions on behalf of Shri Bharti

28. Mr. Vivek Tankha, senior counsel appeared on behalf of Shri Bharti. Counsel dealt with the issue of delay in two parts: delay in initiation of enquiry and delay in conclusion of proceedings. Dealing with the first part, counsel refuted Dr. Mishra's argument regarding inordinate delay in the issuance of the notice dated 15.01.2013. It was pointed out that Mr. Bharti's first complaint dated back to 13.04.2009 was misunderstood. The CEO had submitted a report on some of the allegations made by Shri. Bharti to the EC on 12.08.2009, and a subsequent report on whether the newspapers in question had purportedly received any payment for publishing the news items in relation to Dr. Mishra was issued by the DEO to the EC on 25.07.2012. In the intervening period between April 2009 and 25.07.2012, one Radhe Mohan Soni had preferred a writ petition contending that the proceedings before the EC initiated by Shri. Bharti under section 10A of the Act cannot continue and obtained an interim order. After the show cause notice had been issued to Dr. Mishra, on 15.01.2013, Radhe Mohan Soni again filed an application on 24.01.2013 before the EC stating that the show cause notice issued by it to Dr. Mishra was bad in law. The counsel averred that the interim order obtained by Radhe Mohan Soni in W.P.(C) No. 3512/2011 on 30.05.2011 was at the behest of Dr. Mishra since Radhe Mohan Soni could have no personal interest but for the fact that he

was appearing at the call of Dr. Mishra.

29. Next, dealing with the aspect of delay in the conclusion of proceedings, counsel highlighted the dilatory tactics allegedly indulged by Dr. Mishra chronologically. Counsel submitted that after the issuance of its show cause notice, the EC received a preliminary objection of Dr. Mishra on 28.01.2013, and detailed objections were filed on 29.07.2013. Further, Dr. Mishra also filed W.P. (C) No. 6023/2013 on 29.08.2013 challenging the show cause notice issued to him under section 10A of the Act, whereby, the proceedings before the Election Commission were stayed. Counsel submitted that it was only after Shri Bharti moved the Madhya Pradesh High Court, that by order dated 09.10.2013 was the matter allowed to proceed before the Election Commission. Thus, the proceedings had been stalled only at the behest of Dr. Mishra.

30. Further, the counsel submitted that the issue related to the tenure was hit by constructive *res judicata* as Dr. Mishra had admittedly challenged the constitutional validity of section 10A of the Act, by W.P. No. 6023/2013 and that petition was dismissed by the court by order dated 23.01.2015. Counsel submitted that disqualification would operate from the date of order and it has nothing to do with the tenure; in this context he cited the Kerala High Court Division Bench judgment of *N. K. Pavithran v. M Nandakumar* 2015 (4) KLT 900 where it was similarly held, *inter alia*, as follows:

“12. The date of decision as contemplated under Section 4(3) has its own purpose and object. Till a decision is taken by the State Election Commission the member whose disqualification is under question, is under no disability to continue as member

or to function as a member. The disability arises only when a declaration is made by the State Election Commission. When a declaration is made that a member has defected and he has committed a prohibited act of defection, consequence has to follow therefrom. Further disqualification for a period of six years from the date of decision has been consciously provided which is to take effect from the date of the decision of State Election Commission. When the State Election Commission takes a decision that a member is disqualified, the sting of the decision cannot be obviated by a member on the ground that the tenure of the Municipality has come to an end as well as six years of disqualification thereafter. The purpose and object provided for two disqualifications shall be defeated in the event it is accepted that if after expiry of the tenure of local body, six years have been elapsed, disqualification shall no more be in operation.”

Counsel, thus, submitted that in terms of Section 10A of the RP Act, disqualification would operate from the date of the order and thus Dr. Mishra would be disqualified w.e.f. 23.06.2017.

31. Mr. Tankha next submitted that the intention of the legislature under Section 10A read with Section 77 of the Act is the maintenance of true and correct accounts under law; the purport and intent of that exercise is to ensure that no candidates for election, can treat the requirement to be a formality and file some return without disclosing correct particulars. Counsel further urged that such a stipulation contained in Sections 77(1) and (3), 78, Rule 90, as well as rules 87 and 88 were brought into the statute book in order to ensure that the purity in the election is maintained at any cost and nobody is allowed to violate the law, and highlighted the relevant paragraphs from *Ashok Shankarrao Chavan (supra)*.

32. Mr. Tankha then submitted that though in an election petition facts are to be proved beyond reasonable doubt, however, an enquiry under section 10A of the RPA, 1951, conducted by the Election Commission is based on preponderance of probability. Counsel pertinently cited portions from *Ashok Shankarrao Chavan (supra)*, extracts of which are as follows:

“86. In the first place, the enquiry to be held Under Section 10A is not to examine any allegation of corrupt practice falling Under Section 123 of the Act. The only area of examination to be made in an enquiry Under Section 10A 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 Section 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 10A 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 10A, 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 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 Sections 10A and 11 of the Act.”

33. The learned senior counsel submitted that all the news items contain the same language, photographs and were published in various newspapers, and that some other candidates had made payment for the similar kinds of advertisement. Thereafter, counsel highlighted relevant sections of the EC’s order dated 23.06.2017 to emphasize that the commission perused the reports of the Paid News Committee and issued the show cause notice to Dr. Mishra in exercise of rule 89(5) of the Conduct of Election Rules by affording him an opportunity, which included inspection of all relevant files in the Commission’s record. Similarly, the report of the DEO was averred to have been perused by the EC that enabled them to reach the conclusion that all the 42 news items were found to be extremely biased, many of them being printed “impact features” which are typically paid for pre-negotiated terms according to the then prevailing advertorial policy. Counsel also pointed out how the EC’s order reproduced the advertisements and how none of these items mentioned any campaign of other candidates or comparative analyses of election campaigns of others.

34. Counsel stated that the EC is the expert body and its committee has decided that news items are paid news, and as such, under Article 226/227. That report was considered, after which Dr. Mishra was given show cause

notice. He was heard extensively before the findings were rendered the High Court can only consider the decision making process and not the decision itself. Counsel further reiterated the correctness of the order of the EC in concluding that Dr. Mishra had given his implied authorization for publication of the advertisements in question and had knowingly taken advantage of the same, and had not included the same in the account of election expenses- in the absence of good reason or justification.

35. Finally, Mr. Tankha argued that Dr. Mishra had not lodged a true and correct account of expenditure as envisaged by the Act and Rules. As such, counsel urged that the EC had correctly disqualified Narottam Mishra for three years from the date of the order, under section 10A read with sections 77 and 78 of the RPA, 1951 for failure to lodge his account of election expenses in the manner required by law.

Analysis and Findings

I Maintainability: delay and previous election petition

36. The first issue to be decided is with regard to maintainability of the proceedings and the issuance of orders by the EC, disqualifying Dr. Mishra. One important submission made consistently was that the EC should not have entertained and pursued the proceedings, by issuing show cause notice on 15 January 2013. Both the learned single judge and EC have elaborately dealt with this issue. The single judge's observations and findings are as follows:

“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 10A 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 10A has been committed; would be a disqualification of the elected candidate; a person who is prima-facie guilty under Section 10A cannot seek succor on the ground of delay. A complainant under Section 10A 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 10A 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 moved 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.”

37. Besides, this court notices that Shri Bharti's complaint was forwarded to the election authorities of Madhya Pradesh (MP) in April 2009 itself; however complete or satisfactory responses were not received. In the circumstances, a letter was sent to the chief election officer (CEO) on 29 April 2009; no reply was received from that official. The complainant Shri Bharti, sent reminders and repeated complaints, again on 5 July, 2009. This led to the EC requiring the CEO to inquire into the matter again. The CEO this time furnished a report, suggesting that the particulars furnished (of election expenses) were in order. The complainant, Shri Bharti, moved the High Court in WP 7533/2010, for direction to the EC to dispose of the complaint under Section 10A. In this background, Shri Radha Mohan Swami filed a writ petition (3512/2011) questioning EC's jurisdiction; the MP High Court stayed proceedings under Section 10A, as it suspended the EC's order made in *Ashok Chavan's* case, about existence of its jurisdiction. This resulted in the stay of proceedings relating to Dr. Mishra. Later that year, this court decided *Ashok Shankarrao Chavan (supra)* and upheld EC's jurisdiction. The Supreme Court, on an appeal, stayed that decision on 3 November, 2011. In the meanwhile, Shri Bharti preferred another complaint,

with particulars of 40 news items, concerning Dr. Mishra's election. A report was sought from the DEO, who obtained information and made a report on 25 July, 2012. This led to the EC's "Paid News Committee" which held consultations and concluded that the pattern of the newspaper items indicated that they were biased and one sided, meant to promote Dr. Mishra's candidature and were not shown to be advertisements. The committee felt that the news items and articles were "paid news". A show cause notice was issued to Dr. Mishra on 15 January 2013. Shri Radha Mohan Swami promptly challenged this notice, by an application, in his writ petition. The Supreme Court vacated its interim order on 2 May 2013, to the limited extent of enabling the EC to proceed with the inquiry subject to the decision in *Ashok Shankarrao Chavan (supra)*. The judgment was eventually given. Dr. Mishra filed amendments to the writ petition preferred by him, to challenge Section 10A RP Act; this was dismissed on 23 January, 2013. A flurry of applications appears to have been moved on behalf of Dr. Mishra, which resulted in prolongation of proceedings before the EC; eventually, on 23 June, 2017 it disqualified him under Section 10A.

38. The narration of these events is also twined with the election proceedings that were filed by Shri Bharti, which were sought to be withdrawn; the withdrawal led to other events, such as applications by third parties to be substituted, the Shri Bharti's withdrawal of the withdrawal application and the eventual disposal of the election proceedings, without a ruling. On this it was argued on behalf of Dr. Mishra, that the complainant could not have chosen both forums and that the withdrawal of the election

petition resulted in a quietus to the allegations against him.

39. The events that led to the decision under Section 10A clearly point to impediments in the disposition of Shri. Bharti's complaint, either directly through proceedings by Dr. Mishra, or indirectly, through proceedings at the behest of others. The EC and the single judge characterized such third party litigants as Dr. Mishra's proxies. It is, in the opinion of this court, unnecessary to enter into a debate on that aspect, because the net result of all those litigative forays (by Dr. Mishra or others) led to stalling of proceedings before EC. He was the undoubted beneficiary of the delay. Therefore, the conclusion by EC and the single judge, that delay was not a significant factor in this case, is reasonable and based on the record.

40. As far as the other election proceedings, i.e. the election petition before the High Court and the vicissitudes of fortune it went through, materially, there was no decision on the merits. Secondly, In *L.R. Shivaramagowda (supra)* the Supreme Court had pertinently held as follows:

“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. Hence, we do not find any substance in the argument of learned counsel for the first respondent.”

41. This reasoning was approved and followed in *Ashok Shankarrao Chavan* (supra), where an argument identical to the one made on behalf of Dr. Mishra (in this case) was rejected, in the following terms:

“...the said conclusion reached by this Court in the said decision in Shivaramagowda case fully covers the issue raised and we hold that the order of the Election Commission, which has now been upheld by the High Court in stating that it has got every jurisdiction to enquire into the complaint made before it as regards the incorrect and untrue statement of accounts of election expenses lodged by the appellant can be enquired into for the purpose of passing an order of disqualification under Section 10-A, is perfectly justified.

76. The contention of Mr. Gopal Subramaniam, learned Senior Counsel that the proposed action of the Election Commission to conduct an enquiry under Section 10-A would conflict with the

power to be exercised in an election petition under Article 329(b) and thereby ultimately in the event of an order of disqualification being passed would result in virtually setting aside the election of a successful candidate and therefore the impugned order of the Election Commission, as confirmed by the High Court, cannot be sustained. In dealing with the said contention, it will have to be noted that having regard to the scope of Articles 101 to 103 and 190 to 192 of the Constitution, any order of disqualification passed against a Member of Parliament or a Member of a Legislature will have to be considered by the President of India and the Governor of a State respectively for taking a decision as to the consequence that should follow by reason of such an order of disqualification. Even at that stage, there is another filter point in the form of an opinion to be rendered by the Election Commission to the President of India or the Governor of the State before taking a decision as to whether the member elected should vacate his office pursuant to such disqualification. For the reasons which we have elaborately stated while dealing with the scope and power of jurisdiction of the Election Tribunal (the High Court) and the power of the Election Commission under Section 10-A, it will have to be stated that the said submission no longer survives for consideration. The same is, therefore, rejected.”

The court also relied on *Dalchand Jain v. Narayan Shankar Trivedi* 1969 (3) SCC 685 and held as follows:

“Mr. Prashant Bhushan, learned counsel for the intervenor by relying upon the decision in Dalchand Jain in para 14, pointed out that while Section 123(6), which relates to corrupt practice, is referable to Section 77(3), Sections 77(1) and (2) relate to the maintenance of correct accounts with the prescribed

particulars, contravention of which, it can be examined only by the Election Commission under Section 10-A. The said submission is perfectly justified and the reliance placed upon the above decision in para 14 also fully supports the stand of the learned counsel. Para 14 reads as under: (SCC p. 690)

“14. Section 123(6) lays down that ‘the incurring or authorising of expenditure in contravention of Section 77’ is a corrupt practice. Every contravention of Section 77 does not fall within section 123(6). Section 77 consists of three parts. section 77, sub-section (1) requires the candidate to keep a separate and correct account of all election expenses incurred or authorised by him within certain dates. section 77, sub-section (2) provides that the account shall contain such particulars as may be prescribed. section 77, sub-section (3) requires that the total of the said expenditure shall not exceed the prescribed amount. Section 123(6) is related to Section 73(3). If the candidate incurs or authorises expenditure in excess of the prescribed amount in contravention of Section 77(3) he commits corrupt practice under Section 123(6). The contravention of section 77, sub-sections (1) and (2) or the failure to maintain correct accounts with the prescribed particulars does not fall within Section 123(6). See Shri Krishan v Sat Narain . The same opinion has been expressed in several decisions of the High Courts, see Savitri Devi v Prabhawati Misra 15 ELR 358; N.L. Verma v Muni Lal 15 ELR 495; C.R. Narasimhan v M.G. Natesa Chettiar AIR 1959 Mad 514 and the cases referred to therein.”

Relying upon the said paragraph in Dalchand case, we are not hesitant to hold that while Section 123(6) is

relatable to Section 77(3), there is no bar to invoke Sections 77(1) and (2) while holding the enquiry under Section 10-A of the Act.”

II Is the EC's impugned order is incorrect for not applying the new Paid News Guidelines

42. It was argued on behalf of Dr. Mishra that the EC and the single judge overlooked the fact that new “Paid news” guidelines had been issued on 27 August, 2012 and that since the EC in this case, issued show cause notice, in January, 2013 *after* the formulation of such guidelines, the deviation from those guidelines was arbitrary.

43. The guidelines of 2012 (hereafter “2012 guidelines”) appear to be part of an ongoing effort by the EC to monitor the *conduct of elections and the conduct of candidates during elections*. It creates two largely hierarchal institutions- the multi member District Level Media certification and Monitoring Committee (MCMC) which has to scan all media including *suspected case of paid news – in regard to actual and notional expenditure, monitoring of political expenditure*, etc. The MCMC has to furnish its *daily* reports to an accounting team. The State Level MCMC is a multimember body, headed by the CEO of the state and it has a two pronged function: to decide appeals against orders of MCMCs on certification of advertisements in terms of EC's directions dated 15 April, 2004 and examining all cases of paid news on appeal from orders of MCMCs. Dr. Mishra's pointed reliance was on Para 5.4.1, 5.5.5 and 5.6 to say that these clearly suggested that the entire oversight under Section 10A was to be part of an ongoing election and

not one conducted much after the event. More importantly, it was submitted that the EC was bound to follow this mechanism of first relegating the complaint to the MCMC, then permitting the aggrieved party to appeal to the state MCMC and then, if at all, consider the material itself.

44. This court finds the arguments of Dr. Mishra on this score unpersuasive and insubstantial. No doubt, the 2012 guidelines do suggest that the DEOs, the CEOs and the EC have an obligation to monitor the media contemporaneously during the election process, beginning with the notification, the run up for the elections and the behavior of media in its various forms in relation to particular candidates. Yet, the width of the EC's inquiry to inquire and probe into deviations, particularly in regard to reporting of election expenses, cannot be understated. The Supreme Court in *Ashok Shankarrao Chavan* observed this about the amplitude of the EC's power:

“It is a hard reality that if one is prepared to expend money to unimaginable limits only then can he be preferred to be nominated as a candidate for such membership, as against the credentials of genuine and deserving candidates. If such practices are to be simply ignored and a laudable object with which the Act has been brought into the statute book as early as in the year 1950 and later on by the Act of 1951, wherein by virtue of the constitutional provision under Article 324 an authority in the status of the Election Commission is created in order to supervise and control the elections, it must be stated that such an authority who is in ultimate control in the matter of holding of the elections should be held to be invested with the widest power of its kind specified in the Act. Therefore, when it comes to the question of interpretation of the extent of such

power to be exercised by the said authority, we are convinced that the Court should have a very liberal approach in interpreting the nature of power and jurisdiction vested with the said authority, namely, the Election Commission.”

Furthermore, the EC’s power is plenary; it cannot be performed by other bodies. At best, the MCMC mechanism is to be consider a fact collection, reporting body during the process of elections. Since the elections had been concluded in 2008, and the reporting of expenses during those elections were in issue, it is held that the guidelines of 2012 had no application for the EC’s proceedings under Section 10A.

III The correctness of EC’s conclusions and those of the Single judge

45. This issue can be decided in the context of the relevant provisions of law. The applicable provisions of the RP Act and rules under the Conduct of Elections, Rules, 1961 applied by the EC in arriving at its conclusion, subsequently upheld by the Single Judge, are as follows:

Sections 10A, 77 and 78 of the Representation of the People Act, 1951

“10A. Disqualification for failure to lodge account of election expenses. —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 this Act; and

(b) has no good reason or justification for the failure, the Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person

shall be disqualified for a period of three years from the date of the order.

77. Account of election expenses and maximum thereof.—(1) *Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between [the date on which he has been nominated] and the date of declaration of the result thereof, both dates inclusive.*

[Explanation 1.—For the removal of doubts, it is hereby declared that—

(a) 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 this sub-section.

(b) 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 clause (7) of section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause 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 this sub-section.

Explanation 2.—For the purposes of clause (a) of Explanation 1, the expression “leaders of a political party”, in respect of

any election, means,—

(i) where such political party is a recognised political party, such persons not exceeding forty in number, and

(ii) where such political party is other than a recognised political party, such persons not exceeding twenty in number, whose names have been communicated to the Election Commission and the Chief Electoral Officers of the States by the political party to be leaders for the purposes of such election, within a period of seven days from the date of the notification for such election published in the Gazette of India or Official Gazette of the State, as the case may be, under this Act:

Provided that a political party may, in the case where any of the persons referred to in clause (i) or, as the case may be, in clause (ii) dies or ceases to be a member of such political party, by further communication to the Election Commission and the Chief Electoral Officers of the States, substitute new name, during the period ending immediately before forty-eight hours ending with the hour fixed for the conclusion of the last poll for such election, for the name of such person died or ceased to be a member, for the purposes of designating the new leader in his place.]

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

78. Lodging of account with the district election officer.—

[(1)] Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate or, if there are more than one returned candidate at the election

and the dates of their election are different, the later of those two dates, lodge with the [district election officer] an account of his election expenses which shall be a true copy of the account kept by him or by his election agent under section 77.]

123. Corrupt practices.—*The following shall be deemed to be corrupt practices for the purposes of this Act:—*

(1) “Bribery”

(6)The incurring or authorizing of expenditure in contravention of section 77.”

Rules 89 and 90 of the Conduct of Election Rules, 1961

“89. Report by the [district election officer] as to the lodging of the account of election expenses and the decision of the Election Commission thereon. —

(1) As soon as may be after the expiration of the time specified in section 78 for the lodging of the accounts of election expenses at any election, the 1 [district election officer] shall report to the Election Commission—

(a) the name of each contesting candidate;

(b) whether such candidate has lodged his account of election expenses and if so, the date on which such account has been lodged; and

(c) whether in his opinion such account has been lodged within the time and in the manner required by the Act and these rules.

(2) Where the [district election officer] is of the opinion that the

account of election expenses of any candidate has not been lodged in the manner required by the Act and these rules, he shall with every such report forward to the Election Commission the account of election expenses of that candidate and the vouchers lodged along with it.

(3) Immediately after the submission of the report referred to in sub-rule (1) the 1 [district election officer] shall publish a copy thereof affixing the same to his notice board.

(4) As soon as may be after the receipt of the report referred to in sub-rule (1) the Election Commission shall consider the same and decide whether any contesting candidate has failed to lodge the account of election expenses within the time and in the manner required by the Act and these rules.

(5) Where the Election Commission decides that a contesting candidate has failed to lodge his account of election expenses within the time and in the manner required by the Act and these rules it shall by notice in writing call upon the candidate to show cause why he should not be disqualified under section 10A for the failure.

(6) Any contesting candidate who has been called upon to show cause under sub-rule (5) may within twenty days of the receipt of such notice submit in respect of the matter a representation in writing to the Election Commission, and shall at the same time send to district election officer a copy of his representation together with a complete account of his election expenses if he had not already furnished such an account.

(7) The district election officer shall, within five days of the receipt thereof, forward to the Election Commission the copy of the representation and the account (if any) with such comments as he wishes to make thereon.

(8) If, after considering the representation submitted by the candidate and the comments made by the district election officer and after such inquiry as it thinks fit, the Election Commission is satisfied that the candidate has no good reason or justification for the failure to lodge his account, it shall declare him to be disqualified under section 10A for a period of three years from the date of the order, and cause the order to be published in the Official Gazette.]

90. Maximum election expenses.—The total of the expenditure of which account is to be kept under section 77 and which is incurred or authorized in connection with an election in a State or Union territory mentioned in column 1 of the Table below shall not exceed—

(a) in any one parliamentary constituency of that State or Union territory, the amount specified in the corresponding column 2 of the said Table...”

46. The stipulations for maintaining a separate and correct account of all the expenditure in connection with the election was elucidated in *Ashok Shankarrao Chavan (supra)* as follows:

“37. When we read Section 77(1), it is specified therein that every candidate should keep a separate and correct account of all the expenditure in connection with the election that was incurred as between the date on which his nomination was made and the date of declaration of the result thereof i.e. inclusive of both the dates. A careful reading of Section 77(1) makes it significantly clear that a candidate contesting in an election, should maintain a separate and correct account of all expenditure incurred by him in connection with the election. Section 73(3) makes it mandatory that the total of the expenditure in connection with an election should not exceed

such amount as may be prescribed. Here and now we can point out that Under Rule 90 of the Rules, the total of the expenditure that can be expended for which account is to be maintained Under Section 77 has been prescribed in a separate table applicable to different States, in respect of their Parliamentary Constituency and Assembly Constituency. Therefore, reading Section 77(3) along with Rule 90 and Section 77(1), what ultimately emerges is that every candidate contesting in an election should maintain a separate account relating to the election, that such account should contain all the expenditures incurred by him in connection with the election and most importantly such details of the account and the expenses incurred must reflect the correct particulars apart from ensuring that such expenditure does not exceed the maximum limit prescribed Under Rule 90 as stipulated Under Section 77(3).”

47. The Supreme Court went on to hold that when the Election Commission is invested with the powers to hold an enquiry, such an enquiry is not an empty formality, but with regard to the law stipulated under Sections 77(1), (3) and 78 of the Act, it should be a comprehensive enquiry wherein the EC can ascertain whether the accounts lodged in the compliance of Section 78 by a contesting candidate reflects a true, correct and genuine account and not a bogus one. The Supreme Court held that the onerous responsibility imposed on the Election Commission should necessarily contain every power and authority in it to hold an appropriate enquiry to ensure that, in ultimately arriving at the satisfaction for the purpose of examining whether an order of disqualification should be passed or not as stipulated under section 10A, the high expectations of the electorate, that is the citizens of the country reposed in the EC is fully ensured and also no

prejudice is caused to the contesting candidate by casually passing any order of disqualification without making proper ascertainment of the details of the accounts, the correctness of the accounts and the time within which such account was lodged by the candidate concerned.

48. An account, which has been maintained as stipulated under Section 77 read with Rule 90, is thereafter to be lodged. Section 78 of the Act enjoins every contesting candidate in an election to, within 30 days from the date of election of the returned candidate, lodge with the DEO an account of her or his election expenses, which should be a true copy of the account kept by him or by his election agent as required under Section 77 of the Act. The corresponding rules are Rules 87, 88 and 89 of the Conduct of Election Rules, 1961. Sub-rules (1) to (8) of rule 89 specify the extent to which the verification of the correctness and genuineness of the accounts lodged can be enquired into. Rule 89(5) states that where the Election Commission decides that a contesting candidate has failed to lodge his account of election expenses within the time and in the manner required by the Act and the Rules, it shall by notice in writing call upon the candidate to show cause why he should not be disqualified under section 10A for the failure.

49. The Election Commission, having exercised its powers under section 10A of the Act, came to the conclusion that an implied authorization had been given by Dr. Mishra for incurring expenditure that exceeded the limits prescribed under Section 77(3) and were not duly maintained and lodged in contravention of Sections 77 and 78 of the Act, and subsequently passed an order for his disqualification. While returning this finding, the Election Commission relied upon the decision in *Kanwar Lal (supra)* to hold that that

if any candidate knowingly takes advantage of an expenditure not incurred by him or his agent; it must be presumed to have been authorized by him.

50. In *Kanwar Lal (supra)*, the primary allegation against the respondent was that, *inter alia*, they had incurred or authorized expenditure in excess of the prescribed limit of ₹10,000/- in contravention of Section 77 of the RP Act, and this was the primary ground on which the election of the first respondent was sought to be declared void by the petitioner. The charge against the first respondent was that he incurred or authorized expenditure in excess of the prescribed limit of ₹10,000/- in contravention of Section 77 of the Act, and thereby committed the corrupt practice defined in section 123(6) of the Act. Section 123 sets out various corrupt practices which have the effect of invalidating an election and one of them is the incurring or authorising the expenditure in contravention of Section 77. Section 77 (1) provides that “*every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his, election agent, between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive*”, while Section 77 (3) says that “*the total of the said expenditure shall not exceed such amount as may be prescribed.*”

51. It was common ground between the parties in *Kanwar Lal* was that the expenditure prescribed for a parliamentary constituency in the Union Territory of Delhi was ₹10,000/-. The first respondent and his election agent were, therefore, prohibited by Section 77 from incurring or authorizing expenditure in connection with his election exceeding ₹10,000/-, and if the

first respondent or his election agent incurred or authorized such expenditure in excess of ₹10,000/-, it would amount to a corrupt practice voiding his election under section 123(6). The question that, therefore, arose for consideration was whether the first respondent in *Kanwar Lal*, or his election agent incurred or authorized expenditure in connection with his election exceeding ₹10,000/-.

52. The judgment in *Kanwar Lal*, rested on the crucial foundation that not only is the incurring of excessive expenditure a corrupt practice, but also the authorizing of such expenditure, and authorizing may be implied as well as express. Highlighting *Ram Dayal v. Brijraj Singh and Ors.* (1970) 1 SCR 530, the Supreme Court stated that the mere incurring of expenditure in connection with the election of the candidate by any other individual, would not automatically amount to an expenditure authorized by the candidate; however, if something more reasonably lends itself to the inference of implied authorization, then the court may draw such an inference owing to the object of eliminating the corrupting influence of big money. In regard to the scope and ambit of the provision limiting expenditure, the court proceeded to examine the facts and see whether the first respondent incurred or authorized expenditure exceeding ₹10,000/- in connection with his election.

53. The court in *Kanwar Lal* (*supra*) further relied on the decision of *Megh Raj Patodia v. B. K. Birla* (1971) 2 SCR118 to highlight that if the court concludes that an item of expenditure has been suppressed in the return of election expenses, the fact that there is insufficient evidence about the amount so spent is not ground for ignoring the issue. In this light, the

Supreme Court, in that decision, observed that the first respondent had not only suppressed the items of expenditure on nine public meetings but also the items of expenditure on admitted twenty three public meetings were deliberately shown at a much lesser figure than what must have actually been incurred. The Supreme Court, therefore, examined whether there was sufficient material on the basis of which it could reasonably arrive at an estimate of the expenses incurred by the first respondent in connection with the admitted twenty three public meetings and the further nine public meetings. In doing so, the Supreme Court held the view that 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 utilization in the electoral process are within reasonable bounds and not unduly disparate and the electoral contest is evenly matched. Thus, it was held that the first respondent was guilty of the corrupt practice set out in section 123(6) of the Act, as the candidate knowingly took advantage of an expenditure incurred not by him or his agent, thus, presumably an expenditure authorized by him.

54. In *Kanwar Lal (supra)*, accordingly, the Supreme Court interpreted the expression ‘incurred or authorized’ as including within its scope expenses incurred by a political party or by any other person (other than the candidate), unless such third person is an agent of the candidate. The Court held that Section 77(1) prescribed not only the incurring but also the authorizing of excessive expenditure and that such authorization may be implied or express. This interpretation however, needed a clarification as it did not specify who all specifically would qualify to incur/ authorize such expense, which was brought about by the Representation of the People

(Amendment) Act, 1974 (the “Amendment Act”), by virtue of which explanations 1 and 2 were added to section 77(1) of the RP Act. Explanation 1 prescribed that any expenditure, whether incurred or authorized in connection with the election of a candidate by the political party or by any association or body of persons or by any individual other than the candidate or his election agent, shall not be deemed to be incurred or authorized by the candidate or his election agent. The validity of the Amending Act was upheld in *Dr. P. Nalla Thampy Terah v. Union of India* AIR 1985 SC 1133. The relevant paragraph from this judgment is as follows:

“20. We have already said that the question as regards the constitutional validity of Explanation 1 has to be determined regardless of the consideration as to whether the said Explanation restores the law as it stood before the decision of this Court in Kanwar Lal Gupta or whether it introduces a new provision altogether. We have decided upon the constitutionality of the Explanation on its own terms. It is, therefore, unnecessary to consider the pre-Explanation decisions of this Court in Rananjaya Singh v. Baijnath Singh, Ram Dayal v. Brijraj Singh and Megh Raj Patodiav. R.K. Birla, except to extract a passage from the last of these three cases, which reads thus:

“Now coming to the corrupt practice of incurring expenditure beyond the prescribed limit, in several decisions this Court has ruled that it is not sufficient for the petitioners to prove merely that the expenditure more than the prescribed limit had been incurred in connection with the election, he must go further and prove that the excess expenditure was incurred with the consent or under the authority of the returned candidate or his election

agent.””

55. It was further affirmed in *Dhartipakar Madan Lal Agarwal (supra)* that unless the allegations are specific that the candidate or his election agent authorized the expenses before the money was actually spent and that the candidate or his election agent reimbursed or undertook to reimburse the same, the essential ingredient of corrupt practice would not be complete and it would provide no cause of action to plead corrupt practice. Relevant portions of this judgment are as follows:

“20. Section 77 requires a candidate to keep a separate and correct account of all expenditure "in connection with the election incurred or authorised by him or by his election agent" between the date of his nomination and the date of declaration of the result of the election. The candidate is required to maintain account of only that expenditure which he or his election agent may have authorised before the expenditure was actually incurred, which would imply that the candidate or his election agent undertook to reimburse the expenses which may have been authorised by him or his election agent to be spent at the election. In order to constitute a corrupt practice as contemplated by Sections 77 and 123(6) it is necessary to plead requisite facts showing authorization, or undertaking of reimbursement by the candidate or his election agent. A mere vague and general statement that the candidate and his workers with his consent spent money in election in excess of the permissible ceiling would not be sufficient to constitute corrupt practice.

21. ... After the amendment of Section 77(1) any expenditure at the election by a political party, sympathisers or friends cannot be held to have been incurred by the candidate or his election agent unless it is shown that the money which they spent

belonged to the candidate or his election agent or that he reimbursed the same. It is thus evident that unless the allegations are specific that the candidate or his election agent authorised the expenses before the money was actually spent and that the candidate or his election agent reimbursed or undertook to reimburse the same the necessary ingredient of corrupt practice would not be complete and it would provide no cause of action to plead corrupt practice. In the instant case paragraph 50 and its various sub-paragraphs contain mere assertion of facts relating to expenditure but there is no allegation that the expenditure was incurred or authorised by Rajiv Gandhi or that he undertook to reimburse the same. The appellant made an attempt to jumble up various allegations regarding incurring of expenditure by the returned candidate and his workers. The allegations contained therein do not make out any case of corrupt practice and the High Court was justified in striking out the same.”

56. Moreover, in the decision of *Indira Gandhi (supra)*, the Constitution bench of the Supreme Court held that *Kanwar Lal (supra)* was no longer good in law. It was held that for an expenditure to come within the meaning of Section 77 of the Act, the expenditure must be incurred by the candidate or his agent; and any expenditure incurred by anyone else is not to be taken note of, for the same. It was specifically held that taking advantage of the expenditure or failure to disavow the same would not lead to a conclusion that either the candidate or his agent authorized the same. The aim of this judgment was to restore the legal position that originally existed prior to what was held in *Kanwar Lal (supra)*. The Amendment Act introduced the explanation 1 to section 77(1), and *Indira Gandhi (supra)*, basically, reaffirmed that voluntary expenditure by friends, relations, or sympathisers

and expenditure incurred by a candidate's party without any request or authorization by the candidate, was never deemed to be expenditure by the candidate himself. It was held that the law requires proof of circumstances from which at least implied authorization could be inferred. The relevant findings in *Indira Gandhi (supra)* are as follows:

“113. Counsel for the respondent relied on the recent decision of this Court in Kanwar Lal Gupta v. Amarnath Chawla [1975] 2 SCR 259 in support of the proposition that there has been no change in law and if expenses incurred by a political party can be identified with the election of a candidate then that expenditure is to be added to the election expenses of a candidate as being authorised by him. There are no findings by the High Court in the present appeals that any expenses by a political party were authorised by the appellant. There is also no finding in the present appeals that any expenses incurred by a political party can be identified with the election of the appellant. The changes in law effected by the Amendment Acts, 1974 and 1975 totally repel the submissions on behalf of the respondent. Expenses incurred or authorised in connection with the election of a candidate by a political party 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. Furthermore, the ruling in Kanwar Lal Gupta's case (supra) is no longer good law because of the legislative changes.”

119. On behalf of the respondent it was said relying on the decision of this Court in Kanwar Lal Gupta's case [1975]2SCR259 that if the candidate takes advantage of

expenditure incurred by the political party in connection with the election of the candidate or participates in the programme of activity or fails to disavow the expenditure the candidate cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure but his political party has done so. Expenditure incurred by a political party in connection with the election of the candidates of the party is not a part of the election expenses of the candidate. Similarly, participation in the programme of activity organised by a political party will not fall within the election expenses of the candidate of the party. A candidate is not required to disavow or denounce the expenditure incurred or authorised by the political party because the expenditure is neither incurred nor authorised by the candidate. One can disavow what would be ascribed to be incurred or authorised by one. In the case of expenses of a political party there is no question of disavowing expenditure incurred or authorised by the political party.

120. The decision in Kanwar Lal Gupta's case [1975] 2 SCR 259 was based on an observation extracted from the decision of this Court in Megh Raj Patodia v. R.K. Birla [1971] 2 SCR 118. In Megh Raj Patodia's case (supra) the allegations were that the respondent had been put up by one of the wealthiest business houses in the country which owned or controlled a large number of companies and during the election campaign vast material and human resources of these companies were drawn upon by the respondent. This Court dismissed the appeal on the ground that the appellant had failed to establish that expenditure in excess of the prescribed limit was incurred by the respondent. In Megh Raj Patodia's case (supra) there is an observation that expenses incurred by a political party to advance the prospects of the candidates put up by it without more do not fall within Section 77 of the 1951 Act. The words "something more" were construed by counsel for the

respondent to mean that if a candidate takes advantage of expenditure incurred or authorised by a political party such expenses could be attributed to a candidate. The Amendment Act, 1974 has added Explanation 1 to Section 77 of the 1951 Act which shows that expenditure incurred or authorised in connection with the election of a candidate by the political party shall not be deemed to be expenditure incurred or authorised by the candidate or his election agent.

121. Allegations that election expenses are incurred or authorised by a candidate or his agent will have to be proved. Authorisation means acceptance of the responsibility. Authorisation must precede the expenditure. Authorisation means reimbursement 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 re-imbursement.

493...The judgment of this Court in Kanwarlal Gupta's case (supra) discusses a number of cases decided by this Court which show that it is not enough to prove expenditure of money by a candidate's party or friends or relation. It must be also proved that this was expenditure authorised by the candidate and incurred as the candidate's express or implied agent. These cases were: *Rananjaya Singh v Baijnath Singh*; *Ram Dayal v Brijraj Singh*; *Megh Raj Patodia v R.K. Birla and B. Rajagopala Rao v. N G Ranga*.

494. After examining this catena of cases, I think, with great respect, that the decision of this Court in Kanwarlal Gupta's case (supra) 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 explanation (1) to Section 77 (1) of the Act, could be justified as merely an attempt to restore the law as it had been understood to be previous to decision of this Court in Kanwarlal Gupta's case (supra)."

Explanation 1. 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 authorized by the candidate or by his election agent for the purposes of this sub-section :

Provided that nothing contained in this Explanation shall effect.

(a) any judgment, order or decision of the Supreme Court whereby the election of a candidate to the House of the People or to the Legislative Assembly of a State has been declared void or set aside before the commencement of the Representation of the People (Amendment) Ordinance, 1974;

(b) any judgment, order or decision of a High Court whereby the election of any such candidate has been declared void or set aside before the commencement of the said Ordinance if no appeal has been preferred to the Supreme Court against such judgment, order or decision of the High Court before such commencement and the period of limitation for filing such appeal has expired before such commencement ".

495. It appears to me that both parties to the case now before us were under the impression that the expenses incurred by a

political party over its candidate's election was outside the prescribed limit which operated only against expenditure by a candidate himself. Hence, the petitioner had not pleaded expenses incurred by the party of the original respondent as expenses authorised by the original respondent. 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. Nevertheless, the authorisation has to be set up and proved. In the written statement filed on behalf of the original respondent, it was very frankly admitted that some expenditure, incurred by the local Congress party itself, had not been shown as election expenses of the candidate herself. This was the position because, on the side of the original respondent also, the law was understood to be as it is found now clarified by the addition of an explanation to Section 77(1) of the Act.

*496. The second question which arises for consideration is : if some expenses are shown or admitted to have been incurred by the candidate's party or third persons over the election of the successful candidate, is it possible to separate it from a total expenditure on more than one constituency by some process of estimation and apportionment? Of course, this question can only arise if it is first proved that whatever expenditure was incurred by candidate's party or by some other person, who may be a friend, a relation, or a sympathiser, was incurred in circumstances from which it can be inferred that the successful candidate would reimburse the party or person who incurred it. As I have already held, it is only then that expenditure could be held to be authorised by the candidate. It is not enough that some advantage accrued or expenditure was incurred within the knowledge of the candidate. This was very clearly brought out in *Rananjaya Singh v Baijnath Singh* (supra). In this case, the Manager, Assistant Manager, Rule 20 Zila-dars, and peons of*

the proprietor of an estate in Uttar Pradesh had carried on election work, after having been given a holiday on full pay by the proprietor of the estate who was the father of the successful candidate. It was contended that inasmuch as these persons were virtually employees of the candidate himself, their salary for the day must be added to the list of election expenses. This Court repelled this contention on the ground that this extra expenditure had not been authorised by the candidate or his agent. Hence, it need not be shown as an item of election expense. Voluntary expenditure by friends, relations, or sympathisers and expenditure incurred by a candidate's party, without any request or authorisation by the candidate, has never been deemed to be expenditure by the candidate himself.

497. An attempt was then made to pass the responsibility on to the original respondent for the expenses of at least 23 vehicles whose numbers are mentioned in a letter dated February 25, 1971, written by Shri Kapur, who was then the original respondent's election agent, and sent to the District Officer, Rae Bareilly, stating as follows :

"Sir, I beg to say that the District Congress Committee, Rae Bareilly has taken the following cars for election purposes in the three parliamentary constituencies, Rae Bareilly, Amethi and Ram Sanahi Ghat. You may, therefore kindly release them."

After giving numbers of the vehicles the letter proceeds :

" It is therefore requested that the abovesaid cars may kindly be released without delay. The letter of the President of District Congress Committee about the abovesaid cars is enclosed herewith ".

The letter of the President of the committee, mentioned by Shri Kapur, was a rather urgent request made to him by Shri Dal

Bahadur Singh, on February 24, 1971 (Ex. A-43), after informing him that he is in difficulties as he had tried to find out unsuccessfully the whereabouts of Shri V. Vajpayee, who was contesting election from Amethi parliamentary constituency, and of Shri Baiznath Kureel, who was contesting the election from Ram Sanahi parliamentary constituency. He, therefore asked Shri Kapur, the election agent of the original respondent, to send a letter to the District Officer, who had refused to released the vehicles without the endorsement of the candidate concerned or his her election agent.

498. It is clear from the above-mentioned correspondence that Shri Kapur was not speaking on behalf of the other two candidates of adjoining parliamentary constituencies. He was not even undertaking to pay anything for the use of the vehicles on behalf of the original respondent. Shri Kapur also did not state that these vehicles were needed for work in the original respondent's constituency. He merely forwarded the letter with a request for compliance with what Shri D. B. Singh wanted. Shri Dal Bahadure Singh was concerned and entrusted with conducting electioneering work in three adjoining parliamentary constituencies successfully. He had, therefore made a frantic appeal to Shri Kapur to come to his help. Shri Kapur, without concealing any fact, had sent this very letter with a request for the release of the vehicles to the District Officer concerned. On this evidence, the learned Judge came to the conclusion that it was not possible to say which constituency. The learned Judge after considering the evidenc

499. In Hans Raj v. Pt. Hari Ram this Court in a similar situation said :"

Whichever way one looks at the matter it is quite clear in view of the decision of this Court reported in Rananjaya Singh v

Bajinath Singh (supra) that the expenditure must be by the candidate himself and any expenditure in his interest by others (not his agents within the meaning of the a term in the election law) is not to be taken note of. Here the hiring was by the Congress Committee which was not such an agent and therefore the amount spent by the Congress Committee cannot be taken as an amount which must compulsorily be included in the expenditure over the election by a candidate. If this be the position, we have to decide whether this amount spent on the jeeps must be taken to be an expenditure made by the candidate himself. Of that there is no evidence. The bill stands in the name of the Congress Committee and was presumably paid by the Congress Committee also. The evidence, however, is that this jeep was used on behalf of the returned candidate and to that extent we subscribe to the finding given... ”

57. The above legal position on implied authorization was further referred to by the Supreme Court in *Gajanan Krishnaji Bapat (supra)* reiterating that if expenditure is incurred for the benefit of the candidate, which she or he takes unchecked advantage of, as it is within his knowledge, is not sufficient to cast guilt on the candidate for any corrupt practice. Here, the main case of the appellants before the Supreme Court against the returned candidate was that the expenditure incurred or authorized by Shri Bharti or his election agent was much more than what had been disclosed by him in the return of expenditure lodged under section 78 of the Act with the District Election Officer and that huge expenditure incurred by him in connection with his election had been suppressed, so as to escape from the mischief of section 123(6) of the Act. The Supreme Court, while observing that to unseat a returned candidate, the corrupt practice must be specifically alleged and strictly proved to have been committed by the returned candidate himself or

by his election agent or by any other person with the consent of the returned candidate or by his election agent, noted that suspicion, howsoever, strong cannot take the place of proof, whether the allegations are sought to be established by direct evidence or by circumstantial evidence. The relevant portions from the judgment are as follows:

*“20...Neither the violation of Sub-section (1) of Section 77 nor the violation of Sub-section (2) of Section 77 amounts to the commission of the corrupt practice under Section 123(6) of the Act. However, Section 77(3) mandates that the total of the expenditure in connection with the election shall not exceed the prescribed limit and therefore the provisions of Section 123(6) of the Act are related only to Section 77(3) of the Act. If a candidate incurs or authorises expenditure in excess of the prescribed limits, he commits the corrupt practice under Section 123(6) of the Act and his election is liable to be set aside and he also incurs the disqualification of being debarred from contesting the next election. From a plain reading of Section 123(6) and 77 including Explanation I to the Section 77 of the Act, it is therefore clear that in order to be a corrupt practice, the excessive expenditure must be incurred or authorised by the candidate or his election agent. An expenditure incurred by a third person, which is not authorised by the candidate or his election agent is not a corrupt practice. In *Megh Raj Patodia v. R.K. Birla* [1971] 2 SCR 118 after referring to a catena of authorities even before the inclusion of Explanation I to Section 77 of the Act by the Amendment Act 58 of 1974, it was emphasised that to prove the corrupt practice of incurring or authorising expenditure beyond the prescribed limit, it is not sufficient for the petitioner to merely prove that the expenditure beyond the prescribed limit had been incurred in connection with the election of the returned candidate, but he*

must go further and prove that the excess expenditure was authorised or incurred with the consent of the returned candidate or his election agent. In Raj Narain v. Indira Gandhi [1976]2SCR347 this Court reaffirmed the above view and taking note of the Amendment Act 58 of 1974, opined that voluntary expenditure incurred by friends, relations, or sympathisers of the candidate or the candidates' political party are not required to be included in the candidate's return of expenses, unless the expenses were incurred in the circumstances from which it could be positively inferred that the successful candidate had undertaken that he would reimburse the party or the person who incurred the expense. It is not enough to prove that some advantage accrued to the returned candidate or even that the expenditure was incurred for the benefit of the returned candidate or that it was within the knowledge of the returned candidate and he did not prevent it, to clothe the returned candidate with the liability of committing the alleged corrupt practice. Noticing that during an election, the sponsoring or supporting political parties as well as friends, sympathisers and well-wishers do sometimes incur expenditure not only without the consent of the concerned candidate but even without his knowledge this court opined that the successful candidate cannot be clothed with all such expenses to suffer the disqualification.”

The Supreme Court then referred to its Constitution Bench ruling in *P. Nalla Thampy Terah v. Union of India* 1985 Supp SCC 189 and held, in *Gajanan Bapat* (supra) as follows:

“The Constitution Bench thus emphatically laid down that unless the expenditure is in fact incurred or authorised by the candidate or his election agent, he cannot be saddled with that expenditure. Of course a candidate cannot be permitted to

place his own funds in the power or possession of a political party, an association, or some other persons or individuals for being spent on his behalf and then plead for the protection under Explanation (1) to Section 77 of the Act. Where the election petitioner successfully establishes that the funds were provided by the returned candidate, it would be immaterial as to who actually made the payments, which ought to have been included in the return of election expense. It is not "whose hand it is that spends the money". The essence of the matter is "whose money it is" that has been spent. In order that explanation (1) to Section 77 of the Act may apply, therefore, it must be proved that the source of the expenditure incurred was not out of the money of the candidate or his election agent."

Dealing later, with the allegations about excess expenditure towards petrol and publications and their under reporting, the court held as follows:

"The election petitioners have failed to establish any link between the alleged expenses and the returned candidate for printing and distribution of voters cards and posters and have not brought any circumstance on the record to show that the returned candidate had any hand in the tampering of record or even that the tampering of the record was done for the benefit of the returned candidate only.

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 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 receipts 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 account of the receipt and expenditure by the political parties 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. Vague allegations and discrepant evidence may only create a doubt but then the charge of corrupt practice cannot be held to be proved on mere lurking suspicion or doubts.

Howsoever, undesirable and objectionable the practice might be, the fact remains that the evidence led by the election petitioners in this case does not establish the charge levelled by them at all. In the absence of any cogent, reliable, satisfactory and trustworthy evidence to show that the respondent No.1 or his election agent had incurred or authorised the expenditure as alleged in the petition, the trial court rightly found the issue against the election petitioner and we find no reason to take a different view. We therefore, confirm the findings of the High Court on the said issue."

58. It was, thus, held that where no evidence was brought on record to prove that the returned candidate had personally agreed to give advertisement in the election special issue of a newspaper, an adverse

inference that the elected candidate had issued and paid for the advertisement could not be drawn.

59. In the present case, on receiving the documents and the accompanying report of the DEO dated 25th July, 2012, the EC called a meeting of the EC's National Level Committee on Paid News in order to examine the 42 suspected cases of "paid news" published in the *Dainik Bhaskar*, *BRN*, *Gwalior*, and other newspapers. This was an eight member Committee comprised of the Additional Director General, DAVP, Government of India, the Additional Director General (News) of All India Radio, a senior journalist nominated by the Press Council of India, three Principal Secretaries of the EC, the Secretary of the EC, and the Deputy Secretary of the EC as convenor (also referred to as the "Paid News Committee"). The Paid News Committee held its meeting on 5th and 12th September, 2012 and considered the 42 news items. The Paid News Committee made the following observations:

“(i) The items in question appeared nearly daily from 8th Nov to 27th Nov, 2008 in the five newspapers.

(ii) The news items earned information only about Dr. Narottam Mishra and appeared heavily in his favour. There were features and appeals as well, among these clippings. The news items appeared to read more like an election advertisement for the candidate than a news report.

(iii) One particular news items with same headline appeared on 15th Nov in Aacharan, on 11 Nov in Nai Duniya and on 9th Nov in Dainik Bhaskar, with the body of the news items, reproduced verbatim.

...

17. The Committee concluded that all 42 news items were biased, one-sided and aimed at furthering the prospect of the candidate i.e. the Appellant. Some of the report items were advertisements in favour of the Appellant. The Committee held that the reports/news items and advertisements fitted the definition of 'paid news' i.e. "Any news or analysis appearing in any media (Print & Electronic) for a price in cash or kind as consideration" as given by the Press Council of India."

60. Thus, the EC concluded based on, *inter alia*, the observations made in the above report of the Committee concluded that, because the news items carried information pertaining to and favouring Narottam Mishra, and because he had knowledge of the publications, failed to disavow the said publications in newspapers and knowingly took advantage of the expenditure, he made an implied authorization for that expenditure. *Per contra*, it is to be noted that there was an explicit denial by the editors of media houses, which published the said advertisements, of receiving any such payment from Dr. Mishra or his agent. An enquiry under Section 10A of the Act permits the Election Commission to probe into the larger ambit of how a violation of section 77 or 78 has occurred, but, to ascertain the same "something more" is necessary as stated in *Indira Gandhi (supra)*; such an inquiry cannot be premised on mere conjectures and surmises. Further, as has been highlighted above in *Indira Gandhi (supra)* and reiterated in *Gajanan Krishnaji Bapat (supra)*, taking advantage of the expenditure or failure to disavow the same would not lead to a conclusion that either the candidate or his agent authorized the same; a mere failure of disavowance by the candidate of the benefits/ positive boost to his campaign received

from the alleged newspaper advertisements does not establish the incurring of the payment/impliely authorising the payment for the same in contravention of Section 77. A section 10A enquiry pertains strictly to whether the candidate failed to lodge an account of election expenses within the time and in the manner required, provided that there exists no good reason or justification for the failure, however, in the absence of proof to demonstrate actual expenditure/IMPLIED authorization for such expenditure by the candidate/his agent, determining contravention of sections 77 and 78 is incorrect in law. As was stated in *Nalla Thampy (supra)* it is not sufficient to merely prove expenditure beyond the prescribed limit, but it should also be proved that it was incurred with consent/ under authority of candidate/agent to constitute corrupt practice.

61. In *Mubarak Mazdoor v. Lal Bahadur* 20 E.L.R. 176, it was held that the word 'authorized' is not equivalent to 'with the consent or the knowledge of the person concerned'; it is for the petitioner to prove that certain expenditure had been incurred by the candidate. For an act to amount to a corrupt practice of incurring or authorising expenditure in excess of the prescribed limits and to be deemed as a 'corrupt practice' within the meaning of section 123(6), there needs to be a contravention of Section 77; however every contravention of section 77 of the Act would not qualify as a corrupt practice under section 123(6). As was highlighted in *Gajanan Krishnaji Bapat (supra)*, it is only section 77(3) that prescribes a limit to the total expenditure, thus, this being the only portion of Section 77 whose violation is mandated in section 123(6). Thus, when the EC is enquiring into the violation of section 77, it

pertains to only sections 77(1) and 77(2) which relate to keeping account of all expenditure, containing all the particulars and the violation of section 78 which requires the lodging of the said accounts with the district election officer. In the present case, in order to determine whether Dr. Mishra had violated section 77(3), it has to first be examined whether such excess expenditure has necessarily been incurred/ authorized to be incurred by Dr. Mishra or not.

62. The Single Judge's conclusion that the Election Commission's finding that there was thus an "implied authorization" by Dr. Mishra to publish these news items was correct, was based on what was held in *Ashok Shankarrao Chavan (supra)*: that the nature of an enquiry as in section 10A would be more or less of a civil nature and the principle of preponderance of probabilities alone would apply. The Single Judge reiterated this point by citing *Common Cause (supra)* to emphasize on the powers of superintendence of the Election Commission holding that the superintendence and control over the conduct of an election included the scrutiny of all expenses incurred by a political party. However, the Single Judge was incorrect in interpreting that the details of the expenditure incurred by parties in connection with the election of their respective candidates is all encompassing and that the presumption has necessarily to be drawn against the candidate and 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. This directly goes against what was held in *Gajanan Krishnaji Bapat (supra)* where it was explicitly held that:

“In Raj Narain v. Indira Gandhi [1976]2SCR347 this Court reaffirmed the above view and taking note of the Amendment Act 58 of 1974, opined that voluntary expenditure incurred by friends, relations, or sympathisers of the candidate or the candidates' political party are not required to be included in the candidate's return of expenses, unless the expenses were incurred in the circumstances from which it could be positively inferred that the successful candidate had undertaken that he would reimburse the party or the person who incurred the expense... Noticing that during an election, the sponsoring or supporting political parties as well as friends, sympathisers and well-wishers do sometimes incur expenditure not only without the consent of the concerned candidate but even without his knowledge this court opined that the successful candidate cannot be clothed with all such expenses to suffer the disqualification.”

63. Section 10A of the Act empowers the EC to investigate into whether there was an express/implied expenditure/authorization of expenditure by the candidate, however, such investigation cannot be arbitrary and based on conjectures and surmises. As can be observed from the EC's report as well as from the observations of the Paid News Committee, the conclusion that Dr. Mishra gave an implied authorization for the advertisements has not been sufficiently proved. The fact that there was no dissociation of the benefits of the advertisements by Dr. Mishra, or that he had knowledge of the publications and knowingly took advantage of the expenditure, do not establish that there was any implied authorization by him for the incurrence of such expenditure. To deduce that in absence of evidence that establishes acceptance of the responsibility of authorizing, for instance, proving that the candidate had undertaken to reimburse the party or the person who incurred the expense (as reiterated in *Dhartipakar Madan Lal Agarwal (supra)*),

would be arbitrary and against the spirit of the RPA, 1951. In *Gajanan Krishnaji Bapat (supra)* there was no evidence to show that the returned candidate had personally agreed to give advertisement in an election special issue of a newspaper, the Supreme Court was of the view that adverse inference that the elected candidate had issued and paid for the advertisement could not be drawn. An analogy can be drawn here with the present case, where the Election Commission deduced implied authorization in the absence of evidence to suggest that Dr. Mishra had positively incurred/ impliedly authorized for incurrence of expenses to publish the disputed news items.

64. The importance of establishing the charge of incurring or authorising of expenditure in contravention of Section 77 of the Act beyond reasonable doubt, was held in *Smt. Om Prabha Jain v. Charan Das* AIR 1975 SC 1417. Whether any form of incurrence or implied authorization for incurrence was consented to by Dr. Mishra, can be adequately established only when ‘something more’ can be reasonably added to an expenditure incurred by any other person in connection with the election of the candidate; that establishes beyond doubt that such expenditure was authorised by Dr. Mishra. Likewise, it was demonstrated in *Megh Raj Patodia v. R.K. Birla (supra)* that even before the inclusion of Explanation 1 to section 77 of the Act by the Amendment Act, 1974, it was emphasized that to prove the corrupt practice of incurring or authorizing expenditure beyond the prescribed limit, it is not sufficient for the petitioner to merely prove that the expenditure beyond the prescribed limit had been incurred in connection with the election of the returned candidate, but he must go further and prove

that the excess expenditure was authorised or incurred with the consent of the returned candidate or his election agent. Likewise, in *Rananjaya Singh v. Baijnath Singh*, (1955) 1 SCR 671, the Supreme Court held that under Section 77(1) of the RPA, 1951, only expenditure incurred or authorized by the candidate himself or by his election agent is required to be included in the account or return of election expenses and thus, expenses incurred by any other agent or person without anything more need not be included in the account or return, as such incurring of expenditure would be purely voluntary; although it has not been asserted by Dr. Mishra that the expenses were incurred by a specific third party, the fact that the EC was unable to establish that Dr. Mishra himself/through his agent incurred the expenses, makes the payment to the media houses by the unknown third party a voluntary one, that is beyond the knowledge and control of Dr. Mishra. Likewise, in *Daulat Ram Chauhan v. Anand Sharma* 1984 (2) SCR 419, the Supreme Court laid the following proposition:

“A person may, due to sympathy or on his own, support the candidature of a particular candidate but unless a close and direct nexus is proved between the act of the person and the consent given to him by the candidate or his election agent the same would not amount to a pleading of corrupt practice as contemplated by law. It cannot be left to time, chance or conjecture for the Court to draw an inference by adopting an involved process of reasoning. In fine, the allegation must be so clear and specific that the inference of corrupt practice will irresistibly admit of no doubt or qualm.”

Similarly, in *Ram Dayal v. Brijraj Singh and Ors.*(supra), the petitioner had challenged election of Brijraj Singh (the respondent) on the ground that, the Maharaja and Rajmata of Gwalior had helped the respondent's election in a number of ways and incurred considerable expenditure which exceeded the limit. The Supreme Court held that, assuming the expenditure was incurred by the Maharaja and Rajmata for the purpose of obtaining votes, in the absence of any evidence to show that the Maharaja and Rajmata acted as election agents, or that the expenditure was authorized by the respondent, it was not liable to be included in the election expenses, as follows:

“18. Unless it is established that the expenditure was incurred in connection with the election by the candidate or by his election agent or was authorised by him it is not liable to be included under Section 77 of the Representation of the People Act. We agree with the High Court that under Section 77(1) only the expenditure incurred or authorised by the candidate himself or by his election agent is required to be included in the account or return of election expenses and thus expenses incurred by any other agent or person without anything more need not be included in the account or return, as such incurring of expenditure would be purely voluntary. Assuming that expenditure was incurred by the Maharaja and the Rajmata for the purpose of canvassing votes against Raja Pancham Singh, in the absence of any evidence to show that the Maharaja and the Rajmata of Gwalior acted as election agents of Brijraj Singh or the expenditure was authorised by Brijraj Singh it was not liable to be included in the account of the election expenses.”

65. Section 77(3) read with rule 90 (b) of the Rules 1961 prescribes a limit not exceeding an amount of ₹10,00,000/- as the total expenditure of which

account is to be kept under section 77 of the Act. Shri. Bharti had alleged that Dr. Mishra had incurred a total expenditure of ₹13,50,780/- which was in excess of its maximum limit of ₹10 lakhs under Rule 90 of the 1961 Rules and far in excess of ₹2,40,827/- as disclosed by Dr. Mishra in his account of election expenditure. However, since it has not been satisfactorily established that Dr. Mishra has incurred/ given implied authorization for incurring the expenses for the alleged publishing of various advertisements in local newspapers circulated in the Datia Assembly constituency, in the first place, it cannot be concluded that there was breach of the limit of the amount of ₹10,00,000/- as the total expenditure, and it cannot be inferred that there has been a contravention of Section 77(3) read with Rule 90 (b).

66. The scope of inquiry of the Election Commission in Section 10A of the Act does not extend to examining any allegation of corrupt practice falling under section 123 of the Act and pertains only to determine if there is a contravention of sections 77 and 78 of the Act. This point was stated in *Ashok Shankarrao Chavan (supra)* as follows:

“86. In the first place, the enquiry to be held Under Section 10A is not to examine any allegation of corrupt practice falling under Section 123 of the Act. The only area of examination to be made in an enquiry under Section 10A 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 Section 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.”

67. Thus, although, it was held in *Gajanan Krishnaji Bapat (supra)* previously, that only a contravention of 77(3) will constitute a ‘corrupt practice’ within the meaning of section 123(6), the inquiry and investigation of the same is not within the purview of section 10A of the Act, but instead within an Election Petition, as has been prescribed in Chapter I of Part VI of the Act to Chapter V of the Act. Hence, this court will restrict to deciding the interpretation of sections 77 and 78 insofar as they pertain to the maintenance and lodging of correct election expenses incurred, and not probe into whether a ‘corrupt practice’ under the meaning of section 123(6) of the Act had been committed.

68. On 12.8.2009, the EC had received a report from the CEO that all election expenditure incurred by Dr. Mishra was accounted for as provided in law and disclosed within time. The CEO endorsed the expenditure of ₹2,40,827/- as correct. The DEO Report showed no evidence that Dr. Mishra or his agent incurred any expenditure for publication of any item. The EC however, held that since Dr. Mishra had knowledge of the said publications, and he failed to disavow the same, it would amount to implied authorization. Thus, the Election Commission’s conclusion on the counts that there was high probability that Dr. Mishra had knowledge of the publications and because he failed to disavow the said publications in newspapers and

knowingly took advantage of the expenditure, had to be necessarily based on strong material which established express incurring or implied authorization (by Dr. Mishra or his agent) of the payments to the media houses. When there is an evident absence of an incurrence of expenses (whether directly incurred or authorized to be incurred), it logically follows that such notional expenses cannot be kept an account of or lodged as required under sections 77 and 78 of the Act.

69. There is no doubt that the 42 write-ups or features- which are on record are partisan; they appeal to the electorate: even seem to urge them to vote and support Dr. Mishra. Some list out his virtues others, his achievements; all direct extol his candidature based on past track records. Yet, the media houses denied that they were advertisements or appeals to vote for Dr. Mishra. Perhaps one can be skeptical of this response; even reject those responses. Does this *ipso facto* lead one to hold that the advertisements or write-ups were in fact published at the behest of Dr. Mishra or authorized by him? If one takes into account the authorities, particularly *Indira Nehru Gandhi*, *Gajanan Krishnaji Bapat* and *Nalla Thampi* (supra) – the first being of a Bench of 5 judges, it is important that there ought to be on the record, two essential features that the complainant or petitioner in every proceeding (which alleges violation of Section 77) should establish: one, that the objectionable or suspect advertisement or news item, is indeed one that promotes the candidate concerned and two, that such advertisement, etc. was published *by or through him, or by or under his authority*. Both tests are to be *proved*. Though the standard of proof is not as is required in mandated (i.e. proof beyond reasonable doubt)

yet, there should be *credible and convincing material* to establish both objective facts. That the advertisements or news features acclaim or commend the voter to favour her or him, or amount to election promotional propaganda, in most cases can be established. This is because such features, news etc. can be objectively assessed for their intrinsic worth as political propaganda. It is however a *non-sequitur* that the law enjoins the court or the Election Commission to infer that mere publication of such news, or articles leads to a *presumption that it must have been issued by or under authority of the candidate or his agent*. This feature too, has to be then, proved or established.

70. The Supreme Court has repeatedly stressed in various previous judgments (*Dadasaheb Dattatraya Pawar v. Pandurang Raoji Jagtap*, (1978) 2 SCR 524; *Dharmesh Prasad Verma v. Faiyazal Azam* (1985) 1 SCR 11 and *Rajendra Singh Yadav v. Chandra Sen*, AIR 1979 SC 882) that the standard of proof required to establish a corrupt practice is strict, as imputation of corrupt practices, is quasi-criminal and the charge of corrupt practice under S.123(5) has to be scrutinised in a strict manner. No doubt, those decisions were rendered in the context of proceedings before the courts. At the same time, proceedings before the Election Commission, under Section 10A are further to the Constitutional mandate under Article 191 (1) (e) i.e. that “*if he is so disqualified by or under any law made by Parliament*”. Uncontrovertibly, Section 77 and 78 are part of a law made by Parliament of India; the Constitution of India, Article 192, also authorizes the procedure prescribed. The consequence of declaration of disqualification of any -successful candidate or unsuccessful candidate is that the individual

concerned is debarred from candidature for a three-year period. Unlike in the case of a successful candidate, who faces proceedings after he is declared elected, but has to answer the charge of having indulged in some kind of corrupt practice, entailing his vacating the seat, the uniform application of this rule – under Section 10A means that *the election result is immaterial to the declaration- the disqualification and bar attaches regardless of the failure or success in the election*. This obviously is to ensure purity of the election process and guarantee a “level playing field”. In such event, while the standard of proof beyond reasonable doubt may be inapt, there nevertheless should be some objective evidence linking the offending write-ups or features or “election advertisement”. To use an American aphorism some semblance of proof of a “smoking gun” is necessary for the complainant to show to the EC before the latter can base its conclusions.

71. The report of the Paid News Committee that stated that all 42 of the impugned news items were in the form of paid news, however, failed to substantiate the actual incurring or the giving of implied authorization for such incurrence by Narottam Mishra. The presence of implied authorization has to be proved. Granted, there may be considerable difficulties in securing direct evidence. Yet, the process of arriving at a decision requires that it is not suspicion, but a strong set of circumstances, in the absence of any direct evidence, which leads one to conclude that the news items were paid for by or on behalf of the candidate. There ought to be, therefore, clear indication of reimbursement by the candidate or election agent of the person who has been authorized by the candidate or by the election agent of the candidate to

spend or incur as was stated in *Indira Gandhi (supra)*, in order to establish that the news publications were in the nature of paid news.

72. Section 10A of the Act contemplates the satisfaction of the Commission on two counts, i.e., (i) the candidate has failed to lodge the account of election expenses as required, and (ii) for such failure the candidate has no good reason or justification. The application of what was held in *Kanwar Lal (supra)* by the Election Commission to conclude that an implied authorization has been incurred by Dr. Mishra in the present case too, is erroneous, since, this implied authorization, firstly, has in no manner been proved to have been incurred. The media houses that were responsible for carrying the impugned advertisements in their newspapers have all denied receiving any payment for the same from Narottam Mishra or any agent, the photocopies of the said advertisements although carry first-person slogans of a self- eulogizing format, are insufficient to prove that there was any incurrence or implied authorization for incurrence of expense/ approval for the same on the part of Narottam Mishra. Clearly, there has been no promise of reimbursement to anyone either, for the said advertisements, since, the CEO had endorsed the expenditure of ₹2,40,827/- as correct, thus, the Election Commission has acted arbitrarily in concluding that these news items constituted 'paid news'. Secondly, the Election Commission has not taken into consideration the decisions in, *Indira Gandhi (supra)*, *Gajanan Krishnaji Bapat (supra)* and *Dhartipakar Madan Lal Agarwal (supra)*, which basically overruled *Kanwar Lal (supra)* to hold that for an expenditure to come within the meaning of Section 77 of the Act, the expenditure must be incurred by the candidate or his agent; and any

expenditure incurred by anyone else is not to be taken note of, for the same. If the court is to accept that because Dr. Mishra did not disavow the benefits arising from such favourable propaganda, it amounted to implied authorization; not only would it err in law, but this would also set a precedent of a prejudicial manner, To prove Issue no. 1 as set out in the Election Commission's order, (that whether the news publications are in the nature of paid news/ advertisements), the Election Commission first, had to prove Issue no. 2 (whether Dr. Mishra or his agent incurred or authorized the expenditure for publications in newspapers). Inferring merely from Narottam Mishra having the knowledge of, taking benefit of and not disavowing such benefit arising from the disputed news items, the EC does not establish an implied authorization, and is incorrect in concluding that there has been a contravention of sections 77 and 78 of the Act by Dr. Mishra. The implied authorization needs to be established backed by concrete evidence, as has been reiterated in *Indira Gandhi (supra)* as follows:

“It is true that when elections of persons in the position of the Prime Minister or even of Ministers, whether in the Central Government or a State Government, take place, a number of people come forward to either give or thrust their supposed aid in the election. It may be impossible for the candidate to refuse it without offending them. But it is also impossible for the Courts to make the candidate himself or herself responsible so as to impose an obligation upon the candidate to find out what expenses incurred by them were and then to add these on to the candidate's account of expenses. That would be obviously, a most unfair result. And, this is not what the law requires in this Country. The law requires proof of circumstances from which at least implied authorisation can be inferred.”

However, the same has not been established by the Election Commission and incorrectly upheld by the Single Judge. Thus, the EC and subsequently, the Single Judge have erred in their interpretation of sections 77 and 78 of the Act read with rules 88, 89 and 90 by upholding that there was implied authorization by Dr. Mishra or under his authority for publication of the 42 articles, the expenses for which were to be accounted for by him in Sections 77 and 78 of the RPA, 1951.

IV Effect of Dr. Mishra's subsequent election- whether it rendered the inquiry academic

73. Rule 89(4) of the Conduct of Election Rules states that: “(4) As soon as may be after the receipt of the report referred to in sub-rule (1) the Election Commission shall consider the same and decide whether any contesting candidate has failed to lodge the account of election expenses within the time and in the manner required by the Act and these rules.” Thus, as has been urged by Dr. Mishra, the Election Commission ought to have expeditiously conducted the inquiry under section 10A of the Act. The EC issued the show cause notice on 15.01.2013, after a period of four years, and passed the impugned order on 23.06.2017, after a period of another 4 years. Thus, the Election Commission rendered its decision after a period of around eight years. Likewise, in *Mohamad Kavi Mohamad Amin v. Fatmabai Ibrahim* (1997) 6 SCC 71, the Supreme Court had held: “*This Court in connection with other statutory provisions ... has impressed that where no time-limit is prescribed for exercise of a power under a statute it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time.*” However, election disputes tend to

prolong for a number of reasons, this was highlighted in *Akbar vs. Ashok Sahu and Ors.* 2015 (3) SCJ 609 as follows:

“13. However, we are sad to state that invariably the resolution of election disputes in this country takes unacceptably long periods in most of the cases. Very rarely an election dispute gets resolved during the tenure of the declared candidate reducing the adjudicatory process into a mockery of justice. Such delay coupled with a right of appeal to this Court makes the whole process of adjudication a task in a good number of cases. The reasons are many, we will only mention few:

(i) The stakes are very high for the parties. Nothing short of the membership of a constitutional body for a limited period. The power and glory that go with such membership is too high and valuable and the returned candidates naturally leave no stone unturned for protracting the litigation as long as possible.

(ii) The law of elections and election disputes is highly technical. Therefore, there is always scope for lot of objections and cross-objections regarding every step in the conduct of the election petition.

(iii) The absence of dedicated Benches in the High Court for resolution of the election disputes is another factor which contributes enormously to the delay in the adjudicatory process.”

74. The prolonged gap between the first compliant of Rajendra Bharti and the order of the Election Commission, in the present case was caused due to a number of reasons, *inter alia*: time taken to file replies (detailed objections were filed by Narottam Mishra on 29.07.2013- nearly 6 months after the show cause notice was issued), intervening litigations (for instance, the writ filed by Radhe Mohan Soni to obtain an interim order), and the stalled

proceedings eventually were allowed to proceed only after Rajendra Bharti moved the Madhya Pradesh High Court, vide order dated 09.10.2013. However, as can be observed from the statute, there is no specific duration prescribed for the Election Commission to deliver its order pertaining to inquiry under section 10A. Moreover, if there was a delay, and it was to be upheld that the decision under section 10A of the Act would not be applicable subsequently, if the tenure of the Assembly during which such inquiry was conducted expired, then it would go against the spirit of the RPA, 1951. Counsel for Shri Bharti appropriately cited the Kerala High Court Division Bench judgment of *N. K. Pavithran (supra)* where it was held that “*The purpose and object provided for two disqualifications shall be defeated in the event it is accepted that if after expiry of the tenure of local body, six years have been elapsed, disqualification shall no more be in operation.*”

75. Thus, election proceedings prolong due to, *inter alia*, the technical nature of the cases to be dealt with and the high stakes involved. A decision of disqualification under election law cannot be taken in haste. That however, cannot mean that orders passed in relation to disqualification would never be given effect to, if the candidate has been re-elected meanwhile in a subsequent election. Even if a person has been elected thereafter, in a subsequent election for a subsequent term, the fact that the statute uses the words “from the date of the order” clearly establishes that the legislative intent is to give effect to the disqualification from the said date. Any other interpretation would render the provision infructuous. The disqualification ought not be postponed, just because the person has been

re-elected for a subsequent term; that would frustrate the legislative object of section 10A of the RPA 1951 and belie the intention of the provision. If such an interpretation is accepted it should come into effect after the current term of Dr. Mishra comes to an end, then it may result in indefinite postponement of the order passed under section 10A, which is contrary to the express wording and legislative intent. In *ECI v. Bajrang Bahadur Singh* AIR 2016 SC 2301 the Supreme Court while interpreting section 10A of the RPA, 1951, observed that “*The removal takes place by virtue of the operation of law on the happening of the event, that is, the acquisition of a disqualification.*” Relevant parts of the judgment include:

“37. Therefore, now it is a settled proposition of law that the happening of any one of the disqualifying EVENTS has the effect of making the seat occupied by such a disqualified person vacant immediately by operation of law. The effect of the decision of the Governor Under Article 192 is only to decide whether a legislator acquired the disqualification on a particular date on the happening of one of the disqualifying EVENTS contemplated Under Section 191 (sic Article 191). The consequence is that the legislator who acquires the disqualification ceases to be a Member of the Legislature with effect from the date of the acquisition of the disqualification.

38. We have already noticed that there are two classes of disqualification contemplated Under Article 191, (i) disqualifications which last only for a limited period that is, during the currency of certain events specified Under Article 191, (ii) statutory disqualifications prescribed Under Section 8, Section 8A, Section 9 and Section 10A which render a person ineligible for a period specified under each of the above-mentioned provisions. The disqualifications Under Sections 9A

and 10 of the Act are akin to the disqualifications contemplated under Clauses (a) to (d) of Article 191(1) where the period of disqualification is co-terminus with the currency of the event which renders a person ineligible both for being chosen as or for being a Member of the Legislature. Nonetheless on the acquisition of the disqualification by a legislator, he ceases to be a legislator forthwith by operation of law. However, the cessation of the disqualifying factor cannot put such a person back in the legislature without his being elected once again, of course such person is entitled to contest any election under the R.P. Act, the moment the disqualifying factor ceases to exist as the disqualification is co-terminus with the disqualifying EVENT.”

The assertion of Dr. Mishra that there was inordinate delay in the delivery of the order of the Election Commission under section 10A of the RPA, 1951, and that the impugned order of the EC would not affect the current tenure of Dr. Mishra as MLA, cannot be accepted. The appellant’s arguments are therefore rejected on this point.

Conclusions

76. In view of the above discussion it is held that the EC and the Single Judge both erred in interpreting Sections 10A, 77 and 78 read with Rules 89 and 90, in the facts and circumstances of the present case; there was no manner of proof that could be reasonably accepted by a tribunal established by law, to conclude that Dr. Mishra had incurred, directly or indirectly, or had authorized through his agent the incurring of direct or indirect expenditure *on his behalf* for the publication of the 42 offending articles/features/ election appeals. The impugned order of the Election Commission, and the impugned judgment of the Single Judge upholding it

therefore have to be set aside.

77. It has been repeatedly held that elections are the only mechanism in a democracy, such as our country's where the voiceless, the disempowered and the poorest have the right to vote, equally with the mightiest, the richest and the most influential voters. Elections are all about the process described by Winston Churchill (House of Commons, 31-10-1944) as *"At the bottom of all the tributes paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross on a little bit of paper- no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point."* The courts, and tribunals who are tasked with the responsibility of rooting out the ills and distortions that plague the electoral system are to work within the framework of the laws and the Constitution. One is that the rule of law requires that every conclusion of the tribunal or courts are to be based on facts *established by evidence*. Therefore, assumption based stipulative decisions are to be avoided. The second, more fundamental aspect is that the Model Code of Conduct enjoins political parties, candidates and all active participants in the election process not to indulge in campaigning overtly, or in covert forms through advertisements or such like mediums. However, genuine issues concerning the candidates' strengths and weakness are to be articulated in the public domain in the marketplace of ideas, through free speech. The content of a media article, or a news feature or series of features on particular candidates should ordinarily not be regulated indirectly through the directives of the EC; they essentially fall within the domain of free speech. Any indirect control (except in the manner known to law, i.e. accountability for the spending – direct or indirect, and trial in the form of

“corrupt practice” for misreporting under Section 123) would impact a citizen’s right to free speech and expression. Such indirect control would chill the right and freeze all debates- essential to democracy. The importance of flow of information to the voter, was underscored in *Union of India v. Association for Democratic Reforms* where the Supreme Court held that *“information about the candidate to be selected is must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law makers”* . Doubtlessly, that decision was rendered in the context of whether candidates to elected bodies owed an obligation of public disclosure of their personal assets. But the right of the “little man” or woman who is the ultimate sovereign to *be fully informed can be achieved if there is scope for dissemination of ideas and information about candidates*. This aspect is crucial because the Election Commission’ s remit cannot ordinarily extend to judging content of speech; it is only to adjudge whether the election expenses incurred by the candidate or someone on her or his behalf, under her or his authority have been accounted under Section 77.

78. The appeal is allowed; the impugned judgment and the order of the Election Commission are set aside. No order as to costs.

S. RAVINDRA BHAT, J

MAY 18, 2018

SUNIL GAUR, J