AJAY ARJUN SINGH

v.

SHARADENDU TIWARI & OTHERS

(Civil Appeal No. 2697 of 2016)

MARCH 15, 2016

[J. CHELAMESWAR AND ABHAY MANOHAR SAPRE, JJ.]

Representation of the People Act, 1951 – s.83(1)(c) proviso r/w. Order VI Rule 15(4) of CPC – Interlocutory application under Order VII, Rule 11 CPC – Filed in Election petition – By the returned candidate seeking dismissal of petition on the ground interalia that the affidavit filed alongwith the petition was not in conformity with Form 25 of the Conduct of Election Rules, 1961 – Election petitioner mentioned in his reply that the affidavit in Form 25 was to be found at pages 394 and 395 of the petition and asserted that he filed two affidavits with the petition – The High Court held that though the petitioner had not filed the affidavit in Form-25, but the defect was curable and hence directed the petitioner to file an affidavit in Form 25 – Election Petitioner filed the affidavit as directed – Review petition by the returned candidate against the order of High Court was dismissed – Two appeals filed by the returned candidate in this Court – The election petitioner also filed appeal challenging the finding that affidavit in Form 25 was not filed – This Court adjourned the matter in order to enable the parties to seek a clarification as to whether there was one or two affidavits filed alongwith the petition – Application for the clarification order filed in High Court – High Court clarified that two affidavits were filed alongwith the election petition – Returned candidate filed another appeal to this Court challenging the clarification order – On the ground that the order suffered from lack of jurisdiction being in contravention of r. 13(2) of High Court of Madhya Pradesh Rules, 2008 – Held: The clarification order of High Court did not suffer from lack of jurisdiction as the order was in conformity with s.80A(2) of the Representation of the People Act – Stipulation u/r. 13(2) is contrary to stipulation u/s. 80A(2) – As per Art. 225 of the Constitution (under which High Court Rules were made) any Rule shall be subject to the law, made by appropriate Legislature – It is proved that the election petition was accompanied by an affidavit

A *in Form 25 in compliance with the requirement of statute under proviso to s.83(1)(c) – Conduct of Election Rules, 1961 – Form 25 – Constitution of India – Art. 225 – High Court of Madhya Pradesh Rules, 2008 – Code of Civil Procedure, 1908 – Or. VII, r. 11.*

Dismissing the appeals filed by the returned candidate and
B **allowing that of the election petitioner, the Court**

HELD: 1. Election petitions deal with the basic rights of the citizenry of this country. Election is a "politically sacred" event and an election dispute is too serious a matter to be dealt with casually. Therefore, the Parliament thought it fit to entrust the
C **adjudication of election disputes to the High Courts. The High Court chose to deal with the matter casually. The result is that a finding that there was no affidavit in the Form No.25 came to be recorded without recording any finding regarding the existence or otherwise of the affidavit which is said to have been annexed in the election petition at page nos.394 and 395 nor its content.**
D **Since the Interlocutory Application was dismissed, the election petitioner had neither a reason nor the necessity to challenge the correctness of the findings recorded in the order as the decision is in his favour. [Para 20] [567-C-E]**

2.1 According to the returned candidate, I.A. No.11665 of
E **2015 (seeking clarification from the High Court) ought to have been heard by a Division Bench because of the stipulation contained in Rule 13(2) of the High Court of Madhya Pradesh Rules, 2008. The said Rule stipulates that any application seeking clarifications of an earlier order of the Court passed by a Judge,**
F **who retired thereafter, ought to be heard by a Division Bench and the Judge who passed the order in the OR VII R 11 petition retired subsequently. This preliminary objection raised by the returned candidate is not acceptable. [Paras 29 and 31] [570-F-G; 571-A; 572-A-B]**

G **2.2 The adjudication of election petitions including the examination of all incidental questions in interlocutory proceedings arising during the course of the adjudication of the election petition is entrusted by Section 80A of the Representation of People Act, 1951 to the High Court within whose jurisdiction the election dispute arises. Section 80A(2) stipulates that the**

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jurisdiction shall be exercised ordinarily by a Single Judge who is to be designated by the Chief Justice. Though the said Section indicates that the Chief Justice has a discretion to entrust trial of an election petition to a Bench consisting of more than one judges, such a discretion is to be exercised by the Chief Justice alone. [Para 31] [572-B-D]

2.3 The Rules of the High Court are framed by the High Court pursuant to the power vested in it under Article 225. The exercise of such power is subject to the provisions of the Constitution and the "provisions of any law of the appropriate legislature". Rule 13 mandates the listing of certain matters (nature of which is described therein) before a Division Bench. Such stipulation is contrary to the stipulation of Section 80A(2) that election petitions are to be tried by a single judge of the High Court leaving a discretion in the Chief Justice to decide whether in a given case, an election petition shall be heard by more than one Judge. Such a statutory discretion vested in the Chief Justice of the High Court cannot be curtailed by a rule made as the High Court in view of the clear declaration by the Constitution (in the opening clause of Article 225) that "any rule shall be subject to the law made by the appropriate legislature". [Para 31] [572-E; 573-A-C]

3. The plea of the returned candidate that the subsequent and conflicting finding of the High Court dated 29.9.2015 is not legally tenable, as at the earliest point of time, the High Court in its order dated 25.08.2014 recorded a finding that the election petitioner did not file the affidavit in the prescribed Form 25. The plea, if at all is based on any legal principle, it is based either on the doctrine of res judicata or some principle analogous to it based on public policy that there must be finality to the judicial orders. Even if the principle of res judicata is invoked, what is barred under s.11 of CPC is the adjudication of an issue which was directly and substantially in issue in a former suit between the same parties and has been heard and finally decided. Hence the plea is rejected. [Paras 35(I), 37(i)] [574-C; 576-E-F]

4. It cannot be said that the election petitioner is precluded from contending at a later stage that the finding recorded by the High Court in its order dated 25.08.2014 is incorrect, as having

A complied with the consequential direction of filing afresh affidavit in Form 25, without challenging the correctness of the finding that he failed to file an affidavit in Form 25 along with the election petition. The question whether two affidavits were filed along with the Election petition though was not directly in issue as the returned candidate never filed a rejoinder (to the reply of the election petitioner wherein it was stated that he had filed two affidavits alongwith the election petition). In deciding the OR VII R 11 petition the High Court never examined the question (it is an issue of fact) whether there were two affidavits as pleaded by the election petitioner in his reply to the said petition. The order in OR VII R 11 petition is too casual. It does not take note of either the facts in issue or identify the point to be decided. Any finding of fact recorded in such circumstances is required to be set aside if appealed against by the aggrieved party if such an order is an appealable order. Since the High Court dismissed the OR VII R 11 petition though the finding is adverse to the election petitioner, he need not have filed an appeal. [Paras 35(II), 37(ii)] [574-D-E; 576-G-H; 577-A-B]

5.1 The failure of the Registrar to comply with the requirement of Rule 6(4) is sought to be explained by the High Court by saying that such a lapse occurred probably because nobody pointed out to the Registrar regarding the existence of affidavit at page nos.394-395. Rule 6(4) casts a mandatory duty on the Registrar to sign on each page of the election petition and also the affidavit filed along with the election petition. Such a mandatory duty must be performed irrespective of the fact whether somebody points out to the Registrar or not regarding the existence of the affidavit. However, the non-compliance of the rule by the Registrar is not fatal to the election petition, because it is the settled proposition of law that the act or omission of the Court shall not harm any party. [Para 37(c, d)] [579-E-G]

5.2 But when the question is whether such an affidavit was filed along with the election petition on 20.01.2014, different considerations arise. The question whether the election petitioner filed the 2nd affidavit is a pure question of fact. The burden of proving such a fact in law is on the election petitioner if such a question is really in issue. However, such a question was never in issue in OR VII R 11 petition. [Para 37(e)] [579-H; 580-A-B]

5.3 The objection of the returned candidate in OR VII R 11 petition was only that the "affidavit sworn and filed along with the petition by the petitioner is not in conformity with Form 25 of the Conduct Rules, 1961." Thus, the returned candidate's objection is only regarding the format and content of the affidavit but not regarding the date of the filing of the affidavit, on the other hand, the employment of the expression "along with" clearly indicates that the returned candidate also at that point of time accepted that the affidavit at page nos.394-395 was presented on the same date i.e. 20.1.2014. Therefore, the question of proof of the fact which was never in issue does not arise much less the question of burden of proof. [Para 39] [580-F-G]

6. The fact that the election petitioner chose to file yet another affidavit pursuant to the order dated 25.8.2014 is another circumstance sought to be relied upon by the returned candidate in support of his submission that there was no second affidavit filed along with the election petition. The dispute on hand is regarding the existence of a fact which was never in issue in OR VII R 11 petition. The returned candidate cannot shift his case from stage to stage. He cannot now be permitted to raise such a question of fact in the absence of an appropriate pleading and contend that the election petitioner is precluded from arguing that he had filed a 2nd affidavit along with the election petition by pressing into service a rule of estoppel. [Paras 40, 43] [580-H; 581-A, F-G]

State of Punjab & Others v. Krishan Niwas **1997 (2) SCR 1135 : (1997) 9 SCC 31**; *Banku Chandra Bose & Another v. Marium Begum & Another*, **AIR 1917 Cal. 546 – held inapplicable.**

P.A. Mohammed Riyas v. M.K. Raghavan & Others **2012 (4) SCR 56 : (2012) 5 SCC 511**; *G.M. Siddeshwar v. Prasanna Kumar* **2013 (4) SCR 1107 : (2013) 4 SCC 776**; *Harvinder Singh v. Paramjit Singh* **(2013) 9 SCC 261: 2013 (1) SCR 903 – referred to.**

Case Law Reference

2012 (4) SCR 56	**referred to**	**Para 17**
2013 (4) SCR 1107	**referred to**	**Para 18**

2013 (1) SCR 903	**referred to**	**Para 37(iii)**
1997 (2) SCR 1135	**held inapplicable**	**Para 42**
AIR 1917 Cal. 546	**held inapplicable**	**Para 42**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2697 of 2016.

From the Judgment and Order dated 25.08.2014 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in I. A. No. 43 of 2014 in Election Petition No. 1 of 2014

WITH

C. A. Nos. 2699, 2700 and 2701 of 2016

P. P. Rao, Salman Khurshid, Naman Nagrath Sr. Advs., Navin Prakash, Anshuman Shrivastava, Pulkit Tare, Ms. Meetu Singh, Swarnendu Chatterjee, Vikramaditya Singh, Ms. Ananya Sarkar, M. P. Srivignesh, Vikas Upadhyay, Prakash Upadhyay, Nitin Gaur, Kaustubh Anshuraj, Ishit Saharia, Advs. for the appearing parties.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. General elections to the legislative assembly of Madhya Pradesh took place in the year 2013. On 8.12.2013, one Shri Ajay Arjun Singh (hereinafter referred to as the RETURNED CANDIDATE) was declared elected as a member of legislative assembly from 76 Churhat Assembly Constituency in the said election. On 20th January, 2014, challenging the declaration of said Ajay Arjun Singh, one of the contesting candidates Sharadendu Tiwari (hereinafter referred to as 'the ELECTION PETITIONER') filed an Election Petition No.1 of 2014 before the High Court of Madhya Pradesh.

3. The election of the RETURNED CANDIDATE was challenged on the grounds that the RETURNED CANDIDATE is guilty of commission of two corrupt practices falling under sub-sections (1) and (6) of Section 123 of the Representation of the People Act, 1951 (hereinafter referred to as 'the RP Act'), i.e. (1) making appeal to the voters in the name of religion and bribery; and (2) incurring expenditure in contravention of Section 77 of the RP Act respectively.

4. Notice to the respondents in the Election Petition was ordered

on 10th February, 2014. The RETURNED CANDIDATE was served[1] with the said notice on 18.6.2014. Admittedly, the election petition and all the annexures thereto were served on the RETURNED CANDIDATE on his appearance in the Court on 18.6.2014. A

5. On 1st July, 2014, the RETURNED CANDIDATE filed I.A. No.43 of 2014 invoking Order VII Rule 11 of CPC (hereinafter referred to as "OR VII R 11 petition") praying that the Election Petition be dismissed on the ground that it does not disclose a cause of action. The said petition was dismissed by order of the High Court dated 25.8.2014. Aggrieved by the dismissal of OR VII R 11 petition, the RETURNED CANDIDATE filed an application for review (I.A. No.13575/2015 – hereinafter referred to as the "Review Petition"), which was also dismissed by the High Court by an order dated 18.3.2015. B C

6. Therefore, the RETURNED CANDIDATE filed SLPs No.33933/2014 and 11096/2015 aggrieved by orders dated 25.8.2014 and 18.3.2015 respectively.

7. Aggrieved by certain findings recorded by the High Court (the details of which will be considered later) in the order dated 18.3.2015 in the Review Petition, the ELECTION PETITIONER preferred SLP No.15361/2015. D

8. To adjudicate the correctness of the various impugned orders, an examination of the issues which fell for the consideration of the High Court is required to be identified. E

9. The prayer in the OR VII R 11 petition filed by the RETURNED CANDIDATE is as follows:

> "It is, therefore, prayed that the present election petition be dismissed." F

(i) Para 8 of the OR VII R 11 petition reads as follows:

> "That, besides the above, affidavit sworn and filed along with the petition by the petitioner is not in conformity with Form 25 of the Conduct of Election Rules, 1961. The name of the corrupt practice has not been specified which is required to be specifically stated in the affidavit prescribed under Form No.25. The affidavit which G

[1] Admittedly the RETURNED CANDIDATE could not be served with the summons in the normal course by the High Court. He appeared in the High Court (admittedly) pursuant to the substituted service (paper publication). The RETURNED CANDIDATE has an explanation for the same. The truth of the explanation is not in issue. H

A the petitioner has filed is thus defective and, therefore, the petition deserves to be dismissed."

(ii) Para 13 of the said petition states:

"That, for the aforesaid reasons, the present election petition is liable to be dismissed as the as do not disclose any cause of cause
B of action."

Giving some allowance to the clerical errors, we presume that the RETURNED CANDIDATE prayed that the Election Petition be dismissed on the ground that it does not disclose any cause of action.

In other words, the RETURNED CANDIDATE prayed that the
C Election petition be dismissed for two reasons:

(i) that the affidavit filed along with the Election petition is not in conformity with Form 25 of the Conduct of Election Rules, 1961; and

(ii) that the Election petition does not disclose any cause of action.

D They are two distinct grounds.

10. In response to the said application (OR VII R 11 petition), the ELECTION PETITIONER filed a reply dated 11.07.2014. It is stated in para 6 therein as follows:

"6. That, the third objection which respondent no.1/returned
E candidate has raised with respect to the non filing of the affidavit inconformity of the Form 25 of the Conduct of Election Rules, 1961. **The petitioner has filed the said affidavit along with the election petition which is attached at page no.394 and 395 of the election petition** and also found mention at serial
F no.57-A in the index filed along with the election petition. Since the petitioner has also filed affidavit in support of the election petition and has also filed the affidavit in prescribed format, therefore, there is no defect in this regard. Though, the petitioner respectfully submits that the petition and the affidavit is in proper order but if in the opinion of the court if there is any defect, the
G election petitioner is willing to cure the same."

11. It can be seen from the above that the ELECTION PETITIONER clearly mentioned about the filing of an affidavit in form 25 which is to be found at page nos.394 and 395 of the election petition and also mentioned at serial no.57-A in the index to the election petition.
H Though not very elegantly pleaded, the ELECTION PETITIONER did

assert the fact that he had filed two affidavits along with the election petition[2]. A

12. It can be seen from the above that the ELECTION PETITIONER has also made a submission that "if in the opinion of the Court if there is any defect, the ELECTION PETITIONER is willing to cure the same". Such a statement appears to have been made by way of abundant caution in a bid to save the election petition from being dismissed on the ground of non-compliance with the proviso to Section 83 (1) in the event of the High Court reaching the conclusion that the affidavit filed by the ELECTION PETITIONER along with the election petition is not in fact compliant with the requirement of law. B

13. The High Court, by its order dated 25.8.2014 while dismissing OR VII R 11 petition recorded: C

> "In the instant case, the petitioner has not filed the affidavit in the prescribed Form 25 in accordance with Rule 94-A of the Conduct of Election Rules, 1961. Since aforesaid defect is curable, same can be cured by filing affidavit in the prescribed Form 25." D
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> The High Court further directed:
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> "the petitioner is directed to file an affidavit in Form 25 within 15 days from the date of receipt of certified copy of the order."

Pursuant to this order, admittedly an affidavit was filed by the ELECTION PETITIONER on 31.08.2014. E

14. To understand the controversy in these appeals, an analysis of the provisions of the RP Act is required. Section 83[3] of the RP Act

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[2] Para 6 of reply to the IA No.43 of 2014

"... Since the petitioner has also filed affidavit in support of the election petition and has also filed an affidavit in the prescribed format, therefore, there is no defect in this regard...." F

[3] **"Section 83. Contents of petition.—(1)** An election petition—

(a) Shall contain a concise statement of the material facts on which the petitioner relies;

(b) Shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and G

(c) Shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. H

A stipulates what is required to be contained in an election petition. Section 83(1)(c) requires every election petition to be verified in the manner laid down in the Code of Civil Procedure, 1908. Order VI Rule 15 of the Code deals with the verification of the pleadings[4]. Sub-rule 4[5] stipulates that the person verifying the pleadings shall also furnish an affidavit in support of such pleadings.

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15. An election petition challenging the validity of an election can be filed on any one of the various grounds specified under Section 100 of the RP Act. The commission of a corrupt practice either by the "returned candidate or his election agent or by any other person with the consent of either the returned candidate or his agent" is one of the several grounds on which the High Court can declare the result of a returned candidate to be void. The election of a returned candidate can also be set aside on the ground of the commission of corrupt practice "in the interest of the returned candidate by an agent other than his election agent" and by virtue of such corrupt practice "the result of the election, insofar as it concerns a returned candidate, has been materially affected". In either case, in view of the stipulation contained in proviso to Section 83(1) RP Act, the election petition is required to be accompanied by an affidavit in the prescribed form.

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16. In exercise of the power under Section 169 of the RP Act, the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956 have been framed by the Government of India. Rule 94A prescribes as follows:

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"Rule 94A. Form of affidavit to be filed with election

F (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

[4] **Order VI Rule 15. Verification of pleadings.**— (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

G (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) **The person verifying the pleading shall also furnish an affidavit in support of his pleadings.**

H [5] Sub-rule (4) came to be inserted to the Code by Act 46 of 1999

petition.— The affidavit referred to in the proviso to sub-section (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25." A

Form 25 also indicates the layout of the affidavit. The requirement of giving such affidavit where there are allegations of commission of corrupt practice in an election petition came to be inserted in the Act by virtue of an amendment in the year 1962. B

17. The question whether an election petition challenging the election of a returned candidate on the ground of corrupt practice is required to be accompanied either by one affidavit or two affidavits in view of the insertion of clause (4) of Rule 15 of Order VI, fell for consideration of this Court in ***P.A. Mohammed Riyas v. M.K. Raghavan & Others,*** (2012) 5 SCC 511 and this Court held thus: C

"45. ... We are also unable to accept Mr Venugopal's submission that even in a case where the proviso to Section 83(1) was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions." D

18. Subsequently, the same question again fell for consideration before a larger bench of this Court in ***GM. Siddeshwar v. Prasanna Kumar,*** (2013) 4 SCC 776. The court disapproved the view taken in ***Mohammed Riyas case*** and held: E

"1. ... The principal question of law raised for our consideration is whether, to maintain an election petition, it is imperative for an election petitioner to file an affidavit in terms of Order 6 Rule 15(4) of the Code of Civil Procedure, 1908 in support of the averments made in the election petition in addition to an affidavit (in a case where resort to corrupt practices have been alleged against the returned candidate) as required by the proviso to Section 83(1) of the Representation of the People Act, 1951. In our opinion, there is no such mandate in the Representation of the People Act, 1951 and a reading of *P.A. Mohammed Riyas v. M.K. Raghavan* which suggests to the contrary, does not lay down correct law to this limited extent. F G

30. In any event, as in the present case, the same result has been achieved by the election petitioner by filing a composite affidavit, both in support of the averments made in the election petition and H

A with regard to the allegations of corrupt practices by the returned candidate. This procedure is not contrary to law and cannot be faulted. Such a composite affidavit would not only be in substantial compliance with the requirements of the Act but would actually be in full compliance thereof. The filing of two affidavits is not warranted by the Act nor is it necessary, especially when a B composite affidavit can achieve the desired result."

19. The issue before this Court in this batch of appeals is whether the election petition was accompanied by an affidavit which is compliant with the requirement of statute under the proviso to Section 83(1)(c). For answering the issue, it is incidentally necessary to determine whether C the ELECTION PETITIONER filed two affidavits along with the election petition to satisfy the requirement of the law.

20. Unfortunately, the High Court did not examine, when it passed the orders dated 25.08.2014 or 18.03.2015, the question whether there were two affidavits filed by the ELECTION PETITIONER along with D the election petition and whether the affidavit said to have been annexed to the election petition at page nos.394-395 is compliant with the requirement of stipulations under proviso to Section 83(1). At para 5 of the order dated 25.08.2014, the High Court recorded as follows:

"5. **So far as the contention with respect to verification or** E **affidavit is concerned**, it has been laid down by the Apex Court ***GM. Siddeshwar v. Prasanna Kumar***, AIR 2013 SC 1549 that absolute compliance of format affidavit is not necessary. Substantial compliance with format prescribed is sufficient. In case there is any defect in affidavit or in its verification, the same F is curable and the same cannot be a sufficient ground to dismiss the petition *in limine*. **In the instant case, the petitioner has not filed the affidavit in the prescribed Form 25 in accordance with Rule 94-A of the Conduct of Election Rules, 1961. Since the aforesaid defect is curable, same can be cured by filing affidavit in the prescribed Form 25."**

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We are sorry to note that the para commences with a clumsy statement "so far as the contention with respect to verification or affidavit" and makes an irrelevant reference to the ***GM. Siddeshwar*** case (supra) and ultimately records a conclusion without any discussion of the pleadings or evidence that the ELECTION PETITIONER has H not filed an affidavit in Form-25. It was however ordered at para 6 of

the order dated 25.08.2014: A

> "I do not find any ground for rejection of the petition in limine under Order 7 Rule 11 of the CPC. Accordingly, I.A. No.43/ 2014, filed by the respondent No.1 is hereby dismissed. The petitioner is directed to file affidavit in Form 25 of the Conduct of Election Rules, 1961 within 15 days from the date of receipt of B certified copy of the order. Respondent No.1 is also directed to file written statement within two weeks from the date of receipt of certified copy of this order."

It is a wholly unsatisfactory way of dealing with any issue in a judicial proceeding and more so with election petitions. Election petitions C deal with the basic rights of the citizenry of this country. Election is a "politically sacred" event and an election dispute is too serious a matter to be dealt with casually. Therefore, the Parliament thought it fit to entrust the adjudication of election disputes to the High Courts. It is unfortunate that the learned Judge chose to deal with the matter so casually. The result is that a finding that there was no affidavit in the D Form No.25 came to be recorded without recording any finding regarding the existence or otherwise of the affidavit which is said to have been annexed in the election petition at page nos.394 and 395 nor its content. Since the Interlocutory Application was dismissed, the ELECTION PETITIONER had neither a reason nor the necessity to challenge the E correctness of the findings recorded in the order as the decision is in his favour.

21. Aggrieved by the said order, the RETURNED CANDIDATE filed the Review Petition seeking review of the said order. The application hinged on the finding recorded in the order dated 25.08.2014 that "the F petitioner has not filed the affidavit in the prescribed Form No.25". It is, therefore, pleaded in the Review Petition that the direction of the High Court permitting the ELECTION PETITIONER to cure the defect in the affidavit filed along with the election petition is unsustainable and hence the order dated 25.08.2014 is to be reviewed. Interestingly, in the rejoinder dated 24.12.2014 filed by the RETURNED CANDIDATE to G the reply of the ELECTION PETITIONER dated 8.11.2014 in the said Review Petition, the RETURNED CANDIDATE stated as follows:

> "Para 4. That, the averments made in the petition were verified by the petitioner as per verification clause; submitted an affidavit in support of the petition and filed another affidavit under Form- H

A 25 at pages 394 and 395 of the Election Petition and the third affidavit dated 31.8.2014 pursuant to order of the Hon'ble Court dated 25.8.2014."

22. It is clear from the abovementioned pleading of the RETURNED CANDIDATE that he is clearly aware of the fact that B there were two affidavits filed along with the election petition as averred by the ELECTION PETITIONER in his petition. The said review application was dismissed by order dated 18.03.2015. Aggrieved by the same, the RETURNED CANDIDATE filed SLP No.11096 of 2015.

23. It is rather difficult to understand the order dated 18.03.2015. C There was an unnecessary examination of various authorities of the Supreme Court without first settling the basic facts and identifying the issues. The High Court extracted the content of an affidavit which according to the ELECTION PETITIONER is an affidavit filed in compliance with the requirement of Section 83(1)(c) but not the affidavit in Form 25 and records a conclusion at para 6 as follows:

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"6. A bare reading of earlier affidavit filed by the petitioner makes it clear that the petitioner had covered all the pleadings in his affidavit and no pleading was left which was not mentioned in the affidavit but what was lacking was that the earlier affidavit was not in the prescribed Form No.25 of the Rule 94-A of the Rules of E 1961. Certainly, there was a non-compliance of proviso to Section 83(1) of the Act of 1951 but Section 83(1) of the Act of 1951 is not covered under Section 86 of the Act of 1951."

Interestingly, at para 9, once again the High Court recorded a conclusion:

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"9. As mentioned hereinabove, in the instant case substantial compliance of Section 81(3) of the Act of 1951 has already been done by the petitioner by filing first affidavit along with the petition but only defect was that the affidavit was not in prescribed format, therefore, at the most it was a non-compliance of Section 83(1) G of the Act of 1951 and same is curable. ..."

The cryptic conclusions recorded in the order dated 18.03.2015 only add to the existing confusion.

24. However, aggrieved by the conclusion that the affidavit was "not in the prescribed Form-25", the ELECTION PETITIONER H

preferred SLP No.15361 of 2015 on the ground that such a conclusion came to be recorded on an erroneous identification of the affidavit. Aggrieved by the dismissal of the Review Petition, the RETURNED CANDIDATE filed SLP No.11096 of 2015. A

25. When the appeals were argued before this Court on 20.08.2015, the ELECTION PETITIONER made a submission that two separate affidavits were filed along with the election petition and the High Court's observation (supra) are based on an erroneous identification of the affidavit. The RETURNED CANDIDATE took a stand that there was no 2nd affidavit as alleged by the ELECTION PETITIONER in compliance with the proviso to Section 83(1) of the RP Act filed along with the election petition. B C

26. In view of the abovementioned imprecise findings recorded by the High Court without any reference to the pleadings or evidence on record and the contradictory stands taken before this Court by the parties, this Court thought it fit to adjourn the matter in order to enable the parties to seek a clarification regarding the true state of facts whether there was one or two affidavits filed along with the election petition[6]. D

27. Pursuant to the said order, the ELECTION PETITIONER filed I.A. No.11665/2015 seeking clarifications from the Madhya Pradesh High Court. The said I.A. was disposed of by an order dated 29.9.2015[7]. E

The High Court, recorded;

[6] "The matters were argued at some length before us. Learned counsel appearing for the RETURNED CANDIDATE has proceeded on the basis that there is no affidavit at all as required under Section 83(1)(c) of the Act whereas it is pointed out by learned counsel on behalf of ELECTION PETITIONER that as a matter of fact two separate affidavits were filed along with the election petition. The first being an affidavit in compliance of requirement of the provisions under Order VI Rule 15(4) of Civil Procedure Code and the second an affidavit in compliance with requirement of Section 83(1)(c) of the Act. Xerox copies of both the affidavits are available on record here. F

The question whether there was one affidavit or two affidavits filed along with the election petition as mentioned above, the actual date when those affidavits were filed, whether either of the two affidavits is filed in compliance with the requirement of Section 83(1)(c) of the Act or not are matters for examination of the High Court. The High Court is required to record definite findings in the event there is any dispute with respect to the questions mentioned above. Unfortunately, the orders of the High Court are cryptic and the findings recorded by the High Court (extracted earlier in this order) are not clear with regard to the above mentioned questions." G

[7] Challenging the correctness of the said order, SLP 31051/2015 is filed by the RETURNED CANDIDATE. H

A "37. On the basis of aforesaid discussion, the questions posed by the Supreme Court in order dated 20-08-2015, are answered in the following manner:

Question No. 1: Whether there was one affidavit or two affidavits filed along with the election petition?

B **Answer:** Two affidavits were filed along with election petition.

Question No. 2: The actual date when those affidavits were filed?

Answer: Both affidavits were filed on 20-01-2014, the date on C which the election petition was filed.

Question No. 3: Whether either of the two affidavits is filed in compliance with the requirement of section 83(1)(c) of the Representation of the People Act, 1951?

Answer: The affidavit at page nos. 394 & 395 of the election D petition is filed in compliance with the requirement of proviso appended to section 83(1)(c) of the Representation of People Act, 1951.

38. I.A. No. 11665/2015 stands **disposed of** accordingly."

28. The said order is the subject matter of challenge in SLP No. E 31051 of 2015 filed by the RETURNED CANDIDATE. Apart from the various grounds on which the correctness of the findings recorded by the High Court are challenged, the RETURNED CANDIDATE took a preliminary objection that the order dated 29.9.2015 suffers from lack of jurisdiction and therefore, it is required to be set aside on that ground F alone[8].

29. According to the RETURNED CANDIDATE, I.A. No.11665 of 2015 ought to have been heard by a Division Bench because of the stipulation contained in Rule 13(2) of the High Court of Madhya Pradesh Rules, 2008. The said Rule stipulates that any application seeking G clarifications of an earlier order of the Court passed by a learned Judge,

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[8] *See* Ground No.8 of SLP (C) No.31051 of 2015

"Whether the impugned order has been passed in violation of the provisions of Chapter IV Rule 13 of the Madhya Pradesh High Court Rules, 2008? If yes, whether the impugned order is liable to be set aside on the ground alone?"

H

who retired thereafter, ought to be heard by a Division Bench[9] and Justice Solanki who passed the order in the OR VII R 11 petition retired subsequently. A

30. In response, it is submitted on behalf of the ELECTION PETITIONER that:

i) such an objection was never raised by the RETURNED CANDIDATE before the High Court when I.A. No.11665 of 2015 was being heard and therefore now cannot be permitted to raise the same; B

ii) that, the adjudication of an election petition is governed by Section 81A read with Section 86 of the Representation of the Peoples Act, 1951. Non-compliance, if any, with the Rules of the High Court framed under Article 225 does not render the order one without jurisdiction; C

iii) that, I.A. No.11665 of 2015 is "more about clarification of record, not clarification of order in strict sense". D

In other words, the clarification sought is not regarding either the interpretation of the earlier orders or the legal implications of the earlier orders but an enquiry into certain facts and the record of the High Court pertaining to the election petition. Therefore, Rule 13 would have no application. E

(iv) That the requirement of a matter being heard by a Division Bench under Rule 13(1)(b) is limited only to the cases of review, clarification or modification of only judgments,

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[9]The relevant portion of Rule 13 reads as follows:- F

"13. (1)(a) Save as provided in sub-rule (2), an application for review, clarification or modification of a judgment, decree or final order, passed by a Judge or Judges shall be heard by the same Judge or Judges:

Provided that such application filed in respect of an interlocutory order in a pending case shall be posted before the regular bench.

(b) **An application for review, clarification or modification of a judgment, decree or final order, passed by a Judge or Judges who** or one or more of whom is or are – G

(i) temporarily unavailable and in the opinion of the Chief Justice, the application, looking to the urgency of the matter, cannot wait for such Judge or Judges to resume work or,

(ii) **permanently unavailable, shall be heard**

(1) if the decree or order, review of which is applied for, was passed by a Judge sitting alone, by the regular division bench." H

A decrees and final orders but not to the interlocutory orders such as the order of which "clarification" was sought.

31. We reject the preliminary objection raised by the RETURNED CANDIDATE:

The Reason:

B

The adjudication of election petitions including the examination of all incidental questions in interlocutory proceedings arising during the course of the adjudication of the election petition is entrusted by Section 80A of the Representation of People Act, 1951 to the High Court within whose jurisdiction the election dispute arises. Section 80A(2) stipulates that the jurisdiction shall be exercised ordinarily by a Single Judge who is to be designated by the Chief Justice[10].

C

(a) Though the said Section indicates that the Chief Justice has a discretion to entrust trial of an election petition to a Bench consisting of more than one judges, such a discretion is to be exercised by the Chief Justice alone.

D

(b) The Rules of the High Court are framed by the High Court pursuant to the power vested in it under Article 225[11]. The exercise of such power is subject to the provisions of the Constitution and the "provisions of any law of the

E

[10] Sec. 80A(2) – Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice, shall, from time to time, assign one or more Judges for that purpose.

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

F

[11] **Article 225. Jurisdiction of existing High Courts.**—Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

G

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

H

appropriate legislature". Rule 13 mandates the listing of certain matters (nature of which is described therein) before a Division Bench. Such stipulation is contrary to the stipulation of Section 80A(2) that election petitions are to be tried by a single judge of the High Court leaving a discretion in the Chief Justice to decide whether in a given case, an election petition shall be heard by more than one Judge. Such a statutory discretion vested in the Chief Justice of the High Court cannot be curtailed by a rule made as the High Court in view of the clear declaration by the Constitution (in the opening clause of Article 225) that "any rule shall be subject to the law made by the appropriate legislature". A B C

We are, therefore, of the opinion that the objection raised by the RETURNED CANDIDATE is not tenable.

In view of the above conclusion, we do not wish to examine the other defences of the ELECTION PETITIONER in this regard. D

32. We now proceed to examine the appeals on their merits. The fate of these appeals would eventually depend upon the answer to the questions:

Whether the ELECTION PETITIONER filed two affidavits on 20.01.2014 at the time of presenting the election petition, the second of which being the affidavit (at page nos.394-395) referred to at Serial No.57A of the Index appended to the election petition purportedly in Form 25 to satisfy the requirement of law flowing from the proviso to Section 83(1); and if such an affidavit was in fact filed on 20.01.2014 as contended by the ELECTION PETITIONER whether such an affidavit satisfies the prescription contained in Form 25. E F

33. By order dated 29.09.2015 in IA No.11665 of 2015, the High Court recorded a finding that the ELECTION PETITIONER filed two affidavits along with the election petition on 20.01.2014 (the date on which the election petition was presented to the High Court). The High Court also recorded a finding that the affidavit at page nos.394-395 of the election petition which finds mention at Sr. No.57A in the index is "in compliance with the requirement of proviso appended to section 83(1)(c) of the Representation of People Act, 1951". G H

34. If the abovementioned two findings are legally tenable, three appeals (arising out of SLP Nos.33933 of 2014, 11096 of 2015 and 31051 of 2015) filed by the RETURNED CANDIDATE are to be dismissed and the appeal (arising out of SLP No.15361 of 2015) filed by the ELECTION PETITIONER would have to be allowed. Therefore, we proceed to examine the correctness of the abovementioned findings recorded by the High Court.

35. The correctness of the said findings is contested by the RETURNED CANDIDATE on the following grounds:

I. That at the earliest point of time, the High Court in its order dated 25.08.2014 recorded a finding that the ELECTION PETITIONER did not file the affidavit in the prescribed Form 25. Therefore, the finding to the contra in the order of the High Court dated 29.09.2015 is unsustainable.

II. In the order dated 25.08.2014, after recording a finding that the ELECTION PETITIONER did not file an affidavit in Form 25, the High Court recorded a further finding that such a defect is curable and, therefore, directed the ELECTION PETITIONER to cure the defect by filing a fresh affidavit in Form 25. The ELECTION PETITIONER without challenging the correctness of the finding that he failed to file an affidavit in Form 25 along with the election petition chose to comply with the consequential direction of filing afresh affidavit. Therefore, the ELECTION PETITIONER is precluded from contending at a later stage that the finding recorded by the High Court in its order dated 25.08.2014 is incorrect.

III. Rule 6(4) of the Rules relating to election petitions in the Madhya Pradesh High Court requires:

> "the Additional Registrar or Deputy Registrar shall affix his full signature to every page of the petition and the affidavit accompanying it."

and the affidavit at page nos.394 and 395 of the election petition does not contain the seal and signature of the Registrar of the High Court. Whereas all the other pages of the election petition contain the seal and signature of the Registrar. The absence of the seal and the signature of the Registrar only on the affidavit at page nos.394-395 must necessarily lead to an inference that such an affidavit must have been inserted in the

election petition sometime subsequent to the date of the presentation of the election petition. Such an inference would be further strengthened by the fact that in the index of the election petition, reference to the affidavit at page nos.394-395 is made at Entry No.57-A in the index. The said entry is an addition made in handwriting in an otherwise completely typewritten index.

Hence there is non-compliance with the requirement of the mandate contained in proviso to Section 83(1) warranting the dismissal of the election petition in limine.

36. The ELECTION PETITIONER's response to the above submissions of the RETURNED CANDIDATE is:

(i) the High Court did not record any finding in its order dated 25.08.2014 regarding the existence or otherwise of the affidavit at page nos.394-395 or the content of the said affidavit in spite of the specific plea of the ELECTION PETITIONER. The High Court only recorded a vague finding that the ELECTION PETITIONER "has not filed the affidavit in the prescribed Form 25 in accordance with Rule 94A of the Conduct of Election Rules, 1961". It is not clear from the said order as to which one of the two affidavits was in the mind of the High Court when it recorded such a conclusion. The High Court should have recorded a categoric finding in that regard in view of the specific pleading in the reply of the ELECTION PETITIONER that the ELECTION PETITIONER had in fact filed a separate affidavit to be found at page nos.394-395 to satisfy the requirement of law under the proviso to Section 83(1)[12]. In the absence of any such categoric finding it cannot be said that the findings recorded by the High Court in its order dated 29.09.2015 are inconsistent with the earlier finding recorded in the order dated 25.08.2014.

(ii) that there was no occasion for the ELECTION PETITIONER to challenge the said finding as the ultimate result of the order was in his favour. It is also submitted that though the ELECTION PETITIONER did not challenge the finding recorded by the High Court in its order dated 25.08.2014, the ELECTION PETITIONER is entitled to dispute the

[12] Exact content of reply of the ELECTION PETITIONER in this regard is also extracted at para 10 supra.

A correctness of the finding as and when such a finding is sought to be pressed into service against him.

(iii) Coming to the question of filing a fresh affidavit in obedience of the consequential direction of the High Court, the ELECTION PETITIONER submitted that such a course of B action was pursued by him by way of abundant caution.

(iv) It is submitted by the ELECTION PETITIONER with regard to the absence of the signature of the Registrar on the affidavit at page nos.394-395 that though it is the duty of the Registrar of the High Court to sign on each page of the election petition C and the affidavit filed alongwith the election petition, if the Registrar failed in his duty the ELECTION PETITIONER cannot be penalized by drawing an inference that the affidavit was not presented along with the election petition. In this regard, the ELECTION PETITIONER relied upon the well-settled principle of law that the act (which includes an omission) D of the court shall not prejudice the rights of any party.

37. We reject submissions of the RETURNED CANDIDATE for the following reasons:

(i) The 1st submission of the RETURNED CANDIDATE that E the subsequent and conflicting finding is not legally tenable, if at all is based on any legal principle, it is based either on the doctrine of *res judicata* or some principle analogous to it based on public policy that there must be finality to the judicial orders. Even if the principle of *res judicata* is invoked, (we only presume without examining the applicability of the same), what is barred under F Section 11 of CPC is the adjudication of an issue which was directly and substantially in issue in a former suit between the same parties and has been heard and finally decided.

(ii) The question whether two affidavits were filed along with the Election petition though was not directly in issue as the G RETURNED CANDIDATE never filed a rejoinder (to the reply of the ELECTION PETITIONER wherein it was stated that he had filed two affidavits alongwith the election petition). In deciding the OR VII R 11 petition the High Court never examined the question (it is an issue of fact) whether there were two affidavits as pleaded by the ELECTION PETITIONER in his reply to the H

said petition. We have already recorded that the order in OR VII R 11 petition is too casual. It does not take note of either the facts in issue or identify the point to be decided. Any finding of fact recorded in such circumstances is required to be set aside if appealed against by the aggrieved party if such an order is an appealable order. Since the learned Judge dismissed the OR VII R 11 petition though the finding is adverse to the ELECTION PETITIONER, he need not have filed an appeal[13].

(iii) Therefore, we do not see any legal principle on the basis of which the RETURNED CANDIDATE can successfully contend that in view of the finding recorded in the order dated 25.08.2014 the High Court could not have recorded a finding in IA No.11665 of 2015 that two affidavits were filed along with the Election petition.

(iii) We now deal with the submission of the RETURNED

[13] **Hardevinder Singh v. Paramjit Singh, (2013) 9 SCC 261, para 21 at page 268:**

21. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi v. Ram Phal*, (2003) 9 SCC 606, it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him **or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any findingadverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection** to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code.

A CANDIDATE regarding the absence of the seal and signature of the Registrar of the High Court on the affidavit at page nos.394-395.

a) The High Court in its order dated 29.9.2015 in I.A. No.11665 of 2015 recorded a finding:

B "24. ... However, the Registrar, in compliance with sub-rule (4) of rule 8, has affixed his seal and signatures at every page of the election petition and the affidavit at page no.70 and 71. However, no such seal or signature of the Registrar is to be found upon the affidavit at page nos.394 & 395. ..."

C Further, at para 25 of the order, it is recorded:

"25. In this regard, it has to be kept in mind that all official acts are presumed to be properly done. It is true that affidavit at page nos.394 & 395 does not bear the seal or signatures of the Registrar; however, it appears that it was not sealed and signed D by the Registrar because it was annexed almost at the end of the petition. Since, as per rules, documents annexed to an election petition are not required to be signed and sealed by the Registrar, none of the documents filed along with the petition from serial No.72 to Serial No.393 bears his seal and signatures. E Probably, nobody pointed out to the Registrar that there is another affidavit at page no.394; therefore, it was not sealed and signed like other documents."

b) At the outset, it may be mentioned that there is a typographical error in the abovementioned order. The relevant rule of the High F Court dealing with the matter is Rule 6(4) but not 8(4). Rule 6 reads as follows:

"Chapter VII

Rules Relating to Election Petitions

Rule 6 (1) Every Election Petition complete in all respects, shall G be presented during the Court hours to the Additional Registrar or Deputy Registrar Judicial, at Jabalpur.

(2) The name of the person presenting an Election petition, with a description of the capacity in which he is presenting it, the date and hour of presentation and any other particulars considered H necessary shall be endorsed in the margin of first page of the

petition by the Additional Registrar or Deputy Registrar under his own signature.

(3) The Additional Registrar or Deputy Registrar shall have the petition examined in order to find out that all the requirements of the Representation of the People Act, 1951, and these rules have been complied with.

(4) The Additional Registrar or Deputy Registrar shall affix his full signature to every page of the petition and the affidavit accompanying it.

(5) The Additional Registrar or Deputy Registrar, after examining the petition, shall record his opinion on the opening order-sheet in the following:—

"Presented on ..... by ..... Properly
drawn up, apparently within time and properly stamped."

It can be seen from sub-rule (4) that the concerned Registrar "shall affix his full signature to every page of the petition and the affidavit accompanying it".

c) The failure of the Registrar to comply with the requirement of sub-rule (4) is sought to be explained by the High Court by saying that such a lapse occurred probably because nobody pointed out to the Registrar regarding the existence of affidavit at page nos.394-395. We are of the opinion that such a conclusion is not tenable. Rule 6(4) casts a mandatory duty on the Registrar to sign on each page of the election petition and also the affidavit filed along with the election petition. Such a mandatory duty must be performed irrespective of the fact whether somebody points out to the Registrar or not regarding the existence of the affidavit.

d) If the existence of the 2nd affidavit at page nos.394-395 of the ELECTION PETITIONER is not in dispute but the question is whether the non-compliance of the rule by the Registrar is fatal to the election petition, perhaps the answer would be that "it is not". Because it is the settled proposition of law that the act or omission of the Court shall not harm any party.

e) But when the question is whether such an affidavit was filed along with the election petition on 20.01.2014, different considerations arise. The question whether the ELECTION

A PETITIONER filed the 2nd affidavit is a pure question of fact. The burden of proving such a fact in law is on the ELECTION PETITIONER if such a question is really in issue. Because if he failed, the allegations of the commission of corrupt practices by the RETURNED CANDIDATE cannot be adjudicated in the absence of an affidavit in Form 25. However, such a question was **never in issue** in OR VII R 11 petition.

38. As already noticed at para 10 (supra) at the earliest point during the course of the proceedings of the election petition when the question arose whether an affidavit in Form 25 was filed or not, the ELECTION PETITIONER clearly took a stand that there was an affidavit at page nos.394 and 395. According to him, the said affidavit is in Form 25 contemplated in proviso to Section 83(1). The RETURNED CANDIDATE never disputed the statement (of the ELECTION PETITIONER) by filing a Rejoinder to the above-mentioned stand taken in the ELECTION PETITIONER's reply dated 11.7.2014 in the OR VII R 11 petition. The RETURNED CANDIDATE admits that at least by 18.6.2014 - the date on which he received summons, a copy of the election petition along with Annexures including the affidavit at page nos.394-395 of the election petition was available on record. But his case **NOW** is that such an affidavit was not filed along with the election petition within the period of limitation, but must have been inserted in the election petition sometime in the interregnum period between 22.1.2014 (the date on which the period of limitation for filing the election petition expired) and 18.6.2014.

39. But the objection of the RETURNED CANDIDATE in OR VII R 11 petition was only that the "affidavit sworn and filed **along with the** petition by the petitioner is not in conformity with Form 25 of the Conduct Rules, 1961." From the language of OR VII R 11 petition, it is clear that the RETURNED CANDIDATE's objection is only regarding the format and content of the affidavit but not regarding the date of the filing of the affidavit, on the other hand, the employment of the expression "along with" clearly indicates that the RETURNED CANDIDATE also at that point of time accepted that the affidavit at page nos.394-395 was presented on the same date i.e. 20.1.2014. Therefore, the question of proof of the fact which was never in issue does not arise much less the question of burden of proof.

40. The fact that the ELECTION PETITIONER chose to file

yet another affidavit pursuant to the order dated 25.8.2014 is another circumstance sought to be relied upon by the RETURNED CANDIDATE in support of his submission that there was no second affidavit filed along with the election petition. A

41. We are of the opinion that in the circumstances of the case, the inference such as the one suggested by the RETURNED CANDIDATE cannot be drawn because the ELECTION PETITIONER in his reply to the OR VII R 11 petition (specifically stating that he had filed an affidavit in Form 25 along with the election petition) took a stand by way of abundant caution that if the court comes to a conclusion that his affidavit is found to be defective for any reason, he is willing to file further affidavit to cure the defect. Unfortunately, the High Court took a shortcut without examining the question whether the affidavit at page nos.394-395 satisfies the requirement of Form 25 and (without recording a definite finding in that regard) simply recorded a conclusion that the defect is curable and the same can be cured by filing an affidavit in the Form 25". B C D

42. Mr. P.P. Rao, learned senior counsel submitted that the ELECTION PETITIONER having availed the benefit of the order in OR VII R 11 petition by filing another affidavit cannot now question the correctness of the finding that he did not file an affidavit which is compliance with proviso to Section 83(1). In support of the said submission, Mr. P.P. Rao relied on two judgments i.e. ***State of Punjab & Others v. Krishan Niwas,*** (1997) 9 SCC 31 and ***Banku Chandra Bose & Another v. Marium Begum & Another***, AIR 1917 Cal. 546. E

43. In our opinion, the principle laid down in the said judgments is of no relevance to the controversy on hand. The dispute on hand is regarding the existence of a fact which was never in issue in OR VII R 11 petition. The RETURNED CANDIDATE cannot shift his case from stage to stage. He cannot now be permitted to raise such a question of fact in the absence of an appropriate pleading and contend that the ELECTION PETITIONER is precluded from arguing that he had filed a 2nd affidavit along with the election petition by pressing into service a rule of estoppel. F G

44. In view of the foregoing discussion, Civil Appeal arising out of SLP (Civil) No.31051 of 2015 being without any merits is dismissed. As a consequence, Civil Appeals arising out of SLP (Civil) Nos.33933 of 2014 and 11096 of 2015 are also required to be dismissed and they H

A are accordingly dismissed.

45. Coming to the Civil Appeal arising out of SLP (Civil) No.15361 of 2015, the same is required to be allowed in view of the findings recorded by the High Court in I.A. No.11665 of 2015 which has become final by virtue of dismissal of Civil Appeal arising out of SLP (Civil) B No.31051 of 2015. The same is accordingly allowed.

46. In the facts and circumstances of the case, there will be no order as to costs.

Kalpana K. Tripathy Appeals disposed of.

C