HIGH COURT OF MADHYA PRADESH : JABALPUR

Writ Appeal No.648/2017

Ajay Kumar Dohar .... Appellant

Vs.

State of Madhya Pradesh and others .... Respondents

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Coram :

Hon'ble Shri Justice Hemant Gupta, Chief Justice
Hon'ble Shri Justice Vijay Kumar Shukla, J.

Shri Rohit Sohgaura, Advocate for the appellant.

Shri Pradeep Singh, Govt. Advocate for the respondents/State.

Shri Siddharth Seth, Advocate for Respondent No.2/State Election Commission.

Whether approved for reporting – Yes

Law laid down :

The removal or disqualification of an elected representative has serious repercussion, therefore, elected representative must not be removed unless a clear-cut case is made out.

The requirement of furnishing of election expenses is a step to ensure proper maintenance of accounts. Such condition is only a procedure to achieve the said object, thus, not a mandatory condition. The technicality of non-opening of bank account for incurring the election expenses through the bank account cannot be a ground to disqualify a candidate particularly when the election expenses have been duly furnished and have not been commented upon adversely by the Commission.

The Wednesbury principle of reasonableness and the law laid down by the Supreme Court in the case of **Chief Executive Officer**, **Krishna District Coop. Central Bank Ltd. v. K. Hanumantha Rao, (2017) 2 SCC 528** followed in the context of period of disqualification.

Significant paragraphs : 11, 12, 15 to 24, 29, 31

O R D E R
(Passed on this 9th day of November, 2017)

Per Hemant Gupta, Chief Justice

The challenge in the present appeal is to an order passed by the learned Single Bench on 20.7.2017 in W.P. No.20968/2016, whereby the

challenge to an order passed by the State Election Commission (for short "the Commission") on 21.11.2016, disqualifying the appellant to contest the election for five years under Section 32-C of the M.P. Municipalities Act, 1961 (for short the Act), remained unsuccessful.

02. The appellant contested the election to the office of President, Municipal Council Jaitwara for which polling was held on 2.12.2014. In the said election, the appellant was declared as a returned candidate on 7.12.2014. The appellant filed the election expenses within time granted. The appellant was served with a notice dated 17.3.2015 on the ground that the Part I and II, of the expenses book, and Annexure 1 to 9 of the election expenses furnished after the poll are incomplete and to explain as to why the expenses were not done through the bank account. The reply of the appellant is that he be given time for completion of the incomplete document but, in respect of expenses through bank, the assertion of the appellant was that he has incurred the election expenses from the money lying in the house for which expenses has been accounted for. It is in pursuance of such show cause notice, an order was passed on 21.11.2016 published in the official Gazette dated 22.12.2016 that since the appellant has not spent the amount through bank nor opened the bank account, therefore, he has violated the directions of the Election Commission. Therefore, in terms of Section 32-C of the Act, he was disqualified from being elected as Municipal Councilor and President for a period of five years from the date of the said order.

03. Challenge to such order before the learned Single Judge has remained unsuccessful. Learned counsel for the appellant relied upon the

judgment of this Court in the case of **Mahendra Vs. M.P. State Election Commission and others** reported as **2005 (1) MPLJ 245** and **Jawaharlal Gupta Vs. Rajya Nirvachan Ayog, Bhopal** reported as **2003 (1) MPLJ 180**. On the other hand, learned counsel for the Commission relied upon the judgment of Supreme Court in the case of **Ashok Shankarrao Chavan Vs. Madhavrao Kinhalkar and others** reported as **(2014) 7 SCC 99**. After considering the contentions and the judgment relied upon by the learned counsel for the parties, the learned Single Bench dismissed the writ petition. The relevant paragraphs of the order in appeal are reproduced as under:-

> "Para 14.........
> 14.2 If the provision contained in Section 32-A(3) are read in conjunction with that of article 243 Z A as reproduced supra, it is crystal clear that the State Election Commission can provide all the necessary particulars for maintaining accounts of expenditure by passing necessary directions in exercise of its supervisory jurisdiction for conduct of free, fair and impartial election to any office in a Municipality including that of the President.
>
> 14.3 Having interpreted the contents of Section 32-A (3) in the manner as explained supra there is no scintilla of doubt that the Order of 2014 issued by the Commission can very well provide the manner in which the accounts are maintained as regards receipt and expenditure during election. The provision of maintaining a bank account which though does not expressly find place in Section 32-A of the 1961 Act but the same has to be understood to be prescribed by way of the 2014 Order issued by the Commission in exercise of its powers u/S 32-A (3) of 1961 Act.
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> 15. Analyzed in the above said manner, it becomes crystal clear that opening of a bank account for maintaining the pecuniary transactions during election to the office of President squarely falls within the expression 'manner prescribed' used in Section 32-C (A) of the 1961 Act, thereby rendering the petitioner liable to penal action under Section 32-C (B) of disqualification due to failure to do so."

04. When the matter came up for hearing before this Court on 8.8.2017, this Court framed the following questions which require examination. The same read as under :-

> "1. Whether the requirement of furnishing of bank register of election expenses could be mandated by the State Election Commission in terms of sub-section (3) of Section 32-A of the Act ?
>
> 2. The ancillary question which arises is whether the condition of bank register of election expenses is directory or mandatory ?
>
> 3. The other question is whether disqualification for failure to lodge the account of election expenses is can be vested on a candidate for the next election as well ?"

05. Shri Rohit Sohgaura, learned counsel for the appellant, argued that for transparent and probity in election expenses, furnishing of election expenses is the requirement and not opening of the bank account. The furnishing of election expenses is the essential condition whereas; the requirement of bank account is only a form, an ancillary condition. Therefore, the appellant having submitted account of expenses, he could not be disqualified only for the reason that the bank account was not opened in terms of the Nirvachan Vyay (Lekha Sandharan Aur Prastuti) Aadesh, 2014 published on 10.7.2014 (for short "the Order"). The condition of opening a bank account is not a mandatory condition, but is a step to obtain proper election account expenses. Even in the absence of bank account, the expenses could be verified. The Commission has not found any illegality or irregularity in the expenses furnished, therefore, the appellant could not be disqualified only for the reason that he has not opened a bank account.

06. In response to the questions framed, learned counsel for the

Commission has filed response of the Commission on 28.8.2017. The stand of the Commission is that as per Section 32-A of the Act, every candidate at an election of the President shall, either by himself or by his 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. Sub-section 3 of Section 32-A provides that account of expenditure shall contain particulars as may be prescribed by the Commission. Section 32-C of the Act provides for disqualification for failure to lodge account of election expenses. The appellant has not submitted the election expenses in the prescribed format in the manner prescribed by the Commission in the Order published on 10.7.2014. It is submitted that the appellant has not opened the bank account which was a mandatory condition, thus, the appellant has been disqualified in accordance with law.

07. Mr. Seth, learned counsel for the Commission relied upon hand book of instructions containing the Order as well as the instructions for the candidates. One of the instructions is that a candidate has to open a bank account out of which expenses have to be incurred, though such instruction is not part of the statutory order. Mr. Seth also relied upon an affidavit which is part of the manual as Performa “D”, which contains a declaration that the daily account of expenditure supported by vouchers is being produced for the perusal of the Commission. It is argued that in terms of Clause 7 of the Order, the necessary documents to comply with the requirement of the expenditure includes, Performa “A” mentioned in Clause 4 of the Order containing daily expenses; Performa “B”, a Register of expenses in cash; and Performa “C”,

Bank Register of the election expenses is required to be furnishes. It is contended that all three documents cumulatively satisfy the test of the requirement of the Statute. Since the appellant has admittedly not opened the bank account as is directed in the Manual as well as in terms of Clause 7 (2) (A) of the order, the impugned order passed by the Commission is perfectly legal and justified. It is also argued that the Commission is a Constitutional Authority who is to ensure free and fair election in a transparent manner, therefore, the conditions of submission of expenses has to be strictly construed.

08. The some of the necessary statutory provisions need to be extracted for ready reference. The relevant provisions read as under :-

> "**32. Preparation of electoral rolls and conduct of elections**.
>
> xxx xxx xxx
>
> **32-A. Account of election expenses.** (1) Every candidate at an election of President shall, either by himself or by his election agent, keep a separate and correct account of all expenditures in connection with the election incurred or authorized by him or b y his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive.
>
> xxx xxx xxx
>
> (3) The account of expenditure shall contain such particulars as may be prescribed by the State Election Commission.
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> **32-B. Lodging of account of election expenses.-** Every contesting candidate at an election of President shall, within thirty days from the date of election of the returned candidate lodge with the officer notified by the State Election Commission 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 32-A.
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> **32-C. Disqualification for failure to lodge account of election expenses.-** If the State 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 State Election Commission shall, by order published in the official Gazette, declare them to be disqualified and any such person shall be disqualified for being chosen as, and for being Councillor or President of the Municipal Council or Nagar Panchayat, as the case may be, for a period not exceeding five years from the date of the order.

xxx xxx xxx

35. Disqualification of candidates. -

(a) xxx xxx xxx

(r) has been disqualified under Section 32-C."

The relevant definition and Clauses from the Order, when translated from Hindi read as under:-

"Clause 2........

(g) "**Election Expenditure**" means the expenditure incurred, or authorized by a candidate or his election agent in relation to an election made between the date of the nomination and the date of declaration of election result thereof, (both dates inclusive).

(h) "**Performa**" means-**Performa "A**"-Day to day Account Register of election expenditure; Performa "B"- Cash Register of election expenditure and Performa "C"- Bank Register of election expenditure and Performa "D" Affidavit.

xxx xxx xxx

Clause 7. Filing of accounts of Election Expenses-(1) Every candidate contesting election or his election agent shall file an account of election expenses to the District Election Officer, as specified in the Act. within 30 days from the date of election.

(2) The account of the election expenses shall consists of the following documents i.e.-

> (a) Performa "A" referred to in clause-4- Day to day account register of election expenditure, Performa "B"- Cash Register of election expenditure and Performa "C"- Bank Register of election expenditure, in original,
>
> (b) Vouchers relating to the entries lodged in account register of election expenditure in Performa "A"- Day to day Account Register of election expenditure, Performa "B"- Cash Register of election expenditure and Performa "C"- Bank Register of election expenditure.
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> (c) Summary of election expenses referred to in Clause 6."

09. It may be mentioned that Clause 3 of the Order contemplates that what is required to be contained in Performa "A", "B" and "C". Performa "C" relating to bank accounts is required to contain, the date of receipt of an amount, name of the person from whom such amount is received, whether the amount is received in cash or cheque and cheque number. Such Performa requires that on payment side, the name of payee, nature of the expenditure and the amount, the balance amount and the remarks should be given.

10. We have heard learned counsel for the parties and examined the relevant provisions.

11. Before, the respective arguments of the Learned Counsel for the parties are discussed; some basic principles of the role of municipalities, the election to the institutions of local self-government, scope of interference in the result of the elections need to be discussed. In **Ravi Yashwant Bhoir Vs. Collector** reproted as **(2012) 4 SCC 407**, the Supreme Court held that amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit

unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of the Constitution. It was held that where the statutory provision has very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. It was further held that removal of an elected office-bearer is a serious matter. The elected office-bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. The relevant extract read as under:-

> "**28.** In *State of Punjab v. Baldev Singh – (1999) 6 SCC 172*, this Court considered the issue of removal of an elected office-bearer and held that where the statutory provision has very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. All the safeguards and protections provided under the statute have to be kept in mind while exercising such a power. The Court considering its earlier judgments in *Mohinder Kumar* v. *State – (1998) 8 SCC 655* and *Ali Mustaffa Abdul Rahman Moosa* v. *State of Kerala – (1994) 6 SCC 569* held as under: (*Baldev Singh case (supra)*, SCC p. 199, para 28)
>
> > "*28.* … It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."
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> **30**. There can also be no quarrel with the settled legal proposition that removal of a duly elected member on the basis of proved misconduct is a quasi-judicial proceeding in nature. [Vide *Indian National Congress (I)* v. *Institute of Social Welfare – (2002)*

5 SCC 685]. This view stands further fortified by the Constitution Bench judgments of this Court in *Bachhitar Singh* v. *State of Punjab – AIR 1963 SC 395* and *Union of India* v. *H.C. Goel – AIR 1964 SC 364*. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office-bearer.

33. This Court examined the provisions of the Punjab Municipal Act, 1911, providing for the procedure of removal of the President of the Municipal Council on similar grounds in *Tarlochan Dev Sharma* v. *State of Punjab – (2001) 6 SCC 260* and observed that removal of an elected office-bearer is a serious matter. The elected office-bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. His removal may curtail the term of the office-bearer and also cast stigma upon him. Therefore, the procedure prescribed under a statute for removal must be strictly adhered to and unless a clear case is made out, there can be no justification for his removal. While taking the decision, the authority should not be guided by any other extraneous consideration or should not come under any political pressure.

34. In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office-bearer sought to be removed.

35. The elected official is accountable to its electorate because he is being elected by a large number of voters. His removal has serious repercussions as he is removed from the post and declared disqualified to contest the elections for a further stipulated period, but it also takes away the right of the people of his constituency to

> be represented by him. Undoubtedly, the right to hold such a post is statutory and no person can claim any absolute or vested right to the post, but he cannot be removed without strictly adhering to the provisions provided by the legislature for his removal (vide *Jyoti Basu* v. *Debi Ghosal – (1982) 1 SCC 691, Mohan Lal Tripathi* v. *District Magistrate, Rae Bareily – (1992) 4 SCC 80* and *Ram Beti* v. *District Panchayat Raj Adhikari – (1998) 1 SCC 680*).
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> **36.** In view of the above, the law on the issue stands crystallised to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office-bearer but his constituency/electoral college is also deprived of representation by the person of their choice.
>
> **37.** A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like "no confidence motion", etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period."

12. Still further, the Hon'ble Supreme Court in a judgment reported as **D. Venkata Reddy Vs. R. Sultan, (1976) 2 SCC 455** held that an election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices

are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. Though the judgment relates to an election petition before the Election Tribunal under the Representation of People Act but the test laid down are equally applicable to the question of disqualification of a candidate after declaration of result of a municipality. In fact, the Commission has now dual jurisdiction, one to conduct elections, and another to disqualify a candidate which may include an elected representative as well. When the Commission exercises jurisdiction to disqualify a candidate, it acts a quasi-judicial tribunal and that the strict interpretation is required as the will of the people of an elected candidate is to be set at naught. The relevant extract from the judgment read as under:-

> "**3.** …. In a democracy such as ours, the purity and sanctity of elections, the sacrosanct and sacred nature of the electoral process must be preserved and maintained. The valuable verdict of the people at the polls must be given due respect and candour and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. It is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election. In our country election is a fairly costly and expensive venture and the Representation of the People Act has provided sufficient safeguards to make the elections fair and free. In these circumstances, therefore, election results cannot be lightly brushed aside in election disputes. At the same time it is necessary to protect the purity and sobriety of the elections by ensuring that the candidates do not secure the valuable votes of the people by undue influence, fraud, communal propaganda, bribery or other corrupt practices as laid down in the Act.
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> **6.** Similarly in *Rahim Khan* v. *Khurshid Ahmed – (1974) 2 SCC 660,* Krishna Iyer, J., speaking for the Court most lucidly and aptly observed as follows: (p. 666, para 9)

> "An election once held is not to be treated in a lighthearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded."

To the same effect is the decision of this Court in *Abdul Hussain Mir* v. *Shamsul Huda – (1975) 4 SCC 533,* where this Court observed as follows: [pp. 538-39, paras 4 and 5]

> "Even so, certain basic legal guidelines cannot be lost sight of while adjudging an election dispute. The verdict at the polls wears a protective mantle in a democratic polity. The Court will vacate such ballot count return only on proof beyond reasonable doubt of corrupt practices. Charges, such as have been imputed here, are viewed as quasi-criminal, carrying other penalties from losing a seat, and strong testimony is needed to subvert a Returning Officer's declaration….
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> When elections are challenged on grounds with a criminal taint, the benefit of doubt in testimonial matters belongs to the returned candidate."

13. In a later three Judge Bench judgment reported as **Mohd. Yasin Shah Vs. Ali Akbar Khan, (1977) 2 SCC 23**, it was held that it is well settled that the sanctity and purity of electoral process in the country must be maintained. The election of a duly returned candidate cannot be set at naught on

the basis of interested or partisan evidence which is not backed by cogent circumstances or unimpeachable documents.

14. In a judgment reported as **Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others, (1995) 5 SCC 347**, the Supreme Court again reiterated that the election of a successful candidate is not to be interfered lightly and that one of the essentials of the election law is to safeguard the purity of the election process and to see that people do not get elected by flagrant breaches of the law. The relevant extract reads as under :-

> "13. Though the election of a successful candidate is not to be interfered with lightly and the verdict of the electorate upset, this Court has emphasised in more than one case that one of the essentials of the election law is to safeguard the purity of the election process and to see that people do not get elected by flagrant breaches of the law or by committing corrupt practices. It must be remembered that an election petition is not a matter in which the only persons interested are the candidates who fought the election against each other. The public is also substantially interested in it and it is so because election is an essential part of a democratic process. It is equally well settled by this Court and necessary to bear in mind that a charge of corrupt practice is in the nature of a quasi-criminal charge, as its consequence is not only to render the election of the returned candidate void but in some cases even to impose upon his a disqualification fro contesting even the next election........"

15. The Supreme Court in the judgment reported as **Union of India Vs. Association for Democratic Reforms and another, (2002) 5 SCC 294** held that the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. The relevant extract reads as under :-

> "46.4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted."

16. The Order has been published by the Commission in terms of the powers conferred on it under sub-clause (3) of Section 32-A of the Act of 1961, but the question required to be examined is whether the condition of opening the bank account is essential / mandatory condition or is a directory condition. The purpose of the furnishing of the account of election expense is to ensure that a candidate renders true and faithful account of expenditure. Learned counsel for the Commission could not point out that a person is mandated to open a bank account under any statute. The object and purpose of the furnishing of election expenses is to ensure that there is transparent form of election and money power is not used to change the result of election.

17. In **Ashok Shankarrao Chavan'**s case (supra), on which the learned counsel for the Commission has vehemently relied upon, was a case dealing with Conduct of the Election Rules, 1961 in respect of elections to the State Legislative Assembly under the Representation of People Act, 1951. Rule 86 contemplated different election expenses to be maintained from day to day, but even in such elections to the State Legislature, there is no condition of the expenses has to be incurred through the bank. Still further, while examining the said Rules, the Supreme Court held that purity in the election is to be maintained

at any cost and nobody is allowed to take the voting public of this country for a ride. Therefore, we find that furnishing of day to day expenditure is the essential and mandatory condition, whereas spending the amount through the bank account is only an ancillary condition. If a candidate has not spent the election expenses through the bank does not mean that the detail of expenditure furnished by a candidate is false or untrue. Neither the Commission has returned such finding nor there is any allegation to that effect. The only finding recorded is that the appellant has not opened the bank account for the purpose of election expenses.

18. In **Ashok Shankarrao Chavan'**s case (supra) the Supreme Court also examined that what is expected of the Election Commission while scrutinizing the details of the accounts of election expenses. The Court held as under:-

> “49. In our considered opinion if such a onerous responsibility has been imposed on the Election Commission while scrutinizing the details of the accounts of the election expenses submitted by a contesting candidate, it will have to be stated that while discharging the said responsibility, every care should be taken to ensure that no prejudice is caused to the contesting candidate. The Election Commission should also ensure that no stone is left unturned before reaching a satisfaction as to the correctness or the proper manner in which the lodgment of the account was carried out by the concerned candidate. If such a meticulous exercise has to be made as required under the law, it will have to be held that the onerous responsibility imposed on the Election Commission should necessarily contain every power and authority in him to hold an appropriate enquiry. Only such an exercise would 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 10-A, the high expectation of the electorate, that is the citizens of the country reposed in the Election

> Commission 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."

The Court also held that the Election Commission is required to act with utmost care and caution before passing an order of disqualification of a candidate (see para 51).

19. Hon'ble Supreme Court in a judgment reported as **CCE Vs. Hari Chand Shri Gopal, (2011) 1 SCC 236,** held that a distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished. It was held that an eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature. It was held that the doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. The extract from the Judgment read as under:-

> "**31.** Of course, some of the provisions of an exemption notification may be directory in nature and some are mandatory in nature. A distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished. In *TISCO Ltd. Vs. State of Jharkhand* –

(2005) 4 SCC 272 this Court held that the principles as regard construction of an exemption notification are no longer res integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning wherefor the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed literally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature.

Doctrine of substantial compliance and "intended use"

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially

> complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.
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> **34.** The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."

20. In an another judgment reported as **State of Punjab Vs. Shamlal Murari, (1976) 1 SCC 719,** the Court was examining the question as to whether the requirement of filing of three copies of paper book in an intra-court is an essential condition. It was held that the use of "shall" — a word of slippery semantics — in a rule is not decisive and the context of the statute, the purpose of the prescription, the public injury in the event of neglect of the rule and the conspectus of circumstances bearing on the importance of the condition have all to be considered before condemning a violation as fatal. The relevant extract read as under:-

> "**7.** It is true that, in form, the rule strikes a mandatory note and, in design, is intended to facilitate a plurality of Judges hearing the

appeal, each equipped with a set of relevant papers. Maybe, there is force in the view taken by the Full Bench that certain basic records must be before the court along with the appeal if the court is to function satisfactorily in the exercise of its appellate power. In this sense, the needs of the rule transcend the directory level and may, perhaps, be considered a mandatory need. The use of "shall" — a word of slippery semantics — in a rule is not decisive and the context of the statute, the purpose of the prescription, the public injury in the event of neglect of the rule and the conspectus of circumstances bearing on the importance of the condition have all to be considered before condemning a violation as fatal.

8. It is obvious that even taking a stern view, every minor detail in Rule 3 cannot carry a compulsory or imperative import. After all, what is required for the Judges to dispose of the appeal is the memorandum of appeal plus the judgment and the paper-book. Three copies would certainly be a great advantage, but what is the core of the matter is not the *number* but the presence, and the overemphasis laid by the court on *three* copies is, we think, mistaken. Perhaps, the rule requires three copies and failure to comply therewith may be an irregularity. Had no copy been furnished of any one of the three items, the result might have been different. In the present case, copies of all the three documents prescribed, have been furnished but not three copies of each. This omission or default is only a breach which can be characterised as an irregularity to be corrected by condonation on application by the party fulfilling the condition within a time allowed by the court. We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, thou' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into

> wholesome directions to be complied with in time or in extended time……”.

21. The Supreme Court in the judgment reported as **Shambhu Prasad Sharma Vs. Charandas Mahant and others, (2012) 11 SCC 390**, the papers were said to be incomplete for want of proper affidavit in terms of judgment of Supreme Court in the case of **Association for Democratic Reforms** (supra). As per the instructions issued by the Election Commission, the candidates were required to file an affidavit alongwith their nomination papers. The Court held that the objection that the affidavit was not in the required format is objection to form rather than substance of the affidavit. The relevant extract reads as under:-

> “16. The directions (*Union of India Vs. Association for Democratic Reforms and another, (2002) 5 SCC 294, People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399*) issued by this Court, and those issued by the Election Commission make the filing of an affidavit an essential part of the nomination papers, so that absence of an affidavit may itself render a nomination paper non est in the eye of the law. But where an affidavit has been filed by the candidate and what is pointed out is only a defect in the format of the affidavit or the like, the question of acceptance or rejection of the paper shall have to be viewed in the light of sub-section (4) of Section 36 of the Act which reads: ....”

22. In another judgment of the Supreme Court reported as **Mangani Lal Mandal Vs. Bishnu Deo Bhandari, (2012) 3 SCC 314**, the election was challenged on the ground that the returned candidate suppressed the facts in the affidavit he filed alongwith his nomination papers that he has two wives and the dependent children by marriage with his first wife. The Court held that mere non-compliance or breach of the Constitution or the statutory provisions by itself does not result in invalidating the election of a returned candidate.

Though, the order pertains to an election petition under the Representation of People Act, but the fact remains that every violation of the statutory provision is not by itself a ground for setting aside the elections. The relevant extract from the judgment reads as under :-

> "11. A mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The sine qua non for declaring the election of a returned candidate to be void on the ground under clause (iv) of Section 100(1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observation or non-compliance with the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void Section 100(1)(d)(iv). For the election petitioner to succeed on such ground viz., Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in (1) *Jabar Singh Vs. Genda Lal – AIR 1964 SC 1200*; (2) *L.R. Shivaramagowda Vs. T.M. Chandrashekhar – (1999) 1 SCC 666*; and (3) *Uma Ballav Rath (Smt.) Vs. Maheshwar Mohanty – (1999) 3 SCC 357*."

23. In an another judgment of the Supreme Court reported as **Resurgence India Vs. Election Commission of India and another – (2014) 14 SCC 189**, certain columns in the affidavit required to be filed alongwith the nomination paper were left blank. It was directed that the nomination papers of a candidate can be rejected at the time of scrutiny on the ground that he has not filled up the proforma prescribed by the Election Commission. The said judgment deals with rejection of a nomination paper before elections, but after elections are conducted and result declared, the test for disqualifying the

candidate would be material different then what is contemplated at the time of rejection of the nomination paper.

24. The said principle of interpretation was applied in respect of tender condition to find out what are essential or ancillary conditions. The Hon'ble Supreme Court in a judgment reported as **Poddar Steel Corpn. Vs. Ganesh Engineering Works, (1991) 3 SCC 273** held that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance with the condition in appropriate cases. The extract from the judgment read as under:-

> "**6.** It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender

> may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in *C.J. Fernandez* v. *State of Karnataka – (1990) 2 SCC 488* a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon *Ramana Dayaram Shetty* v. *International Airport Authority of India – (1979) 3 SCC 489* but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

25. In another judgment reported as **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548,** the principles of law in respect of power of judicial review in contractual matter was again came for consideration. The Court held that if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with. It was held as under:-

> **"66.** We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:
>
> (i) if there are essential conditions, the same must be adhered to;

(*ii*) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(*iii*) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(*v*) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(*vi*) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(*vii*) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

26. We find that the condition of opening bank account is not the essential condition as the object of furnishing of election expenses is not dependent upon opening of bank account. It is only a step to ensure proper maintenance of accounts. The bank account is only a procedure to achieve the objective but not an end in itself. It is at best an ancillary condition. The Hon’ble

Supreme Court in the above mentioned judgments has examined the issue as to when a particular condition is essential or ancillary condition. It is held that essential conditions are required to be satisfied whereas, the ancillary conditions are desirable but on account of non-fulfillment of ancillary conditions, the tender cannot be rejected. Such interpretation is the interpretation in relation to the document. But, such interpretation would hold good even in respect of an Order published under a Statute.

27. The Performa "C" i.e. bank register of election expenditure only requires to contain the date of receipt of an amount, name of the person from whom such amount is received, whether the amount is received in cash or cheque and cheque number. On the payment side, the Performa requires the name of payee, nature of the expenditure and the amount and the balance amount in the account. Thus, the bank register of the expenses is only to give a fair account of receipt an expenditure. We cannot loose the practical side that most of the petty traders conduct business in cash. Still further, in the affidavit which a candidate has to furnish in Performa "D" only stipulates the statement of expenditure, but it does not stipulate that such expenditure has been incurred through the bank account only.

28. Therefore, non-opening of bank account or not spending the election expenses through the bank account cannot be a ground to disqualify a candidate when otherwise, election expenses have not been found to be improperly maintained. The will of the people in electing a candidate cannot be set at naught on the mere technicalities of not opening a bank account when otherwise; the election expenses have been duly furnished and have not been

commented upon adversely by the Commission.

29. In view of the above, we hold that though the requirement of furnishing of bank register could be provided by the State Election Commission in terms of sub-section (3) of Section 32-A of the Act, but, production of the bank register is not a mandatory or essential condition. If a candidate is able to satisfy that the election expenses have been properly accounted for, the candidate cannot be disqualified for the reason that the election expenses have not been made through a bank account.

30. The judgment referred to by learned counsel for the appellant before the learned Single Bench pertains to Election Expenses (Maintenance and Lodging of Account) Order, 1997. Such order has no condition of incurring the election expenses through the bank account. Therefore, the said judgments are really not helpful to the arguments raised in the present appeal.

31. In respect of the third question, we find that order passed under Section 32-C is a disqualification of a candidate in terms of Section 35 of the Act. Still further, in terms of provisions of Section 35(r), the disqualification of a candidate for five years is a disqualification for future elections as well. Though, Section 35 of the Act empowers the Commission to disqualify a candidate for a period not exceeding five years from the date of the order, but to pass an order of disqualification for five years, which may disqualify him to contest the next election as well requires to be supported by cogent reasons and not merely on the basis of technicality of not furnishing of bank account. Therefore, though the appellant could be disqualified for a period up to five years, but we find that such period of disqualification is disproportionate even

on the touch stone of Wednesbury principle of reasonableness. The disqualification of five years is wholly disproportionate to the alleged misconduct. In a judgment reported as **Chief Executive Officer**, **Krishna District Coop. Central Bank Ltd. v. K. Hanumantha Rao, (2017) 2 SCC 528**, the Court held that the limited power of judicial review to interfere with the penalty is based on the doctrine of proportionality which is a \ concept of judicial review. If the punishment is so disproportionate that it shocks the judicial conscience, the Court would interfere. The relevant extract read as under:-

> "**7.1.** The observation of the High Court that accusation of lack of proper supervision holds good against the top administration as well is without any basis. The High Court did not appreciate that Respondent 1 was the Supervisor and it was his specific duty, in that capacity, to check the accounts, etc. and supervise the work of subordinates. Respondent 1, in fact, admitted this fact. Also, there is an admission to the effect that his proper supervision would have prevented the persons named from defrauding the Bank. The High Court failed to appreciate that the duties of the Supervisor are not identical and similar to that of the top management of the Bank. No such duty by top management of the Bank is spelled out to show that it was similar to the duty of Respondent 1.
>
> **7.2.** Even otherwise, the aforesaid reason could not be a valid reason for interfering with the punishment imposed. It is trite that courts, while exercising their power of judicial review over such matters, do not sit as the appellate authority. Decision qua the nature and quantum is the prerogative of the disciplinary authority. It is not the function of the High Court to decide the same. It is only in exceptional circumstances, where it is found that the punishment/penalty awarded by the disciplinary authority/employer is wholly disproportionate, that too to an extent that it shakes the conscience of the court, that the court steps in and interferes.

7.2.1. No doubt, the award of punishment, which is grossly in excess to the allegations, cannot claim immunity and remains open for interference under limited scope for judicial review. This limited power of judicial review to interfere with the penalty is based on the doctrine of proportionality which is a well-recognised concept of judicial review in our jurisprudence. The punishment should appear to be so disproportionate that it shocks the judicial conscience. (See *State of Jharkhand* v. *Kamal Prasad – (2014) 7 SCC 223*). It would also be apt to extract the following observations in this behalf from the judgment of this Court in *Kendriya Vidyalaya Sangthan* v. *J. Hussain – (2013) 10 SCC 106:* (SCC pp. 110-12, paras 8-10)

> "*8.* The order of the appellate authority while having a relook at the case would, obviously, examine as to whether the punishment imposed by the disciplinary authority is reasonable or not. If the appellate authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the disciplinary authority. Such a power which vests with the appellate authority departmentally is ordinarily not available to the court or a tribunal. The court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts. (See *UT of Dadra & Nagar Haveli* v. *Gulabhia M. Lad – (2010) 5 SCC 775*). In exercise of power of judicial review, however, the court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when the punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.
>
> *9.* When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with the doctrine of *Wednesbury (Associated Provincial*

Picture Houses Ltd. v. Wednesbury Corpn. - (1948) 1 KB 223=(1947) 2 All ER 680 (CA) rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the court and the court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality was propounded by Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service – 1985 AC 374 = (1984) 3 All ER 935 (HL)* in the following words: (AC p. 410 D-E)

> '… Judicial review has, I think, developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads, grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality".…'

10. An imprimatur to the aforesaid principle was accorded by this Court as well in *Ranjit Thakur* v. *Union of India – (1987) 4 SCC 611*. Speaking for the Court, Venkatachaliah, J. (as he then was) emphasising that "all powers have legal limits" invoked the aforesaid doctrine in the following words: (SCC p. 620, para 25)

'*25.* … The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court Martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction.

> Irrationality and perversity are recognised grounds of judicial review."

32. Therefore, the disqualification of a candidate for a period of five years for not opening a bank account for the purpose of election expenses is wholly disproportionate to the alleged misconduct. The removal or disqualification of an elected representative has serious repercussion, therefore, elected representative must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office and discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. Disqualification of a candidate only for the reason that he has not incurred the election expenses through the bank account is wholly unjustified and is a case of overkill. Therefore, we find that the order passed by the Election Commission for disqualifying an elected candidate solely for that reason is not justified. Consequently, the same is set aside.

33. Consequently, the order passed by the learned Single Bench upholding the order passed by the Election Commission is also set aside. Accordingly, the present writ appeal is **allowed**.

(Hemant Gupta)
Chief Justice

(Vijay Kumar Shukla)
Judge

Anchal