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

Judgment delivered on: 12 September, 2014

+ W.P.(C) No. 4590/2014 & CM 9137/2014

ASHOK SHANKARRAO CHAVAN

..... Petitioner

Represented by: Mr. Kapil Sibal, Mr. Rajeev Nayar
and Mr. Pravin M. Shah, Senior Advocates with
Mr. Abhimanyu Bhandari, Mr. Samanvya D. Dwivedi,
Mr. Saket Sikri and Mr. Aniket Bhakkad Advocates.

Versus

ELECTION COMMISSION OF INDIA & ORS.

..... Respondents

Represented by: Mr. Jayant Bhushan, Senior
Advocate with Mr. Dilip Annasaheb Taur and Mr. Amol
Vishwasrao Deshmukh, Advocates for Respondent No.1.
Mr. D.N. Goburdhan and Mr. Balendu Shekhar,
Advocates for Respondent Nos. 2 and 3.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide present petition, the petitioner has assailed the order dated 13.07.2014 passed by the Election Commission of India (hereinafter called as 'The Commission') and seeks direction to set aside the impugned order to the extent of holding that the petitioner has failed to lodge his account of election expenses within time and in the manner required as per The Representation of The People Act, 1951 (hereinafter called 'the Act') and The Conduct of Elections Rules, 1961 (hereinafter called 'the Rules').

2. Also seeks direction to quash and set aside the consequential order to issue show cause notice under Rule 89(5) of the Rules.

3. Mr. Kapil Sibal, learned senior counsel appearing on behalf of the petitioner submitted that seven advertisements dated 05.10.2009, 12.06.2009, 07.10.2009 and 25.10.2009 were published in different Newspapers during the 'Assembly Election' of the State of Maharashtra. The allegations are that the petitioner did not disclose the expenditure incurred on the aforementioned advertisements within time and manner prescribed in the Act. The total pro-rata expenditure on the alleged advertisements which can be attributed to the share of the petitioner was Rs.16,924/-. The permissible limit set-out as per Rule 90 of the 1961 Rules is Rs.10,00,000/-. Whereas, as per expenditure return filed by the petitioner, he had spent total amount of Rs.6,85,192/- on his Assembly Election.

4. Learned senior counsel submitted that for the sake of arguments, though not admitted, if the aforesaid pro-rata expenditure of Rs.16,924/- spent on all the advertisements mentioned above is added in his election expenditure incurred, i.e., Rs.6,85,192/-, then also his expenses are within the permissible limit of Rs.10,00,000/-.

5. Mr.Sibal further submitted that the petitioner was the then Chief Minister of Maharashtra during relevant period. He contested Assembly Election from '85 Bhokar Legislative Assembly Constituency' from Indian National Congress and declared elected. Thereafter, the opponent losing candidate, i.e., Dr. Madhavrao Kinhalkar, the respondent No.1 herein, filed a complaint before the Election Commission of India. He submitted that the petitioner, thereafter, resigned from the said Constituency and contested the Parliamentary Election from 'Nanded' and elected as a Member of Parliament.

6. Mr.Sibal has referred to an advertisement at page 587, annexure P-14 (colly.), showing photographs of seven other leaders of United Progressive

Alliance (UPA) including deceased father of the petitioner. In the said advertisement, the meeting was to be held on 05.10.2009, however, the same was postponed to 06.10.2009. Accordingly, a similar advertisement showing the meeting to be held on 06.10.2009 was published, which is at page 589. The said advertisement depicts UPA Chairman Smt.Sonia Gandhi, the then Prime Minister Dr. Manmohan Singh, the President of National Congress Party, Mr. Sharad Pawar and the other prominent leaders of 'United Progressive Alliance'. The said meeting was attended by the petitioner and his proportionate share of expenditure incurred on the said meeting was disclosed by petitioner in his account in the Statutory Register provided by the Commission.

7. Mr. Sibal further referred to an advertisement at page 591, wherein all leaders have been shown as were shown in the advertisement mentioned at page 587 except depicting Central Minister Mr. Jyotiraditya Sindhia in place of Smt. Sonia Gandhi. The advertisement at page 593 shows photograph of Salman Khan, a 'Bollywood Star' in place of the aforesaid Central Minister alongwith all other leaders as mentioned above.

8. Learned senior counsel drawn the attention of this Court to the advertisements shown at pages 587 and 589, and submitted that these advertisements were published by Mr. Amar Rajurkar, Secretary, Maharashtra State Congress Committee and the advertisement at page 591, was published by Mr. Ajay Bhisen, President, Nanded City District Congress Committee and Mr. Munna Abbas, President, Nanded City District Youth Congress Committee. Mr. Sibal submitted that these two meetings were attended by the petitioner and, accordingly, he disclosed the expenditure incurred on these meetings in his accounts as election expenses.

9. He further submitted that above named all three publishers have filed their affidavits before the Commission and claimed that the advertisements in question were neither published with consent of the petitioner nor was brought to his knowledge.

10. Learned senior counsel further submitted that despite the affidavits filed by the publishers and the explanation given by the petitioner, the Commission has passed order as under:-

“108. The Commission hereby has decided that the respondent has failed to lodge his account of election expenses in the manner required by the Act and rules. The Commission directs the respondent to show cause in terms of Rule 89(5) of the 1961-Rules why he should not be disqualified under section 10A of the 1951-Act. The respondent is directed to submit his representation, if any, to the Commission within 20 days from the date of receipt of this order.”

11. Mr.Sibal, learned senior counsel submitted that the petitioner has raised the issue before the Commission that under Rule 89(6) of the 1961 Rules, he was entitled to get an opportunity for giving such explanation within twenty days of receipt of the notice, however, the Commission failed to issue such notice, thus has violated the Rules.

12. Learned senior counsel has also drawn attention of this Court to Para 47 of the order dated 02.04.2011, wherein the Commission has observed that, “the Commission has to arrive at satisfaction on two counts, namely, (a) that the candidate has failed to lodge an account of election expenses within the time and in the manner required by or under the law, (b) that the candidate has no good reason or justification for the above failure”. The commission has further observed in that para that the enquiry in question by the Commission is for the purpose of coming to a satisfaction on the first count and that if the Commission is satisfied on the first count that there has been a failure on the part of the petitioner in lodging his

account of election expenses in the manner required by law, then the petitioner would require a notice whether he has any good reason or justification for the said failure and whether he should be disqualified under Section 10A of the Act.

13. Mr.Sibal drawn the attention of this Court to para 44 of Civil Appeal bearing No.5044/2014, titled as **‘Ashok Shankarrao Chavan Vs. Dr. Madhavrao Kinhalkar**, decided by the Apex Court on 05.05.2014 regarding the legal responsibility of the Election Commission and while passing the order under Section 10A of the Act, the Apex Court has observed as under:-

“44. 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 10A, 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.”

14. Mr.Sibal submitted, polling date of the Assembly Election of the Constituency in question was on 13th October, 2009 and the result was declared on 22.10.2009, in which the petitioner declared elected, whereas the deposit of the

respondent No. 1 was forfeited. Thereafter, respondent No.1 filed a complaint on 13.11.2009 on 'paid news', wherein the petitioner succeeded. Then the respondent No.1 filed the complaint in question dated 02.12.2009 before the Commission for filing false and incorrect election expenditure accounts, however, no pleadings regarding accounts of expenses of the alleged advertisements were made by the respondent No.1.

15. Further submitted, pleadings regarding accounts of the election expenses of the alleged advertisements showing particulars of the election meetings were made by the complaints/respondents for the first time vide submissions dated 21.09.2010, i.e., almost after one year of the first complaint.

16. As per the complaint made to the Commission, petitioner got several advertisements published in various Newspapers, in particular, 'Lokmat', 'Pudhari', 'Maharashtra Times' and 'Deshonnati' during election campaign, which appeared in said Newspapers in the garb of news eulogizing the petitioner and his achievements as Chief Minister of Maharashtra.

17. Thereafter, on 04.12.2009, respondent No. 1 filed an election petition being E.P. No.11/2009, under Section 80 of the Act, alleging *inter alia* to declare the election of the petitioner as void and hold the respondent No. 1 as elected candidate. The contentions relating to 'paid news' made in the aforementioned election petition were similar and identical to the contents of the complaint made to the Commission.

18. Vide detailed order dated 02.04.2011, the Commission, on the preliminary objection of jurisdiction of the Commission, while relying on the decision of the Apex Court's Constitutional Bench in the case of ***Sucheta Kriplani Vs. S.S. Dulat, AIR 1955 SC 758***, hold that the Commission has jurisdiction to hear the complaint,

accordingly, dismissed the preliminary objection raised by the petitioner.

19. Being aggrieved of above noted order, petitioner preferred a writ petition being W.P.(C) No. 2511/2011 before this Court on the ground that the Commission has no jurisdiction to entertain a complaint concerning falsity of accounts lodged with the Commission under Section 10-A of the Act. However, the same was dismissed by this Court vide judgment dated 30.09.2011, consequently, order of the Commission was upheld.

20. Thereafter, petitioner preferred a Special Leave Petition (Civil) No. 29882/2011 against the order and judgment of this Court as noted above.

21. It is pertinent to mention that High Court of Bombay Judicature at Aurangabad, dismissed the election petition being E.P.No.11/2009 filed by the respondent No. 1 vide its order dated 18.10.2012. On being challenged before Hon'ble the Supreme Court in Civil Appeal No.9271/2012, the same was also dismissed vide order dated 21.01.2013.

22. Thereafter, on 05.05.2014, the Apex Court passed a detailed order and judgment by dismissing the aforementioned SLP (Civil) No. 29882/2011 filed by the petitioner and specifically held as under:-

“ 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.

In as much as the period of membership is likely to come to an

end, it will be in order for the Election Commission to conclude the proceedings within one month and pass appropriate orders in accordance with law. In order to ensure that within the said period the Election Commission is not prevented from passing the orders due to non-cooperation of any of the parties, it will open for the Election Commission to hold the proceedings on a day to day basis and conclude the same within the said period.”

23. Mr.Sibal further submitted that on 30.05.2014, Commission after taking into consideration the draft issues submitted on behalf of the complainant/respondent No.1, framed the following issues with the consent of all parties:-

“1. Whether the news, analysis, articles and items marked ‘advertisements’, ‘advertorial’ and appearing in various news papers, news paper supplements, pamphlets, magazines, etc., produced by (i) Shri Madhavrao Kinhalkar with his written submissions dated 09.07.2010 and additional written submissions dated 20.10.2010, 2.10.2010, 29.10.2010, 04.01.2011, (i) Shri Mukhtar Abas Naqvi and others with their letter dated 30.1.2009, and (i) Shri Kirt Somaiya and others with his/their letter dated 02.12.2009 and 07.12.2009, were published as paid news for consideration in kind or cash for promoting or procuring the election of the respondent?

2. Whether the publication of the abovementioned news, analysis, articles, supplements, etc., was authorized, and expenditure on their publication was incurred or authorized, by the respondent or by his election agent or by any other person with the consent or knowledge of the respondent or of his election agent?

3. Whether the lodging of such account of election expenses which does not include the expenses covered by issue No. 2 above (in connection with the election of the respondent) would be tantamount to failure on his part to lodge the account in the manner required by or under the law?

4. Whether the respondent has good reason or justification for such failure to lodge his account of election expenses in the manner required by or under the law?

5. Whether the respondent is liable to be disqualified for his above failure by the Election Commission under Section 10A of Representation of Peoples Act, 1951, r/w sections 7 & 78 for a period of three years from the date of the order of the Commission?”

24. As discussed above, petitioner resigned from the Assembly seat and elected as a Member of Parliament from Nanded Parliamentary Constituency. Since the Commission was of the opinion that the present proceedings do not abate on account of resignation of the petitioner from membership of Maharashtra Legislative Assembly and that petitioner cannot file a revised account of his election expenses at this stage, hence, proceeded to deal with the issues involved in the proceedings pending before it.

25. The Commission recorded in Para 72 of the impugned order that the real issues which need to be considered by the Commission were issue Nos. 1 and 2 and a closure look on these issues would show that it has to examine and analyse the following ingredients of those issues:-

“(i) Whether the publications referred to in issue No.1 were published as general news in normal course or as paid news;

(ii) Whether any price was paid in kind or cash as consideration for these publications;

(iii) Whether these publications were made with the object of promoting or procuring the election of the respondent from 85-Bhokar Assembly Constituency;

(iv) Whether the publication of these news items, and advertisements was authorized (a) by the respondent or by his election agent, or (b) by any other person with the consent or knowledge of the respondent or his election agent;

(v) Whether the expenditure, if any, on their publication was incurred or authorized (a) by the respondent or his election agent, or (b) by

any other person with the consent or knowledge of the respondent or his election agent.”

26. Subsequently, two issues noted above were decided in favour of the petitioner by the Commission rejecting the complaint made by the complainant/respondent No.1.

27. However, while examining the first ingredient of issue No.1, the Commission recorded that at the time of 2009-General Elections to which the present case pertains, though phenomenon of ‘paid news’ may have been working as news for consideration in cash or kind, the terminology of ‘paid news’ was formally recognized by the Commission vide its circular dated 08.06.2010, which also laid down, among others, the following guidelines for guidance of the Media Monitoring Committees set up at District and State levels in the context of the General Elections which were held in 2010 and subsequent thereto were issued:-

“The cases of ‘Paid News’ generally manifest in the forms of news articles/reports published about a particular candidate or a party eulogizing them, or similar news articles/reports denigrating the opponents, both intended at unduly influencing the voters. The same or similar type of news articles/reportings (with cosmetic modifications) appearing in more than one newspaper periodical would amount to further corroboration as circumstantial evidence that such news⁶⁴ publication could result from collusion of the candidate/party with the editors, publishers, financiers of the newspaper etc. Such collusion would, however, have generally no transactional evidence of payment of consideration in cash or kind.”

28. Mr.Sibal submitted the Commission further recorded in Para 74 of the impugned order that in order to substantiate the allegations and contentions regarding ‘paid news’, complainants took the Commission through most of these publications, which are on record to show that because of the similarity of the contents of many of these publications with only some minor modifications or

cosmetic changes in the title, headings, etc., these publications would squarely fall within the parameters of guidelines relating to 'paid news' as given by the Commission's above referred circular dated 08.06.2010.

29. Learned senior counsel submitted that the respondents contended before the Commission that these publications were verbatim reproductions appearing in several Newspapers, particularly, 'Lokmat', 'Pudhari', 'Deshonnati' and 'Maharashtra Times', more or less on the same days. Reference here may be usefully invited to the statement of such publications furnished by the complainant/respondent No.1 and as reproduced in paragraph 36 of the impugned order.

30. The respondents contended that publications of these news, articles, etc., were not a coincidence as four different Newspapers could not write and publish the same matter verbatim unless there was a common source for providing a written material for publication thereof.

31. The Commission recorded in the impugned order that contention of the petitioner; on the other hand, to counter the above contentions of the complainants was that all these publications speak about the achievements of Indian National Congress and the State Government and are based on three sources of information which were already in public domain and accessible to all Newspapers and others interested. According to the petitioner, the said three sources of information were those which are mentioned in paragraph 56 of the impugned order, namely: (a) 'Lokrajya', a Government publication, published by the Director of Information, State of Maharashtra, which gives general information about the achievements, growth, developments or vision of the government; (b) 'Mahabharari' (Big Leap), a party publication published by the Maharashtra Pradesh Congress Committee,

which periodically publishes the achievements, development and growth made by the Congress Party; and (c) Party Manifesto published jointly by Indian National Congress, Nationalist Congress Party and RPI (G), alliance partners in the context of 2009-General Elections.

32. On the contentions made by the parties, in para 75 of the impugned order, Commission observed that there was considerable force in the contention of the complainants/respondents that the impugned publications which in most of the cases were identical or verbatim reproduction could not have been coincidence or written independently by the news reporters or journalists of four different Newspapers working separately and more or less on the same dates particularly when publications do not state that the contents are from the same source.

33. In Para 76 of the impugned order, the Commission recorded that going by the definition of 'paid news', as given by the Press Council of India, a news item or news analysis or article, etc., would be deemed to be 'paid news', if it is published for a 'price in cash or kind as consideration'. Therefore, an important question for consideration is the second ingredient of issue No.1, mentioned above. It is settled law that onus of proof of an allegation or contention lies initially on the party which makes that allegation or contention. Hence, the complainants /respondents who have made allegations that impugned publications were 'paid news', onus lies initially on them to prove that there was a price paid for these publications in cash or kind as consideration.

34. Mr.Sibal further submitted that however, the complainants/ respondents have not been able to show any documentary evidence for payment and contended that any business house running newspaper industry would not incur huge expenditure on printing of supplements, etc., without consideration and suffer loss

on that account.

35. In order to find out the version of the Newspapers, the Commission, by its letter dated 06.04.2010, sent through the Chief Electoral Officer, Maharashtra, forwarded the clippings of the articles, etc., under reference, to the publishers of 'Lokmat', 'Pudhari', 'Deshonnati' and 'Maharashtra Times, and asked them:

- (1) whether it was a sponsored article or paid article,
- (2) whether it was inserted through the instrumentalities of any political party or advertising agency,
- (3) if so, the amount paid, and
- (4) if so, the agency which paid for it.

36. Accordingly, vide letter dated 15.04.2010, publisher of Lokmat Newspapers Pvt. Limited replied as under:-

“The objective of publishing these supplements was to acquaint the people of Maharashtra about the achievements and the developments brought about by the Congress led government in Maharashtra during its tenure under the leadership of the sitting Chief Minister. Educating and updating people about the development and the socio-political events are some of the prime responsibilities and objectives of media..... The other fact that motivated us to publish the supplements highlighting the accomplishments of the Congress led government in Maharashtra is the alignment of our groups' ideology with that of the Congress party. Our founder late Jawaharlalji Darda was one of the leaders of the Congress party who were at the forefront during the freedom struggle..... Our Group strongly believe that Congress is the only party which offers a secular option to the electorate. This would give you a glimpse of the reason that drives us to reach out o the people of Maharashtra to present before them such content which highlights and promotes the Congress party and its leaders.....”

37. Vide letter dated 10.04.2010, Chairman and Managing Director of Pudhari
W.P.(C) No. 4590/2014

Publications Pvt. Limited replied as under:-

“.....every newspaper has its inclination towards a political party and Pudhari is no exception to that. The Founder Editor of Daily Pudhari (Late) Padamshri Dr. G. Jadhav was a staunch congressman and had close relation with Mahatma Gandhi and Dr. B.R. Ambedkar. He was also a member of the Legislative Council representing Congress party..... there is no denying the fact that, it has a leaning towards Congress party, as is the case with other Marathi newspapers which are inclined towards some or the other political parties.....each newspaper covers all such events and gives due publicity, the only difference being the degree and extent of coverage depending on newspapers political inclination as explained above.....

The NCP, Congress parties were sending the news items / articles from the party office of their respective parties and we had published these articles of various parties, so that the question of paid news does not arise and such type of articles are also published in al other newspapers in Maharashtra I.e. Lokmat /Punyanagari /Maharashtra Times etc. I would like to reiterate as follows:

(1) No news or article is sponsored or paid article, (2) It was not inserted through the instrumental of any political party or advertising agency, (3) As it is an article the question of payment/amount does not arise, (4) The payment is not done so the question of any agency for paying the same does not arise.”

38. Vide letter dated 17.04.2010, Managing Director and Editor of ‘Deshonnati’ replied as under:-

“I have to clarify that the said publications were neither sponsored articles nor paid articles. It was reflection of my individual perception. It was not inserted through the instrumentality of any political party or any advertising agency. No bills are issued. It was not against any payment. No agency has made any payment for the same.”

39. Vide letter dated 04.05.2010, Authorised Signatory for Benet, Coleman and Company Limited (Times of India Group) replied as under:-

“We firmly believe in the Constitution of India and do everything within our means to strengthen our rich and diverse society through responsible media coverage. As a responsible corporate, we assure that correct and balance information reaches a right set of people at correct time..... As a complete newspaper during elections we cover newsworthy items, personalities, information and analysis of political parties/personalities so as to keep our readers informed and fulfill our duties as the fourth pillar of democracy..... In relation to election of said Hon'ble Chief Minister of Maharashtra, Shri Ashok Chavan, we categorically confirm that the three impugned articles are neither advertisement nor have been sponsored or paid for by him or on his behalf by any other person including any political party..... We are therefore, in compliance of your letter responding in seriatim to your queries as mentioned below:

(1) the said articles are neither sponsored nor paid articles,

(2) the said articles were not published at the instance of any political party or any advertising agency,

(3) in view of our response in Para 1 and 2 hereinabove, we reiterate that the said articles are not advertisements and hence no monetary consideration was paid to us for the said articles.

(4) we confirm that no agency was involved in the publication of the said articles.”

40. Mr.Sibal submitted that counsel for the petitioner argued before the Commission that all these publications narrate only about the development of the State of Maharashtra and several welfare measures taken by the State Government under the leadership of the petitioner and that these publications nowhere make any appeal or solicitation for votes for the petitioner as a candidate from Bhokar Assembly Constituency. These publications were in the nature of general party propaganda and could not be considered as having been made with the objective of

promoting or procuring the election of the petitioner from the said Constituency.

41. During the hearing, the Commission had made a specific query to the learned counsel for the complainants to point out those publications in particular which made any reference to the petitioner as a candidate from the said Bhokar Assembly Constituency or to any special development works or welfare measures undertaken in relation to that Constituency which might give an impression that an appeal, direct or indirect, was being made to woo the voters of that Constituency in favour of the petitioner. In response, the counsel for the complainant/respondent No.1 pointed out (i) one publication in which a reference was made to development works in the area falling in Bhokar Assembly Constituency, (ii) one more publication in which a similar reference was made for certain development works in Nanded District in which the Bhokar Assembly Constituency falls, and (iii) three news items eulogizing the petitioner and the work done by him in Bhokar Assembly Constituency.

42. The first such publication is a news item published in 'Lokmat' dated 12.09.2009, and republished in 'Nav Bharat' dated 12.10.2009, which speaks about the funding assistance to a Buddhist Pilgrims Spot, Mahavihar, Bavrinagar in Ardhapur, which forms part of Bhokar Assembly Constituency. The second publication was in 'Maharashtra Times' dated 10.10.2009 relating to some development plans for Nanded District as part of the development programme for Marathwada region. The remaining three publications were some news items in 'Dainik Satyaprabha' dated 13.10.2009, in which the development work done in Bhokar Assembly Constituency have been highlighted and stated that the petitioner has fair chance of success in that constituency.

43. Accordingly, in Para 80 of the impugned order, the Commission recorded

that under the provisions of Section 7(1) of the Act, it can look into only those publications which were made on or after the date on which the petitioner filed his nomination for the election under reference, i.e., 24.09.2009, and not any publication made earlier thereto.

44. In these news items, development works done in Bhokar Assembly Constituency were highlighted and the achievements of the petitioner were eulogized. Two of these publications were shown to be news items contributed by the correspondents of the Newspaper 'Dainik Satyaprabha'. The third publication also was shown as news item contributed by some reporter or correspondent of the Newspaper giving perception of the election campaign in the Bhokar Assembly Constituency. However, it has not been attributed to that correspondent. The Commission further recorded that there was no pleading at all with regard to these three publications in the main Newspaper 'Dainik Satyaprabha' dated 13.10.2009. When confronted on the question of such silence in the pleadings on the same being pointed out by the Commission, learned counsel for the complainant/respondent No.1 placed reliance on sub-Para at page 6 of his additional written statement dated 21.09.2010 to contend that the above publications were covered by the pleading therein, which is as under:-

"That, in view of the above fact no one can agree with the written statements by various news paper establishments in their reply to Commission. Thus the say of Shri Ashok Chavan based on the said news paper establishments replies to Commission stands untrue and cannot be accepted by any yardstick. Moreover above said news paper supplement should be considered as proof of sponsored advertisement and the expenditure of the above said sponsored supplement incurred by whatsoever should be considered as authorized expenditure by Shri Ashok Chavan. The above said expenditure should have appeared in the election expenditure account of Shri Ashok Chavan but as it is not so, the submitted election expenses account of Shri Ashok Chavan is untrue and incorrect. It

would not be incorrect or out of place to furnish another evidence of Special supplement named VIKAS PARVA in local news paper Dainik Satyaprabha dated 11th, 12th, & 13th October 2009 annexed as – B.”

The above paragraph would show that what the complainant is referring to, and relying upon, in this paragraph is the supplement of the ‘Dainik Satyaprabha’ under the title ‘VIKAS PARVA’ and not on any news item or article published in the issue dated 13th October, 2009, of the main news paper ‘Dainik Satyaprabha’. In view of the settled position of law by the Hon'ble Supreme Court in the cases of Ravinder Singh Vs. Janmeja Singh (supra), the Commission cannot look into these three publications not adverted to at all in the pleadings of the complainant No.1 or by any other complainant.”

45. Accordingly, in Para 83 of the impugned order, the Commission recorded as under:-

“The Commission has examined, scrutinized, and analysed all the news, analysis, articles and items marked ‘advertorial’ and appearing in various news papers, news paper supplements, pamphlets, magazines, etc., referred to in issue No.1. In the letters by various editors quoted in Para 76, one paragraph stands out strikingly. The clear admission by the Chairman and Managing Director, Pudhari Publications, that “The NCP, Congress parties were sending the news items / articles from the party office of their respective parties and we had published these articles of various parties, so that the question of paid news does not arise and such type of articles are also published in all other newspapers in Maharashtra i.e. Lokmat / Punyanagari / Maharashtra Times etc.”. This clearly demonstrates that the articles published by Pudhari have been provided by the political parties concerned. Thus it can be reasonably inferred that among the news articles mentioned in Para 57 (at least to the extent of news items in serial numbers 1,2,7, 10, 15, 17 and 18), those which were published by Pudhari have been provided by the political parties. Thus, the other newspaper articles / materials which had identical publication (to the extent of the above serial numbers) also should have received the material from the same source. In view of the above, and with respect to ingredient (i) of issue No. 1, the Commission is of the considered view that the said news articles cannot be treated as general news in normal course as these are quite

clearly received from political parties and reproduced by all such newspapers so as to pass as general news.

Further, the Commission is concerned to note that the newspapers Lokmat and Pudhari have admitted to be sympathizers of the Congress Party. The Lokmat newspaper further has said that “our group strongly believes that Congress is the only party which offers a secular option to the electorate.”. While every newspaper/media house is entitled to its own philosophy (which could be akin to a political party’s philosophy), what is sought to be published as news should be untinged by such philosophy as different from editorial. The minimum that is expected of ethical journalism is that the reader is cautioned by suitable disclaimers while such articles are published so that the unwary reader can make suitable allowance in his mind while forming his judgement. This matter assumes greater significance in the election period when the media needs to show greater responsibility.”

46. Further in Para 84 of the impugned order, Commission opined that from aforementioned publications, although cannot be established as being sourced from the political parties (by the own admission of ‘Pudhari’ Newspaper and corroborative evidence of identical articles in other Newspapers), but the same cannot be held to be promoting or procuring the election of the petitioner from 85-Bhokar Assembly Constituency. These have to be seen as general party propaganda for the Indian National Congress and highlighting the achievements and the development works undertaken by the State Government headed by the petitioner as Chief Minister of the State of Maharashtra.

47. While considering the matter relating to the publication of certain advertisements in the Newspapers in the context of the visits of Smt. Sonia Gandhi, President of the Indian National Congress, and Shri Jyotiraditya Scindia, Union Minister (both star campaigners of Indian National Congress within the meaning of Explanations (1) and (2) to Section 77(1) of the Act), and Shri Salman Khan, Cine Artist, and the public meetings held by them in Nanded City and certain other

places in that District. A public meeting was scheduled to be held at Nanded and addressed by Smt. Sonia Gandhi on 05.10.2009, which was later on postponed to 06.10.2009. Similarly, a public meeting was held by Shri Jyotiraditya Scindia on 07.10.2009 at Cidco, Nanded City and Mudkhed (which falls in Bhokar Assembly Constituency). Shri Salman Khan, Cine Artist also held a road show and a public meeting on 10.10.2009 at Nanded. According to the complainant/respondent No.1, with a view to giving publicity and inviting general public to attend those public meetings, following advertisements were issued in various Newspapers, expenditure whereon was not shown by the petitioner in his account of election expenses:

“(A) Advertisements with regard to the public meeting of Smt. Sonia Gandhi initially scheduled to be held on 5th October, 209 and re-scheduled and held on 6th October, 2009:

- 1. “Lokmat” dated 03.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
- 2. “Lokmat” dated 04.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
- 3. “Lokmat” dated 05.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
- 4. “Lokmat” dated 06.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
- 5. “Prajawani” dated 03.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
- 6. “Prajawani” dated 04.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
- 7. “Prajawani” dated 05.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*

8. *“Prajawani” dated 06.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
9. *“Dainik Satyaprabha” dated 03.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
10. *“Dainik Satyaprabha” dated 04.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
11. *“Dainik Satyaprabha” dated 05.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
12. *“Dainik Satyaprabha” dated 06.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
13. *“Dainik Gaonkari” dated 04.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
14. *“Dainik Gaonkari” dated 05.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
15. *“Dainik Gaonkari” dated 06.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
16. *“Udyacha Marathwada” dated 04.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
17. *“Udyacha Marathwada” dated 05.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
18. *“Udyacha Marathwada” dated 06.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*
19. *“Deshonati” dated 06.10.2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee.*

(B) Advertisements with regard to the public meeting scheduled to be adressed Shri Jyotiraditya Scindia on 7th October, 2009 at Cidco, Nanded City and Mudkhed:

1. "Lokmat" dated 07.10.2009 published by Shri Ajay Bisen, President, Nanded District Congress Committee & Shri Munna Abbas for Nanded City Youth Congress Committee.

2. "Prajawani" dated 07.10.2009 published by Shri Ajay Bisen, President, Nanded District Congress Committee & Shri Munna Abbas for Nanded City Youth Congress Committee.

(C) Advertisements with regard to the road show and public meeting of Shri Salman Khan, Cine Artist scheduled to be held on 10th October, 2009 at Nanded:

1. "Prajawani" dated 10.10.2009 published by Shri Shyam Darak, Secretary, District Congress Committee Nanded.

2. "Udyacha Marathwada" dated 10.10.2009 published by Shri Shyam Darak, Secretary, District Congress Committee Nanded.

3. "Gaonkari" dated 10.10.2009 published by Shri Shyam Darak, Secretary, District Congress Committee Nanded.

4. "Godatir Samachar" dated 10.10.2009 published by Shri Shyam Darak, Secretary, District Congress Committee Nanded.

48. Issue before the Commission and before this Court is that the petitioner has not shown any expenditure in respect of aforementioned 19 advertisements issued in various Newspapers between 3rd and 6th October, 2009 by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee giving publicity to the public meeting to be held by Smt. Sonia Gandhi on 05.10.2009, which was later postponed to 06.10.2009. It is alleged that the petitioner has shown an apportioned expenditure of Rs.264/- on the publication of an advertisement by Shri Munna Abbas in "Satyaprabha" on 07.10.2009, but no expenditure was shown on similar advertisements published in "Lokmat" and "Prajawani" on the same day, i.e., dated

07.10.2009.

49. Likewise, it is also alleged that the petitioner has shown an apportioned expenditure of only Rs.60/- in respect of an advertisement published by Shri Shyam Darak in 'Satyaprabha' on 10.10.2009, but did not show any expenditure in respect of similar advertisements published by Shri Shyam Darak on the same day in four different Newspapers, namely, 'Prajawani', 'Udyacha Marathwada', 'Gaonkari' and 'Godatir Samachar'.

50. Ld. Counsel appeared on behalf of the petitioner before the Commission submitted to refute the above allegations of the complainant/respondent No.1, petitioner had accounted for the expenditure on all those advertisements of which he had knowledge or about which he was informed by the publishers of those advertisements. In support of his above stand, petitioner has relied upon the affidavits of the publishers of those advertisements, namely, Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee, who allegedly published the abovementioned 19 advertisements relating to the public meeting of Smt. Sonia Gandhi, Shri Munna Abbas, President, Nanded City Youth District Congress Committee, who allegedly published the abovementioned two advertisements relating to public meeting addressed by Shri Jyotiraditya Scindia at Cidco, Nanded City and Mudkhed and Shri Shyam Darak, Secretary, District Congress Committee Nanded, who allegedly published the abovementioned four advertisements relating to road show and public meeting of Shri Salman Khan, Cine Artist.

51. Mr. Sibal submitted that Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee, in his affidavit dated 09.06.2014, deposed that he had published advertisements relating to the public meeting of Smt. Sonia Gandhi on 3rd, 4th, and 5th October, 2009, only in local dailies, namely, "Prajawani",

“Lokmat”, “Gaonkari” and “Udyacha Marathwada” and on 06.10.2009 only in “Deshonati”. In those advertisements, names of all the nine candidates contesting in the District of Nanded as candidates of the Indian National Congress – Nationalist Congress Party – RPI (Gavai) Alliance were given, as the public meeting of Smt. Sonia Gandhi was jointly held. Further deposed, that he borne the entire expenditure on the above publications on his own individually, without the knowledge, consent, authorization and concurrence of any of the candidates, named in the said advertisements.

52. Mr. Sibal further submitted Shri Munna Abbas, President, Nanded Youth District Congress Committee also filed his affidavit and deposed that he had personally volunteered to make the publication about the meeting of Shri Jyotiraditya Scindia, at Cidco, Nanded City and Mudkhed and accordingly published the advertisement only in the local daily “Satyaprabha” on 07.10.2009 and not in any other Newspaper and that neither the candidates nor their election agents have given their written or implied consent or authorization to publish those alleged advertisements. He deposed that though the publication of the above advertisement in “Satyaprabha” was his voluntary act, he nevertheless communicated to the Accountant of the petitioner that he had incurred an expenditure of Rs.792/- on the above advertisement. Accordingly, an amount of Rs.264/- was to be apportioned to the share of the petitioner as the said advertisement carried the names of three candidates. Ld. Counsel submitted the said expenditure of Rs.264/- was accordingly accounted for in the account of election expenses of the petitioner.

53. Likewise, Shri Shyam Darak, Secretary, District Congress Committee Nanded, in his affidavit dated 04.06.2010 accepted the responsibility for the publication of an advertisement in “Satyaprabha” on 10.10.2009, on the road show

and public meeting of Shri Salman Khan, Cine Artist. He denied the responsibility or knowledge regarding publication of any other advertisement relating to the above road show and public meeting of Shri Salman Khan in any other Newspapers. He deposed that he never delivered any declaration signed by him and attested by two persons personally known to him to the other Newspapers, who printed those advertisements (as required under Section 127A of the Act). According to him, he spent an amount of Rs.1,980/- on the publication of the above advertisement in “Satyaprabha” on 10.10.2009, and that he gave an intimation to the accountant of the petitioner to charge the apportioned amount of Rs.60/- in the election expenditure account of the petitioner, which was subsequently ratified by the petitioner.

54. Mr.Sibal further submitted that apart from the support sought to be derived by the petitioner from the above affidavits of Shri Amar Rajurkar, Shri Muna Abbas and Shri Shyam Darak, petitioner has also taken the plea that there was not even a whisper of any allegation by the complainants in their original complaints submitted in November-December, 2009 that petitioner had suppressed any expenditure on advertisements relating to the abovementioned public meetings.

55. Learned senior counsel submitted that the aforementioned allegations were made at much later stage in September, 2010, by adducing evidence during the course of these proceedings.

56. It is contended that allegations with regard to these advertisements should not have been looked into by the Commission in view of the Apex Court’s dictum in the case titled as **“Gajanan Krishnaji Bapat Vs. Dataji Raghobaji Meghe, AIR 195 SC 284**, wherein held that no evidence can be led on a plea not raised in the pleadings and that the court in the appraisal of evidence should ensure that the

evidence led by the parties has not gone beyond their pleadings and no new case has been sought to be made out.

57. Further submitted, petitioner had duly accounted for the expenditure on such advertisements which were in his knowledge or were brought to his knowledge, however, if the publishers of those advertisements or anyone else did not bring to petitioner's notice or knowledge some of the advertisements, petitioner could not be expected or required to account for any expenditure on those advertisements of which he was neither aware nor had knowingly taken any advantage whereof.

58. Also submitted even if the expenditure on some of the advertisements was not included in the account of the election expenses of the petitioner, it was purely unintentional and was an accidental omission without any intention of suppressing any expenditure incurred or authorized by him.

59. Mr. Sibal submitted that well accepted general principle of law is that in borderline cases where two views are reasonably possible, one in favour of the returned candidate should be accepted.

60. In support of his aforesaid submissions, learned counsel relied upon the observation of the Apex Court in the case of ***Narendra Singh Vs. Mala Ram & Another (199) 8 SCC 198*** wherein held as under:-

“In borderline cases the courts have to undertake the onerous task of, ‘disengaging the truth from falsehood, to separate the chaff from the grain’. In our opinion, all said and done, if two views are reasonably possible – one in favour of the elected candidate and the other against him – Courts should not interfere with the expensive electoral process and instead of setting at naught the election of the winning candidate should uphold his election giving him the benefit of doubt. This is more so where allegations of fraud or undue influence are made.”

61. Learned senior counsel submitted that the petitioner was a star campaigner

of the party in terms of Explanations (1) and (2) of the Act and also Chief Minister of the State carrying out the responsibility of the election campaign for the party in the entire State and moving from place to place throughout the State and could not be expected to read all the Newspapers and know what was appearing therein relating to his own Constituency. Learned counsel contended that the petitioner's case should be treated as a special case falling within the exemption clause envisaged in the observations made by the Hon'ble Supreme Court in ***Kanwar Lal Gupta's Vs. Amar Nath Chawla, (1975) 3 SCC 646:-***

“.....When the political party sponsoring a candidate incurs expenditure in connection with his election, as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it or participates in the programme or activity or fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorized the political party to incur such expenditure.....” (emphasis supplied by the respondent).

62. Mr.Sibal further submitted that public meeting of Smt. Sonia Gandhi was held outside Bhokar Assembly Constituency from where the petitioner was contesting the election, yet petitioner accounted for the proportionate expenditure of Rs.1,24,062/-on the holding of the public meeting which fell to his share as he attended that public meeting and knowingly took advantage of the same. As regards the meetings/road show of Shri Jyotiraditya Scindia and Shri Salman Khan, though petitioner did not attend the same being out of station, he nevertheless accounted for the proportionate expenditure of Rs.4,925/- on the public meeting of Shri Jyotiraditya Scindia and Rs.4,300/- on road show/meeting of Shri Salman Khan, apart from the expenditure on advertisements for those meetings which were brought to the notice of the petitioner by the advertisers/publishers of those advertisements.

63. It is submitted that if any expenditure had been incurred on publication of any advertisements by any person without petitioner's authorization, persons concerned committed electoral offences punishable under Section 171H of the Indian Penal Code (hereinafter called 'IPC') and Section 127A of the Act and they were answerable for their lapses and not the petitioner.

64. To strengthen the aforementioned ground, learned counsel for the petitioner cited the case of **Smt. Indira Nehru Gandhi Vs. Shri Raj Narain & Others (1975) SCC Sup 1 (Page 189, Para 502)** and contended that the petitioner could not be held vicariously liable for the act or omission of a person who does something in the interest of the returned candidate, voluntarily, without his knowledge or consent. The Apex Court has held as under:-

“502.....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 State Government, take place, a number of people come forward to either give or thrust heir 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 ad these on to the candidate's account of expenses. That would be, obviously, a most unfair results. And, this is not what the law requires in this country. The law requires proof of circumstances from which at least implied authorization can be inferred.”

65. With regard to concept of implied authorization as enunciated by the Supreme Court in the above cited case of **Smt. Indira Gandhi (supra)**, petitioner also referred to the following observations made by the Apex Court in Para 121:-

“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 reimbursement.”

66. Learned senior counsel submitted that there is no pleading or evidence on behalf of the respondents attributing any *mala fide* or intention to conceal the expenditure incurred on disputed advertisements in light of ceiling limit under Section 77 (3) read with Section 123(6) of the Act, which is Rs.10,00,000/- for an Assembly election. Undisputedly, even if the entire amount against all the disputed advertisements is included in the election expenses of the petitioner, it does not exceed the ceiling limit of Rs.10,00,000/-. Advertisements were relating to the election meetings of which the petitioner was not the organizer. As per the text, different individuals were named in the publications. There is no evidence that inputs of the advertisements were provided by the petitioner. Meetings were not exclusively for the petitioner. But the same were for the multiple candidates set up by United Progressive Alliance. Thus, there was no express authorization in any form given by the petitioner to any such advertiser.

67. It is further submitted that it is nobody's case that the expenditure on the advertisements were, in fact, incurred by the petitioner. No case was made out that there was any promise to reimburse the expenses, if any, made by the petitioner or his election agent. No price in cash or in kind has been paid or even promised as a consideration against the alleged publication by the petitioner or his election agent. There is no such finding in the impugned order. There is no evidence from the Newspaper establishments about raising any bills in the name of the petitioner.

68. Learned senior counsel further submitted that other candidates or the election agents of other candidates or well-wishers or volunteers of other candidates were not the agents of the petitioner or they did not have any authority

of whatsoever nature on behalf of the petitioner. Thus, there was no evidence of whatsoever nature from Newspapers e.g. Editor or Publisher about the payment or Bill or even publication. There was no manuscript or block or digitized design produced on record.

69. To strengthen his arguments on the issue raised above, learned senior counsel has relied upon a case of ***Common Cause Vs. Union of India (1996) 2 SCC 752***, wherein the Apex Court held as under:-

“6. That the expenditure, (including that for which the candidate is seeking protection under Explanation I to Section 77 of the R.P. Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent - shall be presumed to have been authorised by the candidate or his election agent. It shall, however be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only when the candidate discharges the burden and rebuts the presumption he would be entitled to the benefit of Explanation I to Section 77 of the R.P. Act.”

70. Learned senior counsel submitted that approach of the complainant/respondent No.1 was of initial distrust and bias as he was a defeated candidate having lost his deposit. In any event, even if presumed, it stands rebutted completely by reasons of evidence of three publishers mentioned above. All of them were responsible office bearers of the party and they had categorically stated that they did not have any authorization either from parties or from the petitioner. Thus, in terms of the judgment dated 05.05.2014 passed by the Supreme Court in SLP(C) No.29882/2011, evidence in rebuttal is also available. Relevant portion of the same reads as under:-

“109. The submission apparently was that there was every right in the candidate concerned to demonstrate that the candidate did not really incur such expenditure and that he was not to be blamed for any unauthorized expenditure made by the party concerned. Assuming such a stand of any of the Appellants is to be believed, it is always open to the Appellant to demonstrate before the Election Commission, with all the relevant materials and convince the Election Commission that on that score, no order of disqualification can be passed. The said decision cannot however be relied upon to hold that the Election Commission has no power or jurisdiction to enquire into the complaint, which has now been made against the appellant.”

71. Mr. Sibbal, Learned senior counsel submitted that there was no primary or positive evidence to the contrary. There was no common factor amongst the advertisers, but there are three different individuals, whose names have been recorded above.

72. Moreover, in compliance of Rule 87, a notice was displayed on the Notice Board by District Election Officer. As per Rule 88, statement of account was thrown open for public inspection. First three complaints of respondent No. 1 made to the Commission, i.e., dated 02.12.2009, 05.06.2009 and 09.07.2010 were confined to the allegations of ‘paid news’, whereas in the complaint dated 21.09.2010, for the first time, issue regarding disputed advertisements was raised. However, till the time of lodging account of election expenses, disputed advertisements were not brought to the notice of the petitioner. For the first time, the petitioner learnt about it during the course of proceedings before the Commission. Moreover, Election Petition No.11/2009 filed on 04.12.2009 was silent about these advertisements in question. No specific issue was framed about knowledge to the petitioner in the context of disputed advertisements. Photographs of the petitioner on the disputed advertisements were printed because of the State

level recognition of the petitioner as a Chief Minister and party leader, i.e., Star Campaigner.

73. Learned senior counsel submitted that margin of Rs.3,14,808/- was still available with the petitioner to incur further expenditure up to the ceiling limit of Rs.10,00,000/- against the insignificant amount of Rs.16,924/-. Hence, if the pro rata sharing of Rs.16,924/- was added to the account of the petitioner, the same did not reach to the afore-noted ceiling limit of Rs.10,00,000/-.

74. Learned senior counsel submitted that present proceedings are arising out of Section 10-A of the Act. Two-fold issues entertained by the Commission against the petitioner are as under:-

- “(i) The allegation of indulging in causing publication of “Paid News”. That, there was unprecedented media coverage given to the petitioner during the election campaign. Although, the publications appeared to be news, news analysis, article, etc. but in fact the publications were advertisements got published under consideration.*
- (ii) Some of the advertisements related to publications in the local newspapers making announcement of election public meetings and particulars of such meetings were not duly accounted for in the statement of election expenses. The first ground is negative whereas on second ground the finding is against the petitioner.”*

75. To justify the final conclusion in invoking application of implied authorization in the instant case, the supporting reasons are summarized in Para 98 of the impugned order as under:-

“98. The Commission has also taken due note of the concern raised by the respondent, relying on the observation of the Hon'ble Supreme Court in Smt. Indira Gandhi's case (supra), referred to in para 92 above and also the observations of the apex court in Kanwar Lal Gupta's case referred to in para 90 above, regarding the special consideration to be given in relation to expenditure of star campaigners (as defined in Explanation (1) and (2) of Section 77 of the 1951-Act) or top political leaders who have a responsibility of

campaigning for the state or for the country on behalf of the party. It is true that there could be an assortment of so-called friends and well-wishers who could offer assistance by way of advertisements etc., or even malevolent persons offering unsolicited and unknown advertisements which could act as a booby trap at a later stage by raising issues under rule 89 read with section 10A of the 1951-Act. However, in the instant case, the Commission has carefully examined the material on record and the persons who have claimed sponsorship of such advertisements. The Commission feels fully justified in invoking application of implied authorization in the instant case, as –

- The persons sponsoring advertisements are responsible office bearers holding important positions in the party – one, being the Secretary of the 97Maharashtra Pradesh Congress Committee, the second being the Secretary of the Nanded District Congress Committee and the third being the President of the Nanded City Youth Congress Committee, and not ordinary supporters or workers in the field.*

- The quantum of such advertisements is significant (25 in number) and cannot be claimed as a stray advertisement. The publication of these very advertisements in some of the newspapers is admitted by the respondent himself and account for the expenditure on those advertisements.*

- The advertisements relate to public meetings in furtherance of the candidate's election prospects, in which the expenditure for the public meeting / rally is also admitted by the candidate. In the main public meeting held by Smt. Sonia Gandhi, the respondent himself admits to have attended and 19 out of 25 impugned advertisements which have not been accounted for relate to that very public meeting which he had attended.*

- These advertisements were specifically issued in the context of the public meetings to be held by Smt. Sonia Gandhi, Shri Jyotiraditya Scindia and Shri Salman Khan and not by way of general party propaganda.”*

76. Learned senior counsel submitted that this proposition is based on misconception of law. Such proposition is not referable to any statutory provision

of law or emanates from *Kanwar Lal Gupta's case (supra)*.

77. Meeting of Shri Jyotiraditya Scindia was on 07.10.2009, whereas advertisement was also published on the same day. Significantly, it was the day immediately following the date on which there was meeting of Smt.Sonia Gandhi. Similarly, advertisement and road show of Shri Salman Khan was also on one and the same day, i.e., 10.10.2009 and there was no prior publication of advertisements to this effect. Thus, circumstances were reinforced by the fact that petitioner could not even be a part of meetings of Shri Scindia and Shri Salman Khan, as he was out of station. Moreover, functionaries of the Commission, the observer, have checked and verified the account of the petitioner and countersigned it. No negative remark was made by the observer while verifying the accounts of the petitioner.

78. It is submitted that the petitioner or his election agent was not expected to scan each and every Newspaper including sundry Newspapers having no circulation or recognition from public or even such Newspapers, which were not even regularly published. A Star Campaigner was not expected to scan each and every Newspaper of each and every day, including on the dates prior to his return to his Constituency. He will not have to collect all the past Newspapers and carry out meticulous scrutiny of each and every previous local Newspaper with a magnifying glass. Many local Newspapers were shrouded in obscurity and continued to carry uninterrupted scrutiny for detecting such clandestine publications. In a given case, if some such advertisement is telecasted on cable television (local), where the Campaigner is out of station, the candidate cannot have any notice of it. Hence, contention of the complainant deserves to be rejected on the basis of principle that law does not compel the doing of impossibilities or that law does not compel a man to do that he cannot possibly perform. It is

admitted that election agent; namely, Smt. Ameeta Chavan was also a Star Campaigner. Obviously, her campaign was also not confined to Bhokar Assembly Constituency. The quantum of advertisement has no relevance for attributing implied authorization.

79. Learned senior counsel submitted, for the similar reason, Supreme Court had excluded the expenses on the public meeting held at Idgah Road addressed by the Prime Minister in the case of **Kanwar Lal Gupta** (*supra*). Relevant portion thereof reads as under:-

“The first respondent, thus, failed to show that expenditure in connection with this public meeting was incurred by the Delhi Pradesh Congress Committee or the District Congress Committee, Karol Bagh. That, however, cannot help the petitioner because the burden is on the petitioner to establish that the expenditure in connection with this public meeting was incurred or authorized by the first respondent and of that, unfortunately for the petitioner, there is no evidence. The expenditure in connection with this public meeting at Idgah Road cannot, therefore, be attributed to the first respondent.”

80. However, inasmuch as, meeting was organized by the party alliance pro rata expenditure amounting to Rs.1,24,062/-, was debited on the same day of meeting, i.e., 06.10.2009. Only because of misconception of law and fact, this expenditure was accounted in the statement of election expenses. As per the law laid down in **Kanwar Lal Gupta’s** case (*supra*), this amount of Rs1,24,062/- was also required to be excluded from the statement of election expenses. Thus, the margin available to reach the ceiling limit of Rs.10,00,000/- was Rs.4,21,946/- (Rs.2,97,484/- + Rs.1,24,062/-) even after including the notional expenditure of Rs.16,924/- against the advertisements in question.

81. The Constitution Bench of the Apex Court in the case of **Smt. Indira Nehru**

Gandhi (supra) held that:-

“502.....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 State Government, take place, a number of people come forward to either give or thrust heir 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 ad these on to the candidate’s account of expenses. That would be, obviously, a most unfair results. And, this is not what the law requires in this country. The law requires proof of circumstances from which at least implied authorization can be inferred.”

82. It is further submitted on behalf of the petitioner that the complainant has produced a photocopy of the document purporting to be a provisional receipt issued by one Arvind Advertising and Selling Agency Pvt. Ltd., Khokadpura, Aurangabad vide Volume-II, Annexure-H at page 42. It is in a bid to prove both, the authenticity of the publication of meeting and as well as the fact of incurring expenses by Shri Shyam Darak. It is extremely unseen to place any reliance on such document. It is not the original document but a photocopy. Name of Shri Amar Rajurkar was scored out and the name of Shri Shyam Darak appeared to have been interpolated. Shri Shyam Darak was never holding office of General Secretary of Maharashtra Pradesh Congress Committee, Nanded. It did not bear the signature of Shri Shyam Darak. Complainant wanted to establish payment of Rs.6,000/- was made against election meeting advertisement relating to Shri Salman Khan, which published in the Newspaper ‘Gaonkari’. To protect the candidate against such fabricated evidence, provisions in the nature of Section 127 A of the Act and Section 171 IPC are made.

83. The Commission has misinterpreted the findings of **Kanwar Lal Gupta’s**

case (*supra*). There is no finding as to ‘something more’ than mere incurring expenditure by some other party. Even addition of such expenditure of disputed advertisements would not have exceeded the ceiling limit of Rs.10,00,000/-. There was no contravention of Section 77(3) read with Section 123(6) of the Act, which was the foundation of aforementioned ***Kanwar Lal Gupta’s*** case.

84. Similarly, there cannot be disavowal from the advertisements already published. The Commission has over looked the proposition recorded in para 28 (6) of ***Common Cause*** case (*supra*). There is no finding about evidence in rebuttal which shows that the petitioner has not incurred expenditure on advertisements.

85. The facts of the present case are different from the facts of ***Kanwar Lal Gupta’s*** case (*supra*). The chart below (annexure P-3) depicts the difference of both the cases:-

“ANNEXURE P-3

Sr. No.	FACTS OF KANWARLAL GUPTA V. AMARNATH CHAWLA	FACTS OF PRESENT CASE
1.	<p>The case was related to corrupt practice and Section IOA as not covered and/or considered by the Hon’ble Court. The main issue was whether the elected candidate had breached the ceiling of election expenditure provided under the law.</p> <p>The elected candidate was held guilty of corrupt practice under section 123 (6) of the RP Act 1961.</p> <p>(Para 65 Page 697)</p>	<p>Instant case is covered under section IOA and section 123(6) relating to 'Corrupt Practice' is not even an issue to be considered.</p>
2.	<p>The matter started as an Election Petition.</p> <p>(Para 1 Page 651)</p>	<p>The Election Petition filed by the Respondent No.1 against the Petitioner was dismissed.</p>

	<p>Enormous oral and documentary evidence was produced by the parties and the trial judge decided the matter based on the evidence. (Para 6 Page 652)</p>	<p>The instant matter is an enquiry conducted by Learned Election Commission.</p>
3.	<p>The charge was that candidate incurred or authorized expenditure in excess of the prescribed limit and thus was in contravention of section 77 and thereby committed a corrupt practice under section 123(6) of the Act. (Para 8 Page 653)</p>	<p>The issue is that the candidate provided incorrect accounts of expenditure.</p>
4.	<p>The allegation against the elected candidate was that more than 23 public meetings were conducted by him while expenditure was accounted for only 23 meetings. No expenses were shown for the other meetings.</p> <p>Elected candidate attended each and every one of the said meetings and hence attributed to have knowledge about the expenditures.</p> <p>For the remaining public meetings the candidate did not account for the expenses including the expenses incurred on items like durries, takhats, chaddars, microphones, loudspeakers, electrical furnishings etc. (Para 16 Page 659)</p>	<p>The allegation against the elected candidate is that he did not account for the newspaper advertisements of three public meetings.</p> <p>The candidate participated in only one of the three public meetings. The candidate was outside his constituency when the advertisements were made and hence no knowledge about them. Candidate has accounted for his pro rata share for all the three public meetings and those advertisements which were in its knowledge.</p>
5.	<p>The parties, especially the Complainant and his witnesses had given proper oral and documentary evidence and were cross examined by the other party. (Para 17,18 & 20 Page 660-661)</p>	<p>Examination and cross examination did not take place.</p>
6.	<p>The Station House Officers (SHO) posted in the concerned areas where the</p>	<p>No third party/independent witnesses were called for giving</p>

	<p>meetings were held was called to give evidence with respect to the public meetings.</p> <p>(Para 24 Page 663)</p> <p>Based upon the evidence of the SHOs, it was found out that there were two meetings whose expenses were not accounted for by the elected candidate.</p> <p>(Para 26 Page 664)</p>	evidence.
7.	<p>CID officers, who covered the public meetings, were called in witness box to give evidence with respect to the public meetings.</p> <p>(Para 28-35 Page 666-674)</p>	No third party/independent witnesses were called for giving evidence.
8.	<p>After perusal of evidence it was found out that other than 23 public meetings admitted and accounted for by the elected candidate, there were 9 more meetings which were not disclosed and no expenses incurred in those meetings were accounted for by the candidate.</p> <p>(Para 41-42 page 677)</p>	Total three public meetings. Candidate attended only one meeting and accounted his share of the expenses of all three meetings.
9.	<p>The admitted expenses incurred by the candidate in the public meetings were closely scrutinized by the Court.</p> <p>(Para 47 Page 680)</p>	No scrutiny of any expenditure.
10.	<p>The complainant even produced evidence and witnesses to ascertain and produce an estimate of expenditure that the elected candidate would have incurred for the meetings whose expenses were not accounted for.</p> <p>(Para 51 page 684)</p>	The complainant produced no such evidence
11.	<p>The Court considered the expenses incurred in printing posters and handbills.</p> <p>(Para 58 page 692)</p>	No such issue in present case
12.	<p>The Court found out that excess expenditure was incurred by candidate and was not accounted for.</p>	No such finding in the present case.

	(Para 63-64 Page 697)	
13.	Not mere incurring of expenditure by the Political party but 'something more' (Para 13) i.e. the addition of such expenditure would have exceeded the ceiling under section 77(3) read with section 123(6). (Para 42, 56, 65)	

86. The Commission in the present case has relied upon ***Umlesh Yadav's*** case whereas the facts of the present case are materially different. Thus, the said case was wrongly applied. The following chart (annexure P-2) depicting the difference between ***Umlesh Yadav's*** case (*supra*) and the case in hand is as under:-

ANNEXURE P-2

<i>Smt. Umlesh Yadav's Case</i>	<i>Our case</i>
<i>The newspaper Dainik Jagran stated that the news publication, was an advertisement for which a bill of Rs.21,250/- in the name of Pramod Mishra was issued and the client name was mentioned as D.P. Yadav i.e. husband of Umlesh Yadav. The amount was paid in cash.</i>	<i>No bill is raised by any of the publications.</i>
<i>The evidence demonstrated that the same was advertisement in the newspaper for which a bill of Rs.8000/- in the name of Shri D.P. Yadav-was issued and paid.</i>	<i>No evidence to demonstrate any nexus between the petitioner and the publication of alleged advertisements.</i>
<i>Both the newspapers have submitted that the material of newspaper was provided by the petitioner and the material was not collected on the correspondence of the newspaper.</i>	<i>No reply is solicited by any of the newspapers.</i>
<i>The documentary evidence</i>	<i>No evidence by the complainant to built</i>

<p><i>irresistibly established the existence of the nexus between the candidate and the publications. Both the newspapers had submitted that the material of publication for the advertisement was provided on behalf of the candidate. The bills were drawn in the name of D.P. Yadav, the husband of the candidate who was also the President of Rashtriya Parivartan Dal. There was evidence about making payment as a consideration to the newspapers and the receipts were issued acknowledging the cash payment.</i></p>	<p><i>up any nexus between the petitioner and the publication of alleged advertisements.</i></p>
<p><i>The advertisements were referable exclusively to the candidate namely Umlesh Yadav.</i></p>	<p><i>The advertisements were referable to nine candidates, nine constituencies of UPA Alliance i.e. INC, NCP & RPI (Gavai)</i></p>

87. In **Ram Dayal's** case (*supra*) (Para-17), appellant challenged election of the Respondent on the ground that, the Maharaja and Rajmata of Gwalior had helped the Respondent's election in number of ways and incurred considerable expenditure which exceeded the limit. The Supreme Court held that, assuming the expenditure was incurred by 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.

88. In **Magraj Patodia's** case (*supra*) (Paras-15, 16, 17 & 28) allegations were that Respondent had been put up by one of the wealthiest business houses in the country which hold and control a large number of companies and during the election campaign, vast material and human resources of these companies were

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drawn upon by the respondent. The appeal was dismissed holding that the expenses incurred by a political party to advance the prospects of the candidate put up by it "without more" do not fall within Section 77 of the Act.

89. Learned senior counsel argued that it is the settled law obtained prior to insertion of Explanations (1) and (3) to Sub-Section (1) of Section 77 of the Act in the year 1974 and 1975 was considered in these judgments. The said position of law is restored by deleting those Explanations vide, Act No.46/2003 w.e.f. 11.09.2003.

90. Learned senior counsel argued that there is no such finding recorded against the petitioner. This finding of fact is a *sine qua non* for reaching a conclusion of "implied authorization". Not only that there is no such finding but the issue of "without more" is not even germane to the fact situation. There is no question of interference in free and fair election or to keep out the money power as discussed in Para 13 in the judgment of **Kanwar Lal Gupta** (*supra*). In any event, there is no issue of black money influencing the elections in the context of these advertisements.

91. It is further argued that a particular public meeting announcement stating the meeting particulars could be made by various modes such as:-

- (i) The telecast on cable T.V.
- (ii) The broadcast on radio.
- (iii) The loudspeaker in rickshaw etc. or by beat of drums in town.
- (iv) The publication in Newspaper.

92. Learned senior counsel submitted that in the context of the advertisement announcing the public meeting, aforesaid components are inapplicable. As media publication could be made even behind the back of candidate concerned and no

personal physical participation is contemplated. Moreover, the public meeting announcement has to be made prior in time of public meeting. In any event, such voluntary publications are beyond reasonable control and unstoppable by any candidate, even if some stranger causes such publications for the reason best known to him. Thus, the Commission has gone out of context by quoting para-11 of the ***Kanwar Lal Gupta***'s case (*supra*) in the impugned order.

93. Learned senior counsel further submitted that Section 10-A of the Act was not at issue nor addressed. The controversy was restricted to corrupt practices set out in Section 123(6) read with Section 77 (3) of the Act. However, Section 171-H IPC was not at issue in ***Kanwar Lal Gupta***'s case (*supra*).

94. Learned senior counsel submitted that Section 171-H IPC prohibits any expenditure made without authority in writing of a candidate upon any advertisement and makes its violation a penal offence. On the other hand, in the impugned order, such illegal payments made without express authorization from the candidate was sought to be included in the account of election expenses. Thus, there is apparent contradiction between the view taken by the Commission in the impugned order and Section 171-H IPC. Hence, the question arises 'Whether the Court can take cognizance of such expenditure, which is an illegal expenditure in the eyes of law and expect to account for the money spent by somebody else unauthorizedly?

95. The observations made by Constitution Bench of the Apex Court in the case of ***Smt. Indira Nehru Gandhi*** (*supra*) are as under:-

“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 reimbursement.”

96. Learned senior counsel further submitted that in case of **Umlesh Yadav** (*supra*), there was no question of evidence by way of rebuttal- because there was direct nexus between the candidate and Newspapers. Bills were drawn and paid in cash by Shri D.P.Yadav, husband of candidate. There was no question of presumption based on knowledge.

97. Learned senior counsel further submitted that regarding disputed public meeting advertisements, there was no show cause notice issued to the petitioner. Section 10-A 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.

98. Learned senior counsel submitted that in consonance with Section 10-A of the Act, Rule 89 was framed. Rule 89 is also in two parts. Sub-Rule 4 of Rule 89 contemplates the Commission "to 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. Sub-Rules 5 to 8 are substituted by S.O. 3875 dated 15.12.1966. If there is adverse finding against the candidate under Sub-Rule 4 after assigning reasons in support of such findings, in that event a show cause notice is contemplated under Sub-Rule 5. In response to the show cause notice, the candidate may submit a representation in writing together with "**complete account**" of his election expenses if he had not already furnished "**such**" an account. In other words, if such complete account is not furnished prior to the stage of first decision under Sub-Rule 4, after the stage of show

cause notice, Sub-Rule 6 offers yet further opportunity to furnish such complete account. The subsequent satisfaction of the Commission is contemplated under Sub-Rule 8 in respect of the representation and the furnishing of such subsequent complete account as contemplated by Sub-rule 6.

99. Learned senior counsel submitted that on the issue raised above, findings of the Commission are:-

“71.....He is not correct in his contention that the respondent could have filed a revised account of election expenses under Rule 89(6) had he been given a notice in terms of Rule 89(5) of the 1961- Rules. A look at Rule 89(6) would show that that rule permits a candidate to file his account of election expenses where he has not previously filed any account at all under section 78 of the 1951-Act, and not where he has filed an account alleged to be false or incorrect.

72. Having thus decided that the present proceedings do not abate on account of resignation of respondent from the membership of the Maharashtra Legislative Assembly and that the respondent cannot file a revised account of his election expenses at this stage”

100. It is further submitted that the aforesaid proposition is completely unknown to law. Not filing of the account at all is an absolute non-compliance with the mandate of law and it is comparatively a higher default as compared with filing of an account but not complete account. However, observations of the Commission would mean that an accused could be acquitted even if he is charged for committing an offence under Section 302 IPC but, he cannot be acquitted if he is charged with an offence like Section 304-A IPC.

101. In the light of these observations, it was concluded by the Commission that Sub-Rules 4 to 8 of Rule 89 are wholly inapplicable and only a formality of passing final order is left over.

102. On the aforesaid issue, the Commission in Para 102 observed as under:-

“102.His plea is of no avail that even if the total amount of expenditure on the abovementioned advertisements, which according to his calculation comes to Rs.16, 924/-, is added to his expenditure of Rs. 6, 85,192/- incurred or authorized by him in connection with his election, such total expenditure would come nowhere near the maximum limit of Rs.1 0 lakh as permissible under the law. If such a plea is accepted by the Commission, then every candidate would get a license to file an incorrect or false statement and, if caught, may contend that the suppressed expenditure may be added to his account of election expenses. This would frustrate and defeat the very object underlying the provisions of section 77 requiring the maintenance of true account of election expenses and of section 10A of the 1951-Act providing for disqualification for filing an incorrect or false account.”

103. Thus, a concluded finding was recorded by the Commission rejecting the contentions on merits. The Commission has also misinterpreted its verdict in the light of **Umlesh Yadav** (*supra*) holding that Section 10 of the Act does not give any discretion to the Commission or leeway in the matter of its application. These observations are inconsistent with the legislative scheme spoken off by Sub-Rule 4 to Sub-Rule 8 of Rule 89.

104. The aforesaid observations in the impugned order are also inconsistent with the verdict of the Supreme Court in Civil Appeal No. 5044 of 2014 dated 05.05.2014, wherein observed that:-

“40 When we refer to the said stipulation, namely, the manner required under the Act, it will have to be stated that the manner required would certainly include the true and correct accounts to be maintained, a copy of which alone can be stated to mean having been lodged in the manner required. In fact, under sub- rule (2) of Rule 89, the DEO if on verification found that the lodging of the account was not in the manner required, should send a report to that effect to the Election Commission along with the accounts lodged by the

candidate concerned. The DEO should also publish a copy of his report in the notice board. Under sub- rule (4) of Rule 89, after the receipt of the report referred to in sub- rule (1), the Election Commission has to again consider the same and decide whether any contesting candidate failed to lodge the account of election expenses within the time and in the manner required by or under the Act and the Rules.

41. Under sub- rule (5) of Rule 89 when the Election Commission decides that a contesting candidate failed to lodge his account of election expenses within time and in the manner required by the Act as well as the Rules, it should by notice in writing call upon the candidate to show cause why he should not be disqualified under Section 10A for such default. Under sub- rule (6) of Rule 89, once the notice to show cause is issued as per sub- rule (5), within 20 days of receipt of such notice, the candidate concerned should submit a representation in writing to the Election Commission and simultaneously forward a copy to the DEO together with the complete account of his election expenses, if he had not already furnished such an account. Under sub- rule (7) of Rule 89, the DEO should forward his report on the representation so submitted by the candidate, if any, with such comments which he wishes to make on the said representation.

42. Under sub-rule (8) of Rule 89, the Election Commission after such enquiry, as he thinks fit, on being satisfied that no good reason or justification was shown for the failure to lodge the account, can pass an order of disqualification as provided under Section 10A for a period of three years from the date of the order and publish such order in the official gazette. We find in sub-rules (1) to (5), specific reference to the manner required by the Act as regards the account to be maintained, a true copy of which is to be lodged with the DEO which is to be ultimately forwarded to the Election Commission.

43. When we examine sub- rule (8) of Rule 89, the said Rule makes it clear that the Election Commission is empowered to hold such enquiry as it thinks fit before passing any orders under Section 10A of the Act. The said exercise has to be carried out by the Election Commission after the issuance of the show cause notice and after the

receipt of representation by the candidate read along with the comments of the DEO. When the Election Commission has been invested with the powers to hold an enquiry, it will have to be stated that such an enquiry is not an empty formality, but having regard to the requirement of law as stipulated under Section 77(1) and (3) and 78 of the Act, it should be a comprehensive enquiry, wherein the Election Commission can ascertain whether the accounts lodged in the purported exercise of Section 78 by a contesting candidate reflects a true, correct and genuine account and not a bogus one. In fact, the purpose of holding an enquiry is not only to ensure that the ascertainment of the correctness or otherwise of the account lodged, as well as, the time within which such lodgment was made, but also ensure that such account is a true and correct account of the actual expenses incurred for the election inasmuch as the Act as well as the Rule makes it clear that such furnishing of the account is in the manner required under the Act.

44. In our considered opinion if such an 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 10A, 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. "

105. The interpretation sought to be placed on the legislative scheme of Rule 89 in the impugned order is not in conformity with the law laid down by the Supreme Court as above.

106. Further submitted, scope of an enquiry under Section 10-A of the Act is thus, not confined to compliance of Section 78 of the Act alone but it contemplates compliance of Section 77 (1) of the Act as to the correctness of the account also as is interpreted by the Supreme Court in SLP (Civil) 29882/2012.(Para-41 & 84). The interpretation of Commission would give a second chance to the candidates who failed to even lodge the account whereas, the scheme of Rule 89 is intended to give opportunity to the candidate to rectify the errors and fulfil lacuna in the account so submitted, in case the Commission is satisfied that the candidate has failed to lodge an account of election expenses in the manner required by or under the Act. Even recently the Commission has evolved the procedure for accounting "Notional Expenses" which is in accordance with the Scheme of Rule 89. Thus, the Commission has misread and misinterpreted the provisions of Rule 89 in its entirety and the object underlined therein.

107. Learned senior counsel while pointing out that conclusive findings have been recorded by the Commission in the impugned order in paragraphs 94 and 100 to 102, submitted in the light of the concluded findings so recorded in the impugned order, issuance of the show cause notice is only an idle formality to pass the final orders which would be only consequential in nature. The final conclusion is a fait accompli.

108. Learned senior counsel submitted that scope and nature of enquiry as per the Judgment of the Hon'ble Apex Court, enquiry under Section 89 (8) of the Act is

not an empty formality but a comprehensive one. Also submitted, Apex Court further mandated that while conducting such an enquiry, every care should be taken that no prejudice is caused to the contesting candidate. No stone is to be left unturned before reaching a satisfaction as to correctness or the proper manner of lodgment of election expenses. Such enquiry is a meticulous exercise. The enquiry has to be extensive and not be a farced but a true and complete one.

109. On the other hand, Mr. Jayant Bhushan, Ld. Sr. Counsel appearing on behalf of respondent no. 1 submits that the petitioner has relied upon the affidavits filed by Mr. Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee, Mr. Shayam Darak, Secretary, District Congress Committee Nanded and Mr. Munna Abbas, President, Nanded City District Youth Congress Committee who deposed in their affidavits that they published the advertisement in question without the permission and knowledge of the petitioner. They further claimed that they individually paid the amount incurred on the said advertisements.

110. Mr. Bhushan, while relying upon the said affidavits has submitted that in the Advertisement Annexure P-14, at Page 587 and 589, apart from the photograph of the petitioner, the name of his constituency and his name is also mentioned. Not only that, there are 9 Assembly Constituencies in Nanded Parliamentary Constituency and names of the Constituencies and its candidates are also mentioned. The petitioner has not shown the expenses incurred in the said advertisement in his election expenses. Despite, he admittedly attended the said meeting on 06.10.2009.

111. The case of the petitioner is that the amount incurred on the meeting pro-rata has been shown by him in his election expenses, but for the advertisement he has neither paid the amount nor it was in his knowledge. The ground taken by the

petitioner is that neither he consented for, nor got any knowledge. Therefore, implied consent or permission cannot be drawn against him.

112. In the case of ***Gadakhyaashwant Rao Kankarrao v. Balasahed Vikhe Patil 1994, 1 SCC 682***, the Apex Court held as under:

“16. The increasing electoral malpractices, of which some like booth-capturing have led even to amendment of the election law, make availability of evidence difficult and this cannot be ignored while applying the standard of proof of a quasi-criminal charge for the proof of a corrupt practice. The existing law does not measure upto the exiting realities. The ceiling on expenditure is fixed only in respect of the expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal sanction. The spirit of the provision suffers violation through the escape route. The prescription of ceiling on expenditure by a candidate is a mere eye-wash and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This lacuna in the law is, however, for the Parliament to fill lest the impression is reinforced that the retention is deliberate for the convenience of everyone. If this be not feasible, it may be advisable to omit the provision to prevent the resort to indirect methods for its circumvention and subversion of the law, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hide the reality”

113. Mr. Bhushan, Ld. Sr. Counsel submitted that in the present case, the advertisement given for the meeting of 06.10.2009 and the petitioner attended the same. Therefore, it cannot be believed that it was not in his knowledge or without his consent.

114. In a case of ***Common Cause (A Registered Society) v. Union of India 1996 (2) SCC 752***, it has been held that the expenditure in connection with the election of a candidate – to the knowledge of the candidate or his election agent – shall be presumed to have been authorized by the candidate or his election agent. It shall,

however, be opened to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was, in fact, incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only when the candidate discharged the burden and rebuts the presumption, he would be entitled to the benefit of explanation 1 to Section 77 of the Representation of People Act.

115. Mr. Bhushan, Ld. Sr. Counsel has drawn the attention of this Court to the circular dated 29.03.2007 issued by the Election Commission of India to all the Chief Election Officers of all the States and the Union Territories whereby clarified as under:

“1. Section 77 (1) of the Representation of the People Act, 1951, provides that every candidate at an election shall keep it the correct account of all expenditure incurred or authorized by the candidate / his election agents in connection with the election of the candidate. The expenditure incurred on travel by leaders of a political party whose names have been communicated to the Commission and the Chief Electoral Officers as required under Explanation 2 to Section 77 (1) is not deemed to be expenditure incurred or authorized by a candidate of that political party for the purposes of the said Section.

2. Some CEOs and observers have sought clarifications about the effect of expenditure incurred by political parties on advertisements on the election expenditure accounts of the candidates.

3. In this context, attention is invited to the Commission’s letter No. 76/2004/J.S.II, dated 10th April, 2004 (copy enclosed) on the issue of expenditure incurred by political parties in connection with election rallies, etc.

4. In the judgment of the Hon’ble Supreme Court in Kanwar Lal Gupta v. Amar Nath Chawla (AIR 1975 SC 308), referred to in the abovementioned letter dated 10.04.2004, the Hon’ble Supreme Court has held that the expenditure incurred by the political party, as

distinguished from expenditure on general party propaganda, which can be identified with the election of a given candidate would be liable to be added to the expenditure of that candidate as being impliedly authorized by the candidate. The Apex Court has further held in that matter that a party candidate does not stand apart from his political party and if the political party does not want the candidate to incur the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate.

5. *The expenditure incurred by a political party on advertisement, in connection with any election could be categorized into the following:*

(i) *Expenditure on general party propaganda seeking support for the party and its candidates in general, but, without any reference to any particular candidate or any particular class / group of candidates;*

(ii) *Expenditure incurred by the party, in advertisements etc. directly seeking support and / or vote for any particular candidate or group of candidates;*

(iii) *Expenditure incurred by the party which can be related to the expenditure for promoting the prospects of any particular candidate or group of candidates.*

6. *Applying the ratio of the judgment in Kanwar Lal Gupta's case, it is clarified that in the case of any advertisement by political parties, whether in print or electronic or any other media, falling in category (i) above, which is not relatable to the election of any particular candidate or a given group of candidates, the expenditure may be treated as expenditure of the political party on general party propaganda. In the case of expenditure falling in categories (ii) and (iii) above, i.e., cases where the expenditure is relatable to the election of a particular candidate or a group of candidates, the expenditure shall be treated as expenditure authorized by the candidates concerned and such expenditure shall be accounted for in the election expenses accounts of the candidates concerned. In those cases where the expenditure is incurred by the party for the benefit of*

a given group of candidates, the expenditure is to be apportioned equally among the candidates.

7. The contents of this letter may be brought to the notice of all District Election Officers, Returning Officers, Election Observers, and other election authorities. This may also be brought to the notice of all the political parties in the State, including the State units of the recognized political parties.

116. Ld. Sr. Counsel further submitted that it cannot be the violation of sub-section 3 of Section 77, however, there is a violation of Sub-Section 1 and 2 of Section 77. As per Section 77 every candidate either by himself or by his election agent, has to keep separate and correct account of all expenses incurred in connection with the election expenses incurred or authorized by him or by his election agent from the date on which he has been nominated till the date of declaration of result thereto (both days inclusive).

117. Section 10A of the Representation of the People Act, 1951 prescribed as under:

*“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.”*

118. Ld. Counsel for the respondent no. 1 submitted that the petitioner failed to lodge an account of election expenses within the time and in the manner required by under this Act. Sub-clause B of Section 10 A is yet to be decided. Thus every

candidate has to file return of election expenses within 30 days in a manner prescribed in the Act and Rules.

119. Ld. Sr. Counsel referred to Page 750 of the petition towards the Advertisement dated 07.10.2009 in Lokmat, to be held at Mudkhed, Mondah Maidan at 12.30 Noon. The said place falls within the Bhokhar Legislative Assembly, i.e., the Constituency of the petitioner. The said advertisement was published by Mr. Ajay Bisen, President, Nanded, City District Congress Committee and Mr. Munna Abbas, President Nanded City District Youth Congress Committee. Also drawn the attention of this Court to Page 754 of the petition towards the advertisement dated 10.10.2009 in Prajawani for the meeting to be held at Bhokhar and Ardhapur at 9 and 10.30 in the morning respectively. The said Ardhapur also falls within the Bhokhar Constituency of the petitioner. It is pertinent to mention here that Mrs. Anita Tai Chavan, the election agent and the wife of the petitioner was also present in the said meeting. Thus, it was in the knowledge of the petitioner as well as his election agent.

120. Mr. Jayant Bhushan further submitted that the affidavit filed by all three publishers discussed above, has been relied upon by the petitioner as expenses towards the advertisement.

121. Ld. Sr. Counsel has relied upon a case of ***Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405*** wherein the Apex Court at Page 413 produced Sir Winston Churchill's matchless words:

"At the bottom of all tributes paid to democracy is the little man, walking into a 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 the point."

The court further added:

“If we add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men “dressed in little, brief authority”. For “be you ever so high, the law is above you”.

122. Mr. Jayant Bhushan, submitted that the present petition has been filed by the petitioner challenging the Show Cause Notice dated 13.07.2014 issued by the Election Commission under Rule 89 (5) of the 1961 Rules, seeking explanation from the petitioner as to why he should not be disqualified under Section 10 A of the Representation of People Act. Further submitted that the Commission has given 20 days’ time to the petitioner to make its representation in reply to the aforesaid Show Cause Notice. However, it appears that the petitioner with intent to stall the Commission Proceedings filed the present Petition challenging the aforesaid Show Cause Notice on the ground that the aforesaid Show Cause Notice is not as per Rules.

123. Ld. Counsel further submits that though various grounds have been raised in the writ petition, however, the petitioner primarily argued the following points during the final hearing:

“a. Though the Election Commission decided issue no. 1 and 2 in favour of the petitioner it has committed error in not deciding the issue of advertisement in his favour and the Election Commission should have applied the same principle to the case of advertisement as it is applied in the case of paid news.

b. Election Commission of India wrongly applied the principle of implied authority, consent and knowledge and there is no cross examination of Mr. Amar Rajurkar, Mr. Shyam Darak and Mr. Munna Abbas at the instance of the respondent.

c. Judgment in the matter of Kanwar Lal Gupta v. Amar Nath Chawla, (1975) 3 SCC 646 is not applicable to the facts of the present

case.

d. The Election Commission of India should not have given finding to the effect that the petitioner cannot file revised account as Rule 89 (6) of the Rules provides filing of revised account only in case of a candidate who had not already furnished such an account.

e. The petitioner is star campaigner within the meaning of explanation 2 Section 77 (1) of the Representation of People Act and therefore, he is not accountable for the expenses incurred for the rally conducted outside his constituency.

f. As per the article written by the Respondent the petitioner was available in his constituency for last two days before the poll and therefore according to the petitioner he was not aware of the aforesaid advertisement.

g. The Election Commission of India, in fact has given finding on Rule 89 (8) of the Rules at the time when the show cause notice is issued under Rule 89 (6).

h. Even if the expenditure spent on advertisement is added to the account of the petitioner then also his expenses are within the permissible limit of Rs.10,00,000/-."

124. Ld. Counsel for the respondent submits that the contention raised by the petitioner is wrong in as much as the Election Commission framed five issues in the matter out of which the issue no. 1 and 2 consist of two sub-issues such as "paid news" and "advertisements". The argument of the petitioner that the issue no. 1 and 2 are decided in his favour is not entirely correct. It is submitted that the Election Commission of India partly allowed issue no. 1 and 2 in favour of the petitioner so far as the issue of "paid news" is concerned and partly allowed issue no. 1 and 2 in favour of the Respondent so far as issue of advertisement is concerned. It is needless to state that the Election Commission of India has decided issue no. 3 against the Respondent No. 1 qua the 25 advertisements and so far as W.P.(C) No. 4590/2014

issue no. 4 and 5 are concerned these issues are yet to be decided by the Election Commission of India and thus the proceedings qua issue no. 4 and 5 is still pending before the Election Commission of India.

125. On the argument of the petitioner that the Election Commission of India should have applied the same principle while deciding the issue of Advertisement, as it has applied in the case of Paid News, Id. Sr. Counsel argued that the submission of the petitioner is absolutely erroneous in view of the finding recorded by the Election Commission of India at Para 84 of Page 116 and 117 of the Writ Petition which reads as under:

“84. However, in respect of the ingredient (ii) of issue no. 1, it must be stated that the price being paid in cash or kind is of relevance only if the publications were made with a view to promoting or procuring the election of the respondent from 85-Bhokar Assembly Constituency. The Commission is of the considered opinion that the aforementioned publications, although can be established as being sourced from the political parties (by the own admission of Pudhari newspaper and corroborative evidence of identical articles in other newspapers), cannot be held to be promoting or procuring the election of the respondent from 85-Bhokar Assembly Constituency. These have to be seen as general party propaganda for the Indian National Congress and highlighting the achievements and the development works undertaken by the State Government headed by the respondent as Chief Ministry of the State of Maharashtra.”

126. Id. Sr. Counsel further submits that the trigger point is promotion or propaganda or producing the election of the petitioner from his constituency, i.e., 85-Bhokhar Assembly Constituency. It appears that the Commission has negated the issue of “Paid News” only on the ground that there is no reference to the name of the petitioner and his constituency in the aforesaid Article and therefore there is no procurement and promotion of election of the petitioner. However, these

advertisements are not in the nature of general party propaganda. Admittedly, these advertisements referred to the name of the petitioner as an official candidate of congress and allies, his photograph is published, his name of the Constituency is published and the voters have been solicited in lakhs in number and thus there is a promotion and procurement of election of the petitioner as a candidate from his constituency. Thus this is a major difference between the issue “Paid News” and the “Advertisement”.

127. On the issue of principle of implied authority, consent, knowledge and that Kanwarlal Gupta’s case is applicable to the facts of the present case. Ld. Sr. Counsel submitted that Section 77 in the Principle Act reads as under:

“77. Maximum election expenses etc.- The maximum scales of election expenses at the elections and the numbers and descriptions of person who may be employed for payment in connection with elections shall be such as may be prescribed”.

128. Ld. Sr. Counsel further submitted that the aforesaid Section was amended by an Act of 27 of 1956 by way Second Amendment Act, 1956 which reads as under:

“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 of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive.

(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.”

129. Ld. Sr. Counsel submitted that the Apex Court in the matter of **Kanwarlal Gupta (Supra)** observed as under:

“11. Now, if a candidate were to be subject to the limitation of the ceiling, but the political party sponsoring him or his friends and supporters were to be free to spend as much as they like in connection with his election, the object of imposing the ceiling would be completely frustrated and the beneficent provision enacted in the interest of purity and genuineness of the democratic process would be wholly emasculated. The mischief sought to be remedied and the evil sought to be suppressed would enter the political arena with redoubled force and vitiate the political life of the country. The candidate is given complete discretion in authorising expenditure upto his limit. If expenditure made with the knowledge and approval of the candidate exceeds the limit or if the candidate makes a false report of the expenditure after the election, he is subject not only to criminal penalties, but also to having his election voided. It may be contended that this would considerably inhibit the electoral campaign of political parties. But we do not think so. In the first place, a political party is free to incur any expenditure it likes on its general party propaganda though, of course, in this area also some limitative ceiling is eminently desirable coupled with filing of return of expenses and an independent machinery to investigate and take action. It is only where expenditure is incurred which can be identified with the election of a given candidate that it would be liable to be added to the expenditure of that candidate as being impliedly authorised by him. Secondly, if there is continuous community involvement in political administration punctuated by activated phases of well-discussed choice of candidates by popular participation in the process of nomination, much of unnecessary expenditure which is incurred today could be avoided. Considerable distance may not have to be travelled by candidates and supports nor hidden skeletons in political cupboards tactically uncovered, propagandist marijuana skillfully administered, temptations of office strategically held out nor violent demonstrations disruptively attempted. The dawn-to-dawn multiple speeches and monster rallies, the flood of posters and leaflets and the organising of transport and other arrangements for large numbers would become otiose. Large campaign funds would not be able to influence the decision of the electors if the selection and election of candidates becomes people's decision by discussion and not a

Hobson's choice offered by political parties. Limiting election expenses must be part of the political process.”

130. It appears that to get over the judgment of **Kanwar Lal Gupta (Supra)** two explanations added to Section 77 (1) with effect from 19.10.1974 which reads as under:

“Explanation 1. Notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorized 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:

(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.

Explanation 2. – For the purposes of Explanation 1, “political party” shall have the same meaning as in the Election Symbols (Reservation and Allotment) Order, 1968, as for the time being in force.”

131. It appears that the constitutional validity of the aforesaid explanation were challenged and the Hon’ble Supreme Court of India in **P. Nalla Thamby Terah v. Union of India (1985) Supp SCC 189** uphold the constitutional validity of the

aforesaid explanation. However, the aforesaid explanation later on came under the scrutiny of the Apex Court wherein the Apex Court expressed its demand to delete the aforesaid explanations in the case of ***Gadakh Yashwantrao Kankarrao (Supra)*** as quoted above.

132. In the case of ***C. Narayanaswamy (Supra)*** the Apex Court has held as under:

“At the same time we cannot resist from observing that Sub-section (6) of Section 123 which makes incurring or authorising expenditure in contravention of Section 77, a corrupt practice because of the aforesaid Explanation 1 to Section 77(1) has become nugatory and redundant. Sub-section (6) of Section 123 read with the Section 77 and Rule 90, purports to restrict the unlimited flow of money power, and makes expenditure in excess of the limit fixed, a corrupt practice, but legality and sanctity has been given to such excess expenditure by explanation 1 aforesaid, which fixes no limit on the expenditure in connection with the election of a candidate. Neither the candidate nor the political party nor the persons who incur such huge expenditure, for the candidate are required to disclose the same to anyone. It need not be impressed that it is not always possible for the election petitioner to prove or even for the Courts to record a finding that the fantastic expenditure in the election, has been incurred or authorised by the candidate concerned or by his election agent, although the court is satisfied on the material on record that the limit fixed by the Act and the rules has been far exceeded in any particulars case.”

In Para 22 it is further held as under:

“22. As the law stands in India today anybody including a smuggler, criminal or any other anti social element may spend any amount over the election of any candidate in whom such person is interest, for which no account is to be maintained or to be furnished and any such expenditure shall not be deemed to have been expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purpose of Sub-section (1) of Section 77, so as to amount to a corrupt practice within the meaning of Sub-

section (6) of Section 123. It is true that with the rise in the costs of the mode of publicity for support of the candidate concerned, the individual candidates cannot fight the election without proper funds. At the same time cannot be accepted that such funds should come from hidden sources which are not available for public scrutiny. According to us, Sub-section (6) of Section 123 declaring "incurring or authorising of expenditure in contravention of Section 77" a corrupt practice has lost its significance and utility with the introduction of the Explanation 1 aforesaid which encourages corruption under hand methods, if the call for "purity of elections" is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the persons, who have made contributions and investments for the success of the candidate concerned at the election. But this has to be taken care of by the Parliament."

133. Ld. Sr. Counsel has further relied upon a case of **Common Cause (Supra)** wherein it is held as under:

"6. That the expenditure, (including that for which the candidate is seeking protection under Explanation I to Section 77 of the R.P. Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent - shall be presumed to have been authorised by the candidate or his election agent. It shall, however be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only when the candidate discharges the burden and rebuts the presumption he would be entitled to the benefit of Explanation I to Section 77 of the R.P. Act."

134. Ld. Counsel submitted that it is not out of place to mention here that on the aforesaid observations of the Apex Court in the cases of *Kanwarlal Gupta*, *Gadakh Yashwantrao Kankarrao*, *C. Narayanaswamy* and *Common Cause*, the Law

Commission of India in its 170th Report dated 29.05.1999 recommended deletion of explanation 1 and 2 added to Section 77 on 19.10.1974 to the R.P. Act and accordingly Section 77 was amended by deleting explanation 1 and 2 w.e.f 11.09.2003 by substituting new explanations in the nature of removal of doubt making the explanations applicable only for the “Travel Expenses” by star campaigners.

135. In view of the aforesaid amendment and dictum laid down by the Apex Court in the aforesaid judgments, the Commission issued following instructions dated 29.03.2007 under Article 324 of the Constitution of India inter alia providing the procedure to be adopted in accounting expenditure incurred by political party on advertisements in connection with any election would be categorised into the following:

“(i) Expenditure on general party propaganda seeking support for the party and its candidates in general, but, without any reference to any particular candidate or any particular class / group of candidates;

(ii) Expenditure incurred by the party, in advertisements etc. directly seeking support and / or vote for any particular candidate or group of candidates;

(iii) Expenditure incurred by the party which can be related to the expenditure for promoting the prospects of any particular candidate or group of candidates.”

136. Ld. Sr. Counsel argued that applying the ratio of the judgments in the Kanwarlal Gupta’s case it is clarified that in the case of any advertisement by the political parties, whether in print or electronic or any other media, falling in category (i) above, which is not relatable to the election of any particular candidate or a given group of candidates, the expenditure may be treated as expenditure of

the political party on general party propaganda.

137. In cases of expenditure falling in categories (II) and (III) above, i.e., cases where the expenditure is relatable to the election of a particular candidate or a group of candidates, the expenditure shall be treated as expenditure authorized by the candidates concerned and such expenditure shall be accounted for in the election expenses accounts of the candidates concerned. In those cases where the expenditure is incurred by the party for the benefit of a given group of candidates, the expenditure is to be apportioned equally among the candidates.

138. Ld. Sr. Counsel further submitted that the law is well settled that the instructions issued by the Election Commission have statutory force under Article 324 of the Constitution of India.

139. The Apex Court in the matter of ***Mohinder Singh Gill (Supra)*** has held as under:

“39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism- instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading

strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra :[1958]1SCR308 and Harishankar : 1954CriLJ1322 discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J :

But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power. [Indira Nehru Gandhi v. Raj Narain : [1976]2SCR347].”

140. Ld. Sr. Counsel further submits that the concept of implied authority, knowledge and consent has been introduced by the Election Commission through its instructions dated 29.03.2007 issued under Article 324 of the Constitution of India. He submitted that petitioner tried to distinguish the judgment in matter of **Kanwarlal Gupta (Supra)** on the ground that the facts of the said case is different from the present case and the trial court has decided the matter on the basis of evidence recorded and the witnesses were cross-examined, however, in the present case, there is no cross-examination of the witnesses.

141. It is further submitted that the aforesaid submissions of the petitioner are erroneous for the reasons that the principle laid down by the judgment in the matter of Kanwarlal Gupta is applicable to both case, i.e., the cases which fall under the category of Section 77 (1) & (2) and Section 77 (3) and therefore it would be absurd to say that the **Kanwar Lal Gupta (Supra)** is applicable to only those cases

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which fall under the category of Section 77 (3) of the Representation of People Act.

142. As far as the issue of cross-examination is concerned, the respondent need not cross examined those witnesses mainly Mr. Amar Rajurkar, Mr. Shaym Darak and Mr. Munna Abbas for the simple reason that those Affidavits clearly admits that they are follower, well-wisher and supporter of the petitioner and they also admits that they have spent the amount on the advertisements. Since the admission of Mr. Amar Rajurkar, Mr. Shaym Darak and Mr. Munna Abbas squarely following under the dictum of the law laid down by the Hon'ble Supreme Court of India in Kanwar Lal Gupta and also covered by Election Commission India instructions dated 29.03.2007 the respondent need not cross-examined those aforesaid witnesses. However, to the contrary, the petitioner ought to have cross-examined the respondent which he has not done and the evidence of the respondent gone uncontroverted. The respondent in his affidavit in evidence (annexed at Page 1033 to 1056 of Vol. 2 of Counter Affidavit filed by the respondent, at Para 6, 7 and 8 given descriptions of all the advertisements and at Para 11, 12 and 13 categorically stated that the petitioner failed to account the expenses incurred for the aforesaid advertisement into his election expenses. There is no cross-examination of the respondent on this, before the Election Commission of India.

143. It is submitted that as per the Election Commission of India order dated 05.06.2012, the Commission has directed that the present inquiry will proceed "as near as may be" in accordance with the procedure applicable to the CPC and Evidence Act.

144. The Hon'ble Supreme Court of India in the matter of ***Kailash v. Nanhku***, (2005) 4 SCC 480 at Page 46 (ii) has held as under:

(ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

145. It is submitted that Section 87 of the Representation of People Act is applicable to the trial of election petition before the Hon'ble High Court and the proceedings before the Election Commission is covered by Section 146 of the Representation of People Act whereby it is provided if the Election Commission of India is satisfied that on the basis of the affidavits filed and the documents produced in inquiry by the parties concerned of their own accord and if the Election Commission of India cannot come to a decisive opinion on the matter only then the Election Commission of India shall have the power of Civil Court. It is admitted possession in the present proceeding that the affidavit in evidence filed by Mr. Amar Rajurkar, Mr. Shaym Darak and Mr. Munna Abbas and by the petitioner and the respondent are sufficient for Election Commission of India to come to decisive opinion and therefore the Election Commission has not gone into further aspect of the matter. It is needless to say that in the present proceedings, the respondent filed its affidavit in evidence in lieu of examination in chief as also the petitioner filed its affidavit in evidence.

146. In the matter of ***Godakh Yashwantrao Kankarrao (Supra)***, the Apex Court held as under:

“The consent of the candidate for the purposes of Section 123(4) when the offending statement of fact which is false is published by any other person may be proved by inference from the circumstances and not necessarily by positive evidence to that effect since positive

evidence of consent may not be available. See B.R. Rao v. N.G. Ranga :AIR1971SC267, Narasingh Charon Mohanty v. Surendra Mohanty:[1974]2SCR39, and Samant N. Balakrishna etc. v. George Fernandez and Ors. etc.: [1969]3SCR603.”

147. In view of the aforesaid it is evident that the argument of the petitioner that the evidence is not laid in the present case and therefore the *Kanwarlal Gupta* is not applicable to the present case is erroneous. However, it is submitted that even though the *Kanwar Lal Gupta* is dealing the issue of election petition, since the principle laid down by the aforesaid judgment is on Section 77 of the R.P. Act which covers the present case and therefore it is squarely applicable to the present case.

148. Mr. Bhushan, Ld. Sr. Counsel further argued that the arguments of the petitioner that the Commission should not have given finding to the effect that the petitioner cannot file revised account and Rule 89 provides for filing revised account only in case if such account is not already furnished, is erroneous because it is submitted that the Election Commission of India has rightly construed the plain meaning of Rule 89 (6) in as much as if such permission to file revised account is given it would render section 77 (1) & (2) and Section 10-A as “Otiose” & “Nugatory” and there would not be disqualification under R.P. Act.

149. It is submitted that if the interpretation of the petitioner is accepted in this regard it would render Section 77 (1) & (2) and Section 10 (A) as a “dead letter” because every candidate after being held as guilty for not filing true and correct account as per Section 10 (A) and Section 77 (1) & (2) of the R.P. Act, he can easily get away by filing revised account and there cannot be any disqualification under the RP Act.

150. It is submitted that the aforesaid argument if accepted it would come in way

of the purity of the election process and the offenders can easily get away from the rigorous of the provisions of the RP Act.

151. It is submitted that as per the provision of Section 169 of the RP Act the Central Government is empowered to make rules for carrying out the purposes of the Act. However it is well settled law that such rules framed by the Central Government should not come in way or should not interpret or should not override the statute.

152. In view of the aforesaid it is thus submitted that when section 10-A provides that if the candidate has failed to lodge true and correct account of election expenses and he has no good reason for justification for the said failure he shall be disqualified for the period of 3 years from the date of the order. At the same time Section 77 (1) (2) provides for filing of true and correct returns. In this context if the interpretation of the petitioner on Rule 89 (6) is accepted, it would override section 10-A and 77 (1) & (2) of the Act.”

153. To strengthen his arguments, Ld. Counsel for the respondent has relied upon a case of ***Commissioner of Central Excise, Jamshedpur Vs. Ashok 2005 (9) SCC 223*** wherein the Apex Court held as under:

“We are unable to accept the submission that such an interpretation would negate Rule 173C(11). A Rule cannot override or be contrary to a Section. Under Section 4 the normal price has to be the value at which the goods are ordinarily sold. Thus clearly Rule 173C(11) only provides for cases where the normal price cannot be ascertained. In those cases goods are allowed to be removed on basis of price shown on the challan or advise note. But the framers of the Rule were careful enough to provide, in the proviso, that if the price on the challan or advise note does not represent the value as determined under Section 4 then there can be reassessment.”

154. Further relied upon the case of **Major Radha Krishnan v. Union of India and Ors. 1996 3 SCC 507**, wherein the Apex Court has held as under:-

“9. The matter can be viewed from another angle also. So far as period of limitation of trials by Court Martial is concerned Section 122 of the Act is a complete Code in itself for not only it provides in its Sub-section (1) the period of limitation for such trials but specifies in Sub-section (2) thereof the offences in respect of which the limitation clause would not apply. Since the terms of the above section is absolute and no provision has been made under the Act for extension of time like Section 473 Criminal Procedure Code - it is obvious that any trial commenced after the period of limitation will be patently illegal. Such a provision or limitation prescribed under the Act cannot be overridden or circumvented by an administrative act, done in exercise of powers conferred under a Rule. Mr. Ramachandran was, therefore, fully justified in urging that power under Rule 14 of the Army Rules could not be exercised in a manner which would get over the bar of limitation laid down in the Act and that if Rule 14 was to be interpreted to give such power it would clearly be ultra vires. We are therefore in complete agreement with the observations made by the Delhi High Court in M.C. Dhingra's case (supra) that in purported exercised of administrative power under Rule 14, in respect of allegations of misconduct triable by Court Martial, the authorities cannot override the statutory bar of Sub-section (1) of Section 122 of the Act for no administrative act or fiat can discard, destroy or annul a statutory provision.”

155. In the case of **Rallies India Ltd. v. The State of Andhra Pradesh, 1980 2 SCR, 1028**, the Apex Court held as under;

“The only other argument put forward by Mr. Desai in support of the appeal rested on the provisions of Rule 27-A above extracted in its un-amended form. The rule can obviously be of no help to him inasmuch as even if it can be construed as laying down something in favour of the appellant it cannot override the provisions of the Act under which it is framed. No amount of argument would make a rule override or control the legislative enactment under the authority of which it comes into being and that is why the rule was amended in 1974 so as to conform to the parent statute.”

156. On the arguments of the petitioner that he was a Star Campaigner without the meaning of explanation 2 to Section 77 (1) & (2) of the RP Act and therefore he is not accountable to the expenses incurred for the public rally held outside his Constituency is erroneous, Ld. Sr. Counsel for the respondent no. 1 has negated the same by giving reasons that firstly the explanation added to Section 77 of the Act only covers the expenses incurred on travel expenditure only. However the Election Commission of India issued instruction dated 20.01.2012 providing clarification regarding the election expenditure of the party leaders (stars campaigns) covered under explanation (2) of Section 77 (1) of the RP Act inter alia:

i) Expenditure on advertisement in print / electronic media:-

It the advertisement for general party propaganda without photo or appeal of the leader, mentioned above, is made in print and electronic media, without any reference to any candidate, then expenditure on such general advertisement shall be booked to the account of the political party. If such leader happens to be a candidate in any constituency, the expenditure on such general party propaganda, even if it contains his photo, in print and electronic media, shall not be booked to the account of such leaders, as it is in the nature of general party propaganda, without any reference to his constituency.

157. It is submitted that on bare perusal of clause 'I' of the aforesaid instruction it is evident that the advertisement for general party propaganda with photo or appeal of the leader, is made in print and electronic media, with any reference to any candidate, then expenditure on such general advertisement shall be booked to the account of such candidate. However, if there is no reference to the name of any candidate then such expenditure on such general advertisement shall be booked to the account of political party. Secondly, if such leader happens to be a candidate in

any constituency, the expenditure on such general party propaganda with reference to his constituency, shall be booked to the account of such leader, as it is in the nature of general party propaganda, with reference to his constituency. However, if there is no reference to his constituency then the expenditure on such general party propaganda, even if it contains his photo, in print and electronic media, shall not be booked to the account of such leader, as it is in the nature of general party propaganda.

158. It is submitted that the argument of the respondent that he was a star campaigner and therefore he was not accountable to include the expenses incurred towards the general party propaganda even if it contains his photo, in print and electronic media, is absolutely erroneous, since admittedly the advertisements clearly refers the name of the Respondent as an official candidate of Congress Party from Bhokar constituency *inter alia* promoting the election of the Respondent and thus case of the Respondent fall under category 'I' of the instruction dated 20.01.2012. Thus, it is mandatory on the petitioner to include the expenses incurred towards the publication of the advertisement referred para 11, 12 & 13 of the present written arguments despite the fact that the public rally held outside his constituency.

159. Moreover, the public rally of Sonia Gandhi at Nanded which is district place and this rally was for promotion of election of 9 candidates of 9 different Talukas of Nanded District and the voters were called out in lakhs from throughout the 9 Talukas.

160. Furthermore, the Bhokar constituency comprises of 3 major cities namely, Bhokar, Ardhapur, Mudkhed and the Salman Khan's rally a public meeting of Jyotiraditya Scindia admittedly held within the constituency of the petitioner.

161. On the arguments of the petitioner that he was available in his Constituency only for two days, Mr. Jayant Bhushan, Ld. Sr. Counsel submitted that the petitioner permanently residing at Nanded, his District covering 9 Talukas. The Newspaper which had published advertisements excluding “Lokmat” are published from Nanded and circulated throughout 9 Talukas including the constituency of the petitioner and therefore, there is no substance in the arguments of the petitioner that he was not aware about such advertisements.

162. As far as the arguments of the petitioner regarding the revised account is concerned, Mr. Bhushan, Ld. Sr. Counsel submitted that the finding of the Election Commission on revised account is absolutely correct and in conformity with Section 10-A read with Section 77 (1) and (2) of R.P. Act.

163. The Election Commission is dealing with the case of excess expenditure as per Section 77 (3). Law is well settled that 77 (3) is corrupt practice as per Section 123 (6) and can be decided only by this Court. Whereas the issue not finding true and correct return is purely subject matter of the Commission under Section 77 (1) (2) of the R.P. Act. The aforesaid situation is also settled by the Apex Court in the matter of Shivram Gowda and Ashok Shankarrao Chavan v. Madhav Kenarkar.

164. Lastly while concluding his arguments, Id. Sr. Counsel for the respondent no.1 submitted that in Section 10-A of the RP Act, there is no provision of filing the revised return. Therefore, Rule 89 (6) should not be read over and above Section 10-A. The Rules cannot be contrary to the Act. Rule 89 (6) prescribes that if any of the election expenses left bonafidely unnoticed or unsealed expenses, then the right is given under Rule 89 (6) to such candidate to revise the election return.

165. The present case does not fall in that category for the reason that the case of the petitioner is that the advertisement in question cannot be accounted in his

election expenses. Therefore, his argument on the revised return has no justification.

166. Though on the issue of 'paid advertisements', the Commission has rejected the complaint of respondent Nos. 2 and 3, however, Mr.D.N. Goburdhan, learned counsel appearing on behalf of the aforesaid respondents submitted that the prayer to set aside the impugned order dated 13.07.2014 of the Commission, wherein held that the petitioner failed to lodge an account of election expenses as contemplated under the Act, should not be granted prayed relief as this Court is dealing the petition under Article 226 of the Constitution.

167. Mr.Goburdhan submitted that the Statute under Section 10-A of the Act stipulates that being the statutory authority, Commission has all the powers under the Act. More so, matter in hand is of interim nature and the petitioner in an unusual hurry has approached this Court, whereas the Commission is still to pass an order. By reading Section 10 A of the Act, which has clause (a) and (b), conjunctive in nature as the Commission is to be satisfied and only if the petitioner has no good explanation for the failure to lodge a correct account of the election expenses will disqualify the petitioner.

168. Mr.Goburdhan further submitted that the prayer sought in the present petition is premature. No relief should be granted to the petitioner as this Court's satisfaction for accepting or not accepting the justification is beyond the ambit and scope of the Writ Court as the Commission has passed order under the statutory duty.

169. Learned counsel submitted, under Clause (b) of Section 10A of the Act, the Commission is yet to determine and can very well accept the explanation of the petitioner in having failed to lodge the election expenses. Thus, this Court usurps

the jurisdiction and functions of the Commission.

170. It is a settled law in *State of U.P. and Anr. v. Raja Ram Jaiswal and Anr.* (1985) 3 SCC 131 at page 147' Para 16 that the Writ Court cannot exercise this power without conferment of power by the statute. The Writ Court cannot take upon itself the functions of the authority (in this case the Election Commission) and supplant the authority and take upon itself the functions of the authority.

171. Learned counsel submitted that this Court cannot take over the functions and grant the relief sought for by the petitioner. When the statute provides that the particular power has to be exercised in a particular manner, then that authority only can act and exercise that power. This is well settled since *Taylor v Taylor* 49 U.S.(8 How.) 183. Thus this exercise of the power under Section 10A of the Act cannot be exercised by the High Court but it must be done in the manner under the statute or not at all.

172. Mr.Goburdhan submitted that the Supreme Court again in (1999) 3 SCC 422 at page 432 reiterated the said principles of *Taylor v Taylor*. This was first followed in *Shri Bahadur Singh's Case AIR 1954 SC 322* and then in *Deepchand's Case in AIR 1961 SC 1527*.

173. Learned counsel submitted that the matter is under adjudication as the Commission is yet to adjudicate and come to the satisfaction, therefore, no punitive action has been taken which can be ventilated in court. The exercise of the satisfaction of the Commission is yet to take place. Hence, the present petition is liable to be dismissed.

174. I have heard the learned counsel for the parties at length and have given my thoughtful consideration to the material placed on record.

175. It is not in dispute that the Commission partly allowed issue no. 1 and 2 in favour of the petitioner, so far as the issue of paid news is concerned, and partly allowed in favour of the Respondent so far as issue of advertisements is concerned. Needless to state that the Commission has decided issue no. 3 against the Respondent No. 1 qua the 25 advertisements and, so far as issue no. 4 and 5 are concerned, these issues are decided against the petitioner and yet to pass final order for which a show cause notice has been issued.

176. In the case of *Kanwarlal Gupta (Supra)* the Apex Court observed that candidate is given complete discretion for expenditure on election upto his limit. If expenditure made with the knowledge and approval of the candidate and exceeds the limit or if the candidate makes a false report of the expenditure after the election, he is subjected not only to criminal penalties, but also to declare his election void. In the first place, a political party is free to incur any expenditure on its general party propaganda, of course, in this area also some limitative ceiling is eminently desirable coupled with filing of return of expenses and an independent machinery to investigate for taking action. It is only where expenditure is incurred which can be identified with the election of a given candidate that it would be liable to be added to the expenditure of that candidate as being impliedly authorised by him. Secondly, if there is continuous community involvement in political administration punctuated by activated phases of well-discussed choice of candidates by popular participation in the process of nomination, much of unnecessary expenditure which is incurred today could be avoided. The selection and election of candidates becomes people's decision by discussion and not a Hobson's choice offered by political parties if the decision of elections is not influenced by campaign funds. Limiting election expenses must be part of the political process. The candidate should not be allowed to plead ignorance about the persons, who have made contributions and investments for the success of the

candidate concerned at the election. But this has to be taken care of by the Parliament.

177. In the case of *Common Cause (Supra)* the Apex Court observed that the expenditure, (including that for which the candidate is seeking protection under Explanation I of Section 77 of the R.P. Act) in connection with the election of a candidate, shall be presumed to have been authorised by the candidate or his election agent. It shall, however be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only then the candidate discharges the burden and rebuts the presumption, accordingly, would be entitled to the benefit of Explanation 1 to Section 77 of the R.P. Act.

178. The Apex Court in the cases of *Kanwarlal Gupta*, *Gadakh Yashwantrao Kankarrao*, *C. Narayanaswamy* and *Common Cause* and the Law Commission of India in its 170th Report dated 29.05.1999 recommended deletion of explanation 1 and 2 added to Section 77 of the Act. Accordingly Section 77 was amended by deleting explanation 1 and 2 w.e.f 11.09.2003 by substituting new explanations in the nature of removal of doubt by making the explanations applicable only for the “Travel Expenses” by star campaigners.

179. In view of the aforesaid amendment and dictum laid down by the Apex Court in the aforesaid judgments, the Commission issued following instructions dated 29.03.2007, under Article 324 of the Constitution of India, inter alia providing the procedure to be adopted in accounting expenditure incurred by political party on advertisements in connection with any election, as under:

“(i) *Expenditure on general party propaganda seeking support for the party and its candidates in general, but, without any reference to*

any particular candidate or any particular class / group of candidates;

(ii) Expenditure incurred by the party, in advertisements etc. directly seeking support and / or vote for any particular candidate or group of candidates;

(iii) Expenditure incurred by the party which can be related to the expenditure for promoting the prospects of any particular candidate or group of candidates.”

180. Further, the Apex Court in the matter of ***Mohinder Singh Gill (Supra)*** has observed that we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commission is vested with wide powers, the law expects to act fairly and legally. Discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the same. But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely.

181. The case of the respondents is that the principle laid down by the judgment in the matter of Kanwarlal Gupta is applicable to both case, i.e., the cases which fall under the category of Section 77 (1) & (2) and Section 77 (3) and, therefore, it would be absurd to say that the *Kanwar Lal Gupta (Supra)* is applicable to only those cases which fall under the category of Section 77 (3) of the Act. As far as the issue of cross-examination is concerned, learned counsel for the respondent no.1 submitted that the respondent need not cross examine those witnesses, namely, Mr. Amar Rajurkar, Mr. Shaym Darak and Mr. Munna Abbas for the simple reason that their Affidavits clearly admit that they are followers, well-

wishers and supporters of the petitioner and they also admitted that they have spent the amount on the advertisements. Since the admission of aforesaid publishers squarely falls under the dictum of the law laid down by the Hon'ble Supreme Court in Kanwar Lal Gupta and also covered by the Commission's instructions dated 29.03.2007, thus, the respondent need not cross-examine the aforesaid witnesses.

182. On the language of Section 87(1) of the Act, learned Sr. counsel for the respondent argued that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the Civil Procedure Code apply to the trial of election petitions under the Act with flexibility and only acts as guidelines. Thus, section 87 of the Act is applicable to the trial of election petition before the High Court. The proceedings before the Commission is covered by Section 146 of the Act, whereby it is provided, if the Commission is satisfied that on the basis of the affidavits filed and the documents produced in inquiry by the parties concerned of their own accord and if the Commission cannot come to a decisive opinion on the matter only then the Commission shall have the power of Civil Court. Though, the Kanwar Lal Gupta's case dealt the issue of election petition, however, it does not matter, since the principle laid down by the aforesaid judgment is on Section 77 of the Act which covers the present case.

183. On the issue of Rule 89, it is submitted by Mr. Jayant that the Commission has rightly construed the plain meaning of Rule 89 (6), as much as, if such permission to file revised account is given, it would render section 77 (1) & (2) and Section 10-A as Otiose & Nugatory and there would be disqualification under the Act. Because every candidate after being held as guilty for not filing true and correct account can easily get away by filing revised account and there cannot be

any disqualification under the Act.

184. Under section 169 of the Act, the Central Government is empowered to make rules for carrying out the purposes of the Act. However it is well settled law that such rules, framed by the Central Government, should not come in way or should not interpret or should not override the statute. Section 10-A provides that if a candidate has failed to lodge true and correct account of election expenses and he has no good reason for justification for the said failure, he shall be disqualified for the period of 3 years from the date of the order. At the same time Section 77 (1) (2) provides for filing of true and correct returns. In this context, if the interpretation of the petitioner on Rule 89 (6) is accepted, it would override section 10-A and 77 (1) & (2) of the Act. In the case of ***Commissioner of Central Excise, Jamshedpur (supra)*** the Apex Court held that such an interpretation would negate Rule 173C(11). A Rule cannot override or be contrary to a statute. In the case of ***Major Radha Krishnan (supra)*** the Apex Court has held that in purported exercise of administrative power under Rule 14, in respect of allegations of misconduct triable by Court Martial, the authorities cannot override the statutory bar of Sub-section (1) of Section 122 of the Act for no administrative act or fiat can discard, destroy or annul a statutory provision. Also, in the case of ***Rallies India Ltd.(supra)*** the Apex Court held that no amount of argument would make a rule override or control the legislative enactment under the authority of which it comes into being and that is why the rule was amended in 1974 so as to confirm the parent statute.

185. Regarding the issue of revised account, Mr. Bhushan, Ld. Sr. Counsel submitted that the finding of the Election Commission on revised account is absolutely correct and in conformity with Section 10-A read with Section 77 (1)

and (2) of the Act. The Commission has dealt the case of excess expenditure as per Section 77 (3). Law is well settled that 77 (3) is corrupt practice as per Section 123 (6) and can be decided only by this Court. Whereas, the issue, not finding true and correct return is purely subject matter of the Commission under Section 77 (1) & (2) of the Act. Under section 10-A of the Act, there is no provision of filing the revised return, therefore, Rule 89 (6) should not be read over and above Section 10-A. The Rules cannot be contrary to the Act. Rule 89 (6) talked about that if any of the election expenses left bonafidely unnoticed or unsealed expenses, then the right is given under Rule 89 (6) to such candidate to revise the election return.

186. However, it is not disputed that polling date of the Assembly Election of the Constituency was on 13.10.2009 and the result was declared on 22.10.2009, in which the petitioner declared elected, whereas the deposit of the respondent No. 1 was forfeited.

187. Thereafter, respondent No.1 filed a complaint on 13.11.2009 on 'paid news', wherein the petitioner succeeded. Thereafter, the respondent No.1 filed a complaint in question dated 02.12.2009 before the Commission for filing false and incorrect election expenditure accounts, however, no pleadings regarding accountability of expenses of the alleged advertisements were made by the respondent No.1. Thus, the pleadings regarding accountability of the election expenses of the alleged advertisements showing particulars of the election meetings were made by the respondents for the first time vide submissions dated 21.09.2010, i.e., almost after one year of the first complaint.

188. As alleged, the petitioner got several advertisements published in various Newspapers, in particular, 'Lokmat', 'Pudhari', 'Maharashtra Times' and 'Deshonnati' during election campaign, which appeared in the said Newspapers in

the garb of news eulogizing the petitioner and his achievements as Chief Minister of Maharashtra.

189. On 04.12.2009, respondent No. 1 filed an election petition being E.P. No.11/2009, under Section 80 of the Act, alleging *inter alia* to declare the election of the petitioner as void and hold the respondent No. 1 as elected candidate. The contentions relating to 'paid news' made in the aforesaid election petition were similar and identical to the contents of the complaint made to the Commission.

190. It is pertinent to mention here that High Court of Bombay, Adjudicature at Aurangabad dismissed the election petition being E.P.No.11/2009 filed by the respondent No. 1 vide its order dated 18.10.2012. On being challenged before the Hon'ble Supreme Court in Civil Appeal No.9271/2012, the same was also dismissed vide order dated 21.01.2013.

191. Thereafter, on 05.05.2014, Apex Court passed a detailed order by dismissing the aforementioned SLP (Civil) No. 29882/2011 and observed that if such a onerous responsibility has been imposed upon the Election Commission while scrutinizing the details of the accounts of the election expenses submitted by a contesting candidate, therefore, while discharging the said responsibility, every care should be taken to ensure that no prejudice is caused to the contesting candidate. The 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 lodgement of the account was carried out by the concerned candidate.

192. Vide order dated 30.05.2014, the Commission framed five issues as mentioned above in Para 23 of this judgment. Undisputedly, the first two issues decided in favour of the petitioner by the Commission rejecting the complaint

made by respondent no. 1 on 'paid news'. While examining the first ingredient of issue no. 1, the Commission recorded that at the time of 2009 General Election, to which the present case pertains, though phenomenon of 'paid news' may have been working as news for consideration in cash or kind, the terminology of 'paid news' was formally recognized by the Commission vide its circular dated 08.06.2010.

193. According to the petitioner, three sources of information were those which are mentioned in Para 56 of the impugned order, namely: (a) 'Lokrajya', a Government publication, published by the Director of Information, State of Maharashtra, which gives general information about the achievements, growth, developments or vision of the government; (b) 'Mahabharari' (Big Leap), a party publication published by the Maharashtra Pradesh Congress Committee, which periodically publishes the achievements, development and growth made by the Congress Party; and (c) Party Manifesto published jointly by Indian National Congress, Nationalist Congress Party and RPI (G) and allied partners in the context of 2009-General Elections.

194. In Para 75 of the impugned order, the Commission observed that there was considerable force in the contention of the complainants/respondents that the impugned publications which in most of the cases were identical or verbatim reproduction could not have been coincidence or written independently by the news reporters or journalists of four different Newspapers working separately and more or less on the same dates particularly when publications do not state that the contents are from the same source. On the issue of 'paid news' the respondents / complainants was unable to show any documentary evidence for payment, however contended that any business house running newspaper industry would not

incur huge expenditure on printing of supplements, etc., without consideration.

195. However, in order to find out the version of the Newspapers, the Commission, by its letter dated 06.04.2010, sent communication to the Chief Electoral Officer, Maharashtra, by forwarding the clippings of the articles, etc., under reference, to the publishers of 'Lokmat', 'Pudhari', 'Deshonnati' and 'Maharashtra Times, and asked them; (i) whether it was a sponsored article or paid article, (ii) whether it was inserted through the instrumentalities of any political party or advertising agency, (iii) if so, the amount paid, and (iv) if so, the agency which paid for it.

196. Accordingly vide letter dated 15.04.2010, publisher of 'Lokmat' Newspapers Pvt. Limited replied as under:-

"The objective of publishing these supplements was to acquaint the people of Maharashtra about the achievements and the developments brought about by the Congress led government in Maharashtra during its tenure under the leadership of the sitting Chief Minister. Educating and updating people about the development and the socio-political events are some of the prime responsibilities and objectives of media..... The other fact that motivated us to publish the supplements highlighting the accomplishments of the Congress led government in Maharashtra is the alignment of our groups' ideology with that of the Congress party. Our founder late Jawaharlalji Darda was one of the leaders of the Congress party who were at the forefront during the freedom struggle..... Our Group strongly believe that Congress is the only party which offers a secular option to the electorate. This would give you a glimpse of the reason that drives us to reach out o the people of Maharashtra to present before them such content which highlights and promotes the Congress party and its leaders....."

197. Moreover, vide letter dated 10.04.2010, Chairman and Managing Director of Pudhari Publications Pvt. Limited, vide letter dated 17.04.2010, Managing Director

and Editor of 'Deshonnati' and vide letter dated 04.05.2010, Authorised Signatory for Benet, Coleman and Company Limited (Times of India Group) replied and confirmed that no agency specially the petitioner and his agent was involved in the publication of said articles. Moreover, by any of the publications, nowhere any appeal or solicitation for votes for the petitioner as a candidate from Bhokar Assembly Constituency has been made.

198. I note, first publication is a news item published in 'Lokmat' dated 12.09.2009 and 12.09.2009, and republished in 'Nav Bharat' dated 12.10.2009, which speaks about the funding assistance to a Buddhist Pilgrims Spot, Mahavihar, Bavrinagar in Ardhapur, which forms part of Bhokar Assembly Constituency. The second publication was in 'Maharashtra Times' dated 10.10.2009 relating to some development plans for Nanded District as part of the development programme for Marathwada region. The remaining three publications were some news items in 'Dainik Satyaprabha' dated 13.10.2009, in which the development work done in Bhokar Assembly Constituency has been highlighted whereby stated that the petitioner has fair chance of success in that constituency.

199. It is important to note that the Commission recorded in the impugned order that there was no pleadings at all with regard to these three publications in the main Newspaper 'Dainik Satyaprabha' dated 13.10.2009.

200. In view of the settled position of law by the Apex Court in the cases of ***Ravinder Singh (Supra)***, the Commission cannot look into these three publications not adverted to at all the pleadings of the complainant No.1 or by any other complainant.

201. It is clear admission by the Chairman and Managing Director, Pudhari

Publications, that, “the NCP, Congress parties were sending the news items / articles from the party office of their respective parties, accordingly, they had published these articles of various parties, therefore, the question of paid news does not arise and, such type of articles were also published in all other newspapers in Maharashtra i.e. Lokmat / Punyanagari / Maharashtra Times etc. However, the Commission is of the view that the said news articles cannot be treated as general news in normal course as these are quite clearly received from political parties and reproduced by all such newspapers so as to pass a general news.

202. In Para 84 of the impugned order, the Commission opined that from aforementioned publications, although cannot be established as being sourced from the political parties, but the same cannot be held to be promoting or procuring the election of the petitioner from 85-Bhokar Assembly Constituency. These have to be seen as general party propaganda for the Indian National Congress and highlighting the achievements and the development works undertaken by the State Government headed by the petitioner as Chief Minister of the State of Maharashtra.

203. As far as the publication of certain advertisements in the Newspapers in the context of the visits of Smt. Sonia Gandhi, the President of the Indian National Congress and Shri Jyotiraditya Scindia, Union Minister, both star campaigners of Indian National Congress within the meaning of Explanations (1) and (2) to Section 77(1) of the Act), and Shri Salman Khan, Cine Artist, and the public meetings held by them in Nanded City and certain other places in that District. A public meeting was scheduled to be held at Nanded and addressed by Smt. Sonia Gandhi on 05.10.2009, which was later on postponed to 06.10.2009. Similarly, a

public meeting was held by Shri Jyotiraditya Scindia on 07.10.2009 at Cidco, Nanded City and Mudkhed. Shri Salman Khan, Cine Artist also held a road show and a public meeting on 10.10.2009 at Nanded. Even according to complainant/respondent No.1, the said advertisement was with a view to giving publicity and inviting general public to attend those public meetings.

204. Issue before this Court to be considered is that the petitioner has not shown any expenditure in respect of aforementioned 19 advertisements issued in various Newspapers between 3rd and 6th October, 2009 published by Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee by giving publicity to the public meeting to be held by Smt. Sonia Gandhi on 05.10.2009, which was later postponed to 06.10.2009. It is alleged that the petitioner has shown an apportioned expenditure of Rs.264/- on the publication of an advertisement by Shri Munna Abbas in “Satyaprabha” on 07.10.2009, but no expenditure was shown on similar advertisements published in “Lokmat” and “Prajawani” on the same day, i.e., dated 07.10.2009. Likewise, it is also alleged that petitioner has shown an apportioned expenditure of Rs.60/- in respect of an advertisement published by Shri Shyam Darak in ‘Satyaprabha’ on 10.10.2009, but did not show any expenditure in respect of similar advertisements published by Shri Shyam Darak on the same day in four different Newspapers, namely, ‘Prajawani’, ‘Udyacha Marathwada’, ‘Gaonkari’ and ‘Godatir Samachar’.

205. It is not in dispute that the expenditure on all those advertisements of which the petitioner had knowledge or about which he was informed by the publishers of those advertisements has to be borne by the candidate concerned. However, Shri Amar Rajurkar, Secretary of Maharashtra Pradesh Congress Committee, in his affidavit dated 09.06.2014, deposed that he had published advertisements relating

to the public meeting of Smt. Sonia Gandhi on 3rd, 4th, and 5th October, 2009, only in local dailies, namely, “Prajawani”, “Lokmat”, “Gaonkari” and “Udyacha Marathwada” and on 06.10.2009 only in “Deshonati”.

206. However, it is noted that in those advertisements, names of all the nine candidates contesting in District Nanded as candidates of the Indian National Congress – Nationalist Congress Party – RPI (Gavai) Alliance were given, as the public meeting of Smt. Sonia Gandhi was jointly held. Further, Sh. Amar Rajurkar deposed, that he borne the entire expenditure on the above publications on his own individually, without the knowledge, consent, authorization and concurrence of any of the candidates, named in the said advertisements.

207. Shri Munna Abbas, President, Nanded District Youth Congress Committee also deposed that he had personally volunteered to make the publication about the meeting of Shri Jyotiraditya Scindia, at Cidco, Nanded City and Mudkhed and accordingly published the advertisement only in the local daily “Satyaprabha” on 07.10.2009. It is further deposed that though the publication of the above advertisement in “Satyaprabha” was his voluntary act, he nevertheless communicated to the accountant of the petitioner that he had incurred expenditure of Rs.792/- on the above advertisement. Accordingly, an amount of Rs.264/- was to be apportioned to the share of the petitioner as the said advertisement carried the names of three candidates. Accordingly, Rs.264/- accounted for in the account of election expenses of the petitioner.

208. Shri Shyam Darak, Secretary, District Congress Committee Nanded, in his affidavit dated 04.06.2010 accepted the responsibility for the publication of an advertisement in “Satyaprabha” on 10.10.2009, on the road show and public meeting of Shri Salman Khan, Cine Artist. He denied the responsibility or

knowledge regarding publication of any other advertisement relating to the above road show and public meeting of Shri Salman Khan in any other Newspapers. According to him, he spent an amount of Rs.1,980/- on the publication of the above advertisement in “Satyaprabha” on 10.10.2009, and that he gave an intimation to the accountant of the petitioner to charge the apportioned amount of Rs.60/- in the election expenditure account of the petitioner, which was subsequently ratified by the petitioner.

209. Therefore, the allegations with regard to these advertisements should not have been looked into by the Commission with a view to the Apex Court’s dictum in case of ***Gajanan Krishnaji Bapat (Supra)***, wherein held that no evidence can be led on a plea not raised in the pleadings and that the court in the appraisal of evidence should ensure that the evidence led by the parties has not gone beyond their pleadings and no new case has been sought to be made out.

210. The petitioner had duly accounted for the expenditure on such advertisements which were in his knowledge or were brought to his knowledge, however, if the publishers of those advertisements or anyone else did not bring to petitioner’s notice or knowledge about some of the advertisements, petitioner could not be expected or required to account for any expenditure on those expenditure. However, even if the expenditure on some of the advertisements was not included in the account of the election expenses of the petitioner, it was purely unintentional and was an accidental omission without any intention of suppressing any expenditure incurred or authorized by him.

211. It is well accepted general principle of law is that in borderline cases where two views are reasonably possible, one in favour of the returned candidate should be accepted as held in the case of ***Narendra Singh (supra)***, that in borderline cases

the courts have to undertake the onerous task of, disengaging the truth from falsehood, to separate the chaff from the grain. Therefore, if two views are reasonably possible, one in favour of the elected candidate and the other against him, Courts should not interfere with the expensive electoral process and instead of setting at naught the election of winning candidate should uphold his election by giving him the benefit of doubt.

212. The petitioner was a star campaigner of the party in terms of Explanations (1) and (2) of the Act and also Chief Minister of the State carrying out the responsibility of the election campaign for the party in the entire State and moving from place to place throughout the State.

213. It is not in dispute that the public meeting of Smt. Sonia Gandhi was held outside Bhokar Assembly Constituency from where the petitioner was contesting the election. However, petitioner accounted for the proportionate expenditure of Rs.1,24,062/- on the holding of the public meeting which fell to his share as he attended that public meeting and knowingly took advantage of the same. As regards the meetings/road show of Shri Scindia and Shri Salman Khan, though petitioner did not attend the same being out of station, he nevertheless accounted for the proportionate expenditure of Rs.4,925/- and Rs.4,300/- respectively, apart from the expenditure on advertisements for those meetings which were brought to the notice of the petitioner by the advertisers/publishers of those advertisements. But if any expenditure had been incurred on publication of any advertisements by any person without petitioner's authorization, the said person has committed electoral offences punishable under Section 171H of the Indian Penal Code and Section 127A of the Act and they were answerable for their lapses and not the petitioner. As held in the case of *Smt. Indira Nehru Gandhi* (supra), that the allegations of election expenses which are incurred or authorized by a candidate or

his agent will have to be proved.

214. It is pertinent to note that authorisization means acceptance of the responsibility. Authorisization must precede the expenditure. Authorization means reimbursement by the candidate or election agent who has been authorized by the candidate or by the election agent to spend or incur. In order to constitute authorization, the affect must be that the authority must carry with it the right of reimbursement.

215. However, it cannot be disputed that there is no pleading or evidence on behalf of the respondents attributing any *mala fide* or intention to conceal the expenditure incurred on disputed advertisements in light of ceiling limit under Section 77 (3) read with Section 123(6) of the Act, which is Rs.10,00,000/- for an Assembly election. Undisputedly, even if the entire amount against all the disputed advertisements is included in the election expenses of the petitioner, it does not exceed the ceiling limit of Rs.10,00,000/-. Advertisements were relating to the election meetings of which the petitioner was not the organizer. As per the text, different individuals were named in the publications. There was no evidence before the Commission that inputs of the advertisements were provided by the petitioner. Moreover, the meetings were not exclusively for the petitioner, but the same were for the multiple candidates set up by United Progressive Alliance. Thus, there was no express authorization in any form given by the petitioner to any such advertiser. Moreover, it is nobody's case that the expenditure on the advertisements were, in fact, incurred by the petitioner. No case was made out that there was any promise to reimburse the expenses, if any, made by the petitioner or his election agent. No price in cash or in kind has been paid or even promised as a consideration against the alleged publication by the petitioner or his election agent.

216. In addition, there is no evidence from the Newspaper establishments about raising any bills in the name of the petitioner. It is important to note that, in compliance of Rule 87, a notice was displayed on the Notice Board by District Election Officer. As per Rule 88, statement of account was thrown open for public inspection. First three complaints of respondent No. 1 made to the Commission, i.e., dated 02.12.2009, 05.06.2009 and 09.07.2010 were confined to the allegations of 'paid news', whereas in the complaint dated 21.09.2010, for the first time, issue regarding disputed advertisements was raised. However, till the time of lodging account of election expenses, disputed advertisements were not brought to the notice of the petitioner. For the first time, the petitioner learnt about it during the course of proceedings before the Commission. Moreover, Election Petition No.11/2009 filed on 04.12.2009 was silent about these advertisements in question. No specific issue was framed about knowledge to the petitioner in the context of disputed advertisements. Photographs of the petitioner on the disputed advertisements were printed because of the State level recognition of the petitioner as a Chief Minister and party leader, i.e., Star Campaigner.

217. Smt. Ameeta Chavan was also a Star Campaigner. Obviously, her campaign was also not confined to Bhokar Assembly Constituency. The quantum of advertisement has no relevance for attributing implied authorization.

218. It is pertinent to note that the complainant has produced a photocopy of the document purporting to be a provisional receipt issued by one Arvind Advertising and Selling Agency Pvt. Ltd., Khokadpura, Aurangabad vide Volume-II, Annexure-H at page 42. It is in a bid to prove both, the authenticity of the publication of meeting and as well as the fact of incurring expenses by Shri Shyam Darak. It is extremely unseen to place any reliance on such document. It is not the

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original document but a photocopy. Name of Shri Amar Rajurkar was scored out and the name of Shri Shyam Darak appeared to have been interpolated. Shri Shyam Darak was never holding office of General Secretary of Maharashtra Pradesh Congress Committee, Nanded. It did not bear the signature of Shri Shyam Darak. Thus, the complainant wanted to establish payment of Rs.6,000/- was made against election meeting advertisement relating to Shri Salman Khan, which published in the Newspaper 'Gaonkari'. To protect the candidate against such fabricated evidence, provisions in the nature of Section 127 A of the Act and Section 171-H of IPC are made.

219. The Commission has relied upon the case of *Kanwar Lal Gupta (supra)* whereas the facts of the present case and the facts of the *Kanwar Lal Gupta* are totally different. The charge in *Kanwar Lal Gupta* was that candidate incurred or authorized expenditure in excess of the prescribed limit and thus was in contravention of section 77 and thereby committed a corrupt practice under section 123(6) of the Act. Whereas in the case in hand, the charge is that the candidate provided incorrect accounts of expenditure. In the case of Kanwar Lal Gupta, the allegation against the elected candidate was that more than 23 public meetings were conducted by him, whereas expenditure was accounted for 23 meetings only. However, no expenses were shown for the other meetings. Whereas, in the present case the allegation against the elected candidate is that he did not account for the newspaper advertisements of three public meetings. In Kanwar Lal Gupta's case, the candidate attended each and every meeting and hence attributed to have knowledge of the expenses. However, in the present case, the candidate participated in only one of the three public meetings. The petitioner was outside his constituency when the advertisements were made and hence had had no knowledge about the same.

220. Moreover, to prove the allegations in Kanwar Lal Gupta's case the SHO concerned, CID officers who covered the public meetings and other witnesses were examined and cross-examined, whereas, in the present case none of the witness has been examined or cross-examined. Further, the Commission has only relied upon the allegations made by the petitioner and ignored the affidavits filed by three publishers as observed above.

221. Even facts of **Umlesh Yadav's** case (*supra*) are materially different from the present one, however, the Commission has applied the same while writing the opinion against the petitioner. In the case of **Umlesh Yadav**, the newspaper Dainik Jagran stated that the news publication, was an advertisement for which a bill of Rs.21,250/- in the name of Pramod Mishra was issued and the client's name was mentioned as D.P. Yadav i.e. husband of Umlesh Yadav. The amount was paid in cash. Whereas in the present case no bill is raised by any of the publishers. The evidence demonstrated in **Umlesh Yadav's case was** that the same was advertisement in the newspaper for which a bill of Rs.8000/- in the name of Shri D.P. Yadav-was issued and paid. Whereas in the present case, no evidence demonstrated any nexus between the petitioner and the publisher of alleged advertisements. In above noted case, both the newspapers had submitted that the material of newspaper was provided by the candidate therein and the material was not collected on the correspondence of the newspaper. Whereas in the present case no reply is solicited by any of the newspapers.

222. In the case of **Ram Dayal** (*supra*) the allegation against the candidate was that the Maharaja and Rajmata of Gwalior had helped the Respondent's election in number of ways and incurred considerable expenditure which exceeded the limit. Accordingly, the Supreme Court held that, assuming the expenditure was

incurred by aforesaid persons for the purpose of obtaining votes, however, in the absence of any evidence to show that the Maharaja and Rajmata had acted as election agents, or that the expenditure was authorized by the candidate, thus, it was not liable to be included in the election expenses.

223. Section 10-A of the Act was not an issue nor addressed before the Commission. The controversy was restricted to corrupt practices set out in Section 123(6) read with Section 77 (3) of the Act. However, Section 171-H of IPC was not the issue in ***Kanwar Lal Gupta***'s case (*supra*) as relied upon by the Commission. Section 171-H of IPC prohibits any expenditure made without authority in writing for a candidate upon any advertisement and makes its violation a penal offence. On the other hand, in the impugned order, such illegal payments made without express authorization from the candidate was sought to be included in the account of election expenses. Thus, there is apparent contradiction between the view taken by the Commission in the impugned order and Section 171-H of IPC.

224. Hence, the question arises 'Whether the Court can take cognizance of such expenditure, which is an illegal expenditure in the eyes of law and expect to account for the money spent by somebody else unauthorizedly?

225. In the case of ***Smt. Indira Nehru Gandhi*** (*supra*) the Constitution Bench of the Supreme Court observed that the 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 reimbursement. However, in the case in hand, except the bald allegation

made by the respondent no.1, no evidence is brought on record whereby the opinion can be given that for the expenditures in question there was a consent from the petitioner expressly or impliedly.

226. It is settled law that an election once held is not to be treated in 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. The 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.

227. Regarding disputed public meeting advertisements, there was no show cause notice issued to the petitioner. Section 10-A 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.

228. In consonance with Section 10-A of the Act, Rule 89 was framed. Rule 89 is also in two parts. Sub-Rule 4 of Rule 89 contemplates the Commission "to 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 the Rules. Sub-Rules 5 to 8 are substituted by S.O. 3875 dated 15.12.1966. If there is adverse finding against the candidate under Sub-Rule 4 after assigning reasons in support of such findings, in that event a show cause notice is contemplated under Sub-Rule

5. In response to the show cause notice, the candidate may submit a representation in writing together with complete account of his election expenses if he had not already furnished such an account. In other words, if such complete account is not furnished prior to the stage of first decision under Sub-Rule 4, after the stage of show cause notice, Sub-Rule 6 offers yet further opportunity to furnish such complete account. The subsequent satisfaction of the Commission is contemplated under Sub-Rule 8 in respect of the representation and the furnishing of such subsequent complete account as contemplated by Sub-rule 6.

229. The Commission recorded its finding that Rule 89(6) is available to a candidate to file his account of election expenses where he has not previously filed any account at all under section 78 of the Act, and not where he has filed an account alleged to be false or incorrect.

230. If the opinion of the Commission is accepted on Rule 89(6) then not filing of the account at all is an absolute non-compliance with the mandate of law and it would be a higher default as compared with filing of an account but not complete account. It means a graver offence is allowed to be committed but not a minor offence.

231. The Commission has also recorded in its impugned order that sub-Rules 4 to 8 of Rule 89 are wholly incapable of any formality of passing final order is left over. In the impugned order it is recorded that if such a plea is accepted by the Commission, then every candidate would get a license to file an incorrect or false statement and, if caught, may contend that the suppressed expenditure may be added to his account of election expenses. This would frustrate and defeat the very object underlying the provisions of section 77 requiring the maintenance of true

account of election expenses and of section 10A of the Act providing for disqualification for filing an incorrect or false account. More so, while relying upon *Umlesh Yadav's (supra)* it is opined that Section 10-A of the Act does not give any discretion to the Commission in the matter of its application. These observations are inconsistent with the legislative scheme described under Sub-Rule 4 to Sub-Rule 8 of Rule 89. It is also inconsistent with the verdict of the Supreme Court in Civil Appeal No.5044/2014 whereby the Supreme Court has recognized the Rules and Rule 89 in particular.

232. As submitted by Mr. Jayant Bhushan, learned senior counsel appearing on behalf of the respondent no.1 that scheme of Rule 89 is inconsistent with Section 10-A of the Act but the fact remains that the respondents have not questioned the validity of the rules so framed, thus, issuance of the show cause notice is rendered only an idle formality and only a ritual of passing a consequential order is left over. Therefore, the representation pursuant to show cause notice would be rendered meaningless as the final conclusion is a *fait accompli*. Therefore, such show cause notice is meaningless. The scope of an enquiry under Section 10-A of the Act is thus, not confined to compliance of Section 78 of the Act alone but it contemplates compliance of Section 77 (1) of the Act as to the correctness of the account also as is interpreted by the Supreme Court in SLP (Civil) 29882/2012, as discussed above. The interpretation of the Commission would give a second chance to the candidates who failed to even lodge the account whereas, the scheme of Rule 89 is intended to give opportunity to the candidate to rectify the errors in the account so submitted. The scope and nature of enquiry under Section 89 (8) of the Act is not an empty formality but a comprehensive one. The mandate of the Apex Court is that while conducting such an enquiry, every care should be taken that no prejudice is caused to the contesting candidate. No stone is to be left unturned before

reaching a satisfaction as to correctness or the proper manner of lodgment of election expenses. Such enquiry is a meticulous exercise. The enquiry has to be extensive and not be a farced but a true and complete one.

233. Scheme of the Act is to give space to all the citizens of this country to participate in democratic process, i.e., to cast vote and contest election. The election should not be bounty of rich people only. Therefore, under the Act there is a limit to spend the amount in the election. If any candidate crosses the limit, he shall be dealt under the Act. Such a candidate may be debarred from contesting any election for a term of three years, if he failed to justify any of the amount crossing the limit prescribed under the Act. It is also required that the candidate shall file his return of election expenses incurred by him in the manner prescribed and within time frame. But if any of the expense is left un-noticed then he may revise the return.

234. However, the Scheme of the Act is not that if any of the expenses incurred by him, his agent, friends or relative are left-out, un-intentionally or inadvertently, he may not get opportunity to rectify the same. If on rectification, even it crosses the limit prescribed he will face the consequences, otherwise, his corrected return shall be accepted. Therefore, the Commission has to ensure that any candidate shall not cross the limit prescribed.

235. Be that as it may, margin of Rs.3,14,808/- was still available with the petitioner to incur further expenditure upto the ceiling limit of Rs.10,00,000/- against the insignificant amount of Rs.16,924/-. Hence, if the pro rata sharing of Rs.16,924/- was added to the account of the petitioner, the same did not reach to the aforementioned ceiling limit of Rs.10,00,000/-.

236. In view of above discussion and settled law, this Court is of the considered opinion that the Commission has failed on both counts, i.e., by not complying the Rule-89(6) of the Rules and not framing the issue regarding knowledge and consent of the petitioner or his agent on the expenses incurred on advertisements in question. Moreover, no evidence brought on record before writing its opinion against the petitioner. Therefore, I set aside the impugned order dated 13.07.2014 and consequential order to issue show cause notice under Rule -89(5) of the Rules.

237. Consequently, the writ petition is allowed with no order as to costs.

CM 9137/2014

Dismissed as infructuous.

SURESH KAIT. J

SEPTEMBER 12, 2014

sb/jg/RS