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

\+ **WRIT PETITION (CIVIL) No. 750/2018**

Reserved on: 28th February, 2018

% **Date of Decision**: 23rd March, 2018

KAILASH GAHLOT & ORS. ..... Petitioners

Through Mr. K.V. Vishwanathan, Sr. Advocate with Mr. Manish Vashist, Mr. Sameer Vashist, Mr. J.P. Gupta, Mr. Rikky Gupta, Ms. Trisha Nagpal, Ms. Astha Gupta, Mr. Manashwy Jha and Mr. Ravi Raghunath, Advocates.

Versus

ELECTION COMMISSION OF INDIA & ORS. ..... Respondents

Through Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.

Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.

Mr. Anuj Aggarwal, ASC for GNCTD.

Mr. Mudit Gupta and Mr. Sangam Kumar, Advocates for R-4.

WRIT PETITION(CIVIL) No. 751/2018

RAJESH RISHI & ANR. ..... Petitioners

Through Mr. K.V. Vishwanathan, Sr. Advocate with Mr. Manish Vashist, Mr. Sameer Vashist, Mr. J.P. Gupta, Mr. Rikky Gupta, Ms. Trisha Nagpal, Ms. Astha Gupta, Mr. Manashwy Jha, Mr. Ashwin Kumar and Ms. Aditi Anil Davi, Advocates.

versus

ELECTION COMMISSION OF INDIA & ORS. ..... Respondents

Through Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.
Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.
Mr. Gautam Narayan, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 752/2018

ALKA LAMBA ..... Petitioner

Through Ms. Nishant Anand, Ms. Aswathy Menon and Mr. Nubair Alvi, Advocates.

versus

UNION OF INDIA, MINISTRY OF LAW AND JUSTICE AND ORS. ..... Respondents

Through Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.
Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.
Mr. Satyakam, ASC for GNCTD with Mr. Shashwat Parihar, Adv.

WRIT PETITION(CIVIL) No. 1121/2018

NARESH YADAV ..... Petitioner

Through Ms. Nishant Anand, Ms. Aswathy Menon and Mr. Nubair Alvi, Advocates.

versus

UNION OF INDIA, MINISTRY OF LAW AND JUSTICE AND ORS. .... Respondents

Through Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.
Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.
Mr. Naushad Ahmed Khan, ASC with Mr. Devesh Dubey and Mr. Sahid Hanief, Advocates for GNCTD

WRIT PETITION(CIVIL) No. 1122/2018

SHRI ADARSH SHASTRI AND ORS. ..... Petitioners

Through Mr. K.V. Vishwanathan, Sr. Advocate with Mr. Manish Vashist, Mr. Sameer Vashist, Mr. Rikky Gupta, Ms. Trisha Nagpal, Ms. Astha Gupta, Mr. Manashwy Jha, Mr. Duayan Jain and Mr. Sitwat Nabi, Advocates.

Versus

ELECTION COMMISSION OF INDIA AND ORS. ..... Respondents

Through Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.
Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.
Mr. Hetu Arora Sethi, ASC for R-3

WRIT PETITION(CIVIL) No. 1123/2018

SANJEEV JHA ..... Petitioner

Through: Ms. Nishant Anand, Ms. Aswathy Menon and Mr. Nubair Alvi, Advocates.

versus

UNION OF INDIA, MINISTRY OF LAW & JUSTICE & ORS. ..... Respondents

Through: Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.
Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.
Mr. Anuj Aggarwal, ASC for GNCTD

WRIT PETITION (CIVIL) No. 1124/2018

RAJESH GUPTA ..... Petitioner
Through Ms. Nishant Anand, Ms. Aswathy Menon and Mr. Nubair Alvi, Advocates.

versus

UNION OF INDIA AND ORS. .... Respondents
Through Mr. Sanjay Jain, ASG with Mr. Anil Soni, CGSC, Ms. Rajul Jain with Mr. Yuvraj Sharma, Advocates for UOI.
Mr. Amit Sharma, Mr. Dipesh Sinha, Ms. Ayiala Imti and Mr. Prateek Kumar, Advocates for ECI.
Mr. Naushad Ahmed Khan, ASC with Mr. Devesh Dubey and Mr. Sahid Hanief, Advocates for GNCTD.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

Writ petitioners, 20 in number, who were elected in February, 2015 as members of the Legislative Assembly of the National Capital Territory of Delhi have filed the afore-stated writ petitions challenging their disqualification. Prayer clause of the amended writ petition in the case of Kailash Gahlot, which is treated as lead case, reads as under:-

"1. A Writ of Certiorari or any other appropriate Writ to quash/set-aside the opinion dated 19.01.2018 rendered by the Respondent no.1 in case Reference no. 5 of 2015 bearing title as Prashant Patel vs. Praveen Kumar & 20 other MLA's being rendered without affording any opportunity of hearing to the Petitioners and being against the principles of natural justice and without considering the facts as well as law pleaded by the Petitioners before the Respondent No.1 and also being ultra vires, unconstitutional and null and void.

2. A Writ of Certiorari or any other appropriate Writ to Quash/Set-Aside the Notification Dated 20.01.2018 published in the Official Gazatte of India, Extraordinary, Part-II, Section 3-Sub Section (ii) bearing Number 293, Published on 21.01.2018 by Respondent No.2 being ultra vires, unconstitutional, null and void and against the principles of Natural Justice, which was issued in consequence of the opinion rendered by Respondent No.1.

3. A Writ of Mandamus or any other appropriate Writ directing Respondent No.1 to conduct the proceedings of Reference Case No. 5 of 2015 in accordance with law and by following and adhering to the principles of natural justice and further declare that till such time the re-hearing takes place the Petitioners shall continue to hold the post of Members of Legislative Assembly of Delhi.

3(a) A Writ of Certiorari or any other appropriate writ be passed declaring order dated 23.06.2017 passed by the Election Commission of India to be null and void or unsustainable in the eyes of law.

4. Any other Writ or other appropriate Writ in the facts of the present matter. "

2. The petitioners are primarily seeking setting aside and quashing of:

(i) Notification/order dated 20th January, 2018 under Section 15 (4) of the Government of National Capital Territory of Delhi

Act, 1991 ('GNCTD Act', for short) disqualifying them as members of the Legislative Assembly of the National Capital Territory of Delhi, in view of the opinion of the Election Commission of India (hereinafter referred to as 'ECI' and sometimes for convenience as Election Commission/ Commission) dated 19th January, 2018 in Reference Case No.5 of 2015.

(ii) ECI's opinion dated 19th January, 2018 that the petitioners on appointment as Parliament Secretaries to the Ministers vide order dated 13th March, 2015 had held "office of profit under the government" and thus, they had incurred disqualification to serve as a member of the Legislative Assembly.

(iii) ECI's order dated 23rd June, 2017 refusing to accept petitioners' objection to the Reference as the order dated 13th March, 2015 appointing the petitioners as Parliament Secretaries had been set aside by the Delhi High Court in Writ Petition (Civil) No.4714/2015 vide judgement dated 8th September, 2016.

Preliminary Objection of the ECI

3. Before we refer to the facts, we must deal with and reject the preliminary objection of the ECI that the writ petitions should be dismissed as the petitioners have not challenged the order of the President of India dated 20th January, 2018, but have challenged Notification of the same date.

4. Petitioners vide prayer clause 2 seek issue of Writ of Certiorari or any other appropriate Writ for quashing/setting aside Notification dated 20th January, 2018 published in the Official Gazatte on 21st January, 2018, being

ultra vires, unconstitutional etc, issued in consequence of the opinion rendered by the ECI. Notification dated 20th January, 2018 that publishes the order passed by the President of India begins - "The following Order made by the President is published for general information". Thereafter, the order made by the President dated 20th January, 2018 is extracted and reproduced. Opinion of the ECI dated 19th January, 2018 and other orders of ECI are enclosed as annexure to the Notification. Challenge to the Notification is undoubtedly and without doubt challenge to the Presidential Order dated 20th January, 2018. We would read prayer No.2 holistically and appropriately and not to dislodge and dismiss the writ petitions holding that the order dated 20th January, 2018 passed by the President is not under challenge and question. Therefore, contention of ECI that opinion of ECI is under challenge and not the decision of the President is fallacious and incorrect.

Scope and Ambit of power of judicial review

5. We would at this stage also examine the scope and ambit of power of judicial review which the constitutional courts exercise when examining question of disqualification of a member of the Legislative Assembly taken by the President or the Governor pursuant to opinion given by the Election Commission.

6. Scope and ambit of power of judicial review exercised by superior courts in writ petitions filed challenging orders on the question of disqualification of a member of the Legislature under Articles 103, 192, Section 14(4) of the Government of Union Territories Act, 1963 and Section 15 of the GNCTD Act is not *res-integra* and is settled by several decisions.

Decision of Constitutional Bench of six judges relied upon by counsel for both sides in ***Union of India versus Jyoti Prakash Mitter,*** (1971) 1 SCC 396, was a case relating to dispute regarding date of birth and determination of the question of age under clause (3) of Article 217 of the Constitution. The clause stipulates that question as to the age of the judge of the High Court shall be decided by the President after consultation with the Chief Justice of India and decision of the President shall be final. The judgment holds:

> "32. It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217(3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Article 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution-makers have thought it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion or appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from a Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against

him after the same is disclosed to him. The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the Rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the Courts determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion."

7. In ***Election Commission of India versus Bajrang Bahadur Singh and Others***, (2015) 12 SCC 570, the Supreme Court had observed that there was always a possibility that in a given case decision of the Governor regarding disqualification could be challenged before the High Court and can be held to be unsustainable. Footnote refers to, with affirmation for election cases, the decision in the case of ***Jyoti Prakash Mitter*** (supra). Reference was also made to Constitution Bench's decision in ***Kihoto Hollohan versus Zachillhu and Others***, 1992 Supp (2) SCC 651 and ***Dr. Mahachandra Prasad Singh versus Chairman, Bihar Legislative Council***, (2004) 8 SCC 747.

8. In ***Kihoto*** case, the Constitution Bench was dealing with the validity of Constitution 52nd Amendment Act, 1985 by which paragraphs were added to Tenth Schedule as a declaration that decision of the speaker/chairman shall be final and no Court shall have any jurisdiction in

respect of any matter incorporated in Article 192 of the Constitution. Constitutional Bench observed that the concept of statutory finality embodied in the provision would not detract from or arrogate power of judicial review under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides or non-compliance of rules of natural justice and perversity were concerned.

9. Equally important are the observations of the Full Bench of Madras High Court in ***K.S. Haja Shareff versus His Excellency Governor of Tamil Nadu***, ***Madras and Others***, AIR 1985 Madras 55, which had the occasion to consider scope of judicial review of an order under Article 192 (1) and had observed:-

> "**15.** Considerable reliance is placed by learned counsel for the petitioner on *Union of India* v. *Jyoti Prakash Mitter*, (1971) 1 SCC 396 : AIR 1971 SC 1093, which dealt with the scope of Art. 217(3) and it was held therein that, when taking a decision under the said Article the President performs a judicial function of grave importance under the scheme of the Constitution, and notwithstanding the declared finality of the order of the President, the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed (i) on collateral considerations or (ii) the rules of natural justice were not observed or (iii) that the President's judgment was coloured by the advice or representation made by the Executive, or (iv) it was founded on no evidence; and that Courts will not sit in appeal over the judgment of the President nor determine the weight that should be attached to the evidence, since appreciation of evidence is entirely left to the President and it is not for Court to hold that, on the evidence placed before the President on which the conclusion was founded, if they were called upon to decide they would have reached some other conclusion. A larger Bench of the Supreme Court by a later decision in *Union of India* v. *Jyoti Prakash Mitter*, (1971) 1 SCC 396 : AIR 1971 SC 1093, having dealt with, as to what can be the finality that could

be claimed when a decision is taken by a Constitutional functionary the preliminary objection taken on behalf of respondents 1 and 2 and also adopted by respondents 5 and 7, has to be rejected. If it be made out that, any of the vitiating factors as enumerated in the said decision could be made out, in a decision arrived at under Art. 192(1), then, such a decision could be set aside by filing a writ petition under Art. 226. Therefore, it cannot be held that merely because a decision had been arrived under Art. 192(1), no writ petition could be filed. But, to what extent in such proceeding, on being initiated, a petitioner could secure relief, would depend upon himself establishing about the existence of the vitiating factors, spelt out in *Union of India* v. *Jyoti Prakash Mitter*, (1971) 1 SCC 396 : AIR 1971 SC 1093. Hence, as against a decision pronounced under Art. 192(1), a writ petition could be entertained under Art. 226 by a High Court.

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23. If a Constitutional functionary, in whom power had been conferred to take a decision which has the seal of finality, wrongly interprets the Constitutional provisions, then, the decision so arrived at will have to be set aside by issue of a writ of certiorari, because it would not be a valid order in the eye of law. Hence, we are of the view, that there can be a judicial review of an order passed under Art. 192(1) on this ground also."

Making reference to ***Rex versus Northumberland Compensation Appeal Tribunal, Ex Parte Shaw***, 1952-1 K.B. 338, it was observed that the word "final" was not enough, for it would mean subject to recourse to Certiorari. The word "final" makes the decision final on facts but not final in law and, therefore, Certiorari could still be issued when required and necessary even if the decision was made by the statute as final.

10. This decision and ratio with approval was followed by the Karnataka High Court in ***A.K. Subbaiha versus Ramakrishna Hegde***, ILR 1993 KAR 2528 in the following manner:-

> ".....The aforesaid Decision of the Full Bench is on the same lines as the decisions of the Supreme Court to which we have made reference. Therefore, it cannot be said that only because it is provided under Article 192(1) that the decision of the Governor shall be final, it cannot be reviewed in Judicial Proceedings before the High Court under Article 226. On the contrary, a conjoint reading of the aforesaid decisions of the Supreme Court and the Full Bench of the Madras High Court which has expressed the view with which we respectfully concur, it becomes clear that if it is shown to the High Court under Article 226 that the decision of the Governor based on opinion of the Election Commission was based on no evidence whatsoever regarding the alleged disqualification of the Member or the decision was perverse, it could be reviewed in Judicial Proceedings. It is of course well settled that re-appreciation of such evidence is out-side the purview of such proceedings. In the light of the aforesaid limited scope of Judicial Review, we will have to see whether the learned single Judge was justified in granting relief under Article 226 to respondent-1. We shall now deal with second preliminary objection of the learned Counsel for the appellant as to the maintainability of the Writ Petition moved by respondent-1."

11. We will strictly go by the aforesaid ratio and dictum while examining the contentions of the petitioners, whether the order/notification dated 20th January, 2018 and opinion of the ECI dated 19th January, 2018 and order dated 23rd June,2017 are contrary to law and should they be struck down.

<u>Grounds of challenge</u>

12. The petitioners have challenged the order/notification dated 20th January, 2018 and the opinion of the ECI dated 19th January, 2018 primarily on the following grounds:

(i) Order of Reference under Section 15 was not valid in the eyes of law for a formal reference was not made by the President and the complaint/representation on the basis of which reference was made was unsigned.

(ii) ECI's order dated 23rd June, 2017 refusing to accept petitioners' objection to continuance of the reference was invalid and bad in law as the Delhi High Court, vide order dated 8th September, 2016, had struck down order dated 13th March, 2015 appointing the petitioners as Parliamentary Secretaries.

(iii) There has been violation of statutory rights and principles of natural justice on the following grounds: (a) oral hearing and arguments were not heard by the ECI before rendering opinion dated 19th January, 2018; (b) Mr.O.P. Rawat who had earlier recused, had re-joined the proceedings without information and knowledge of the petitioners. Mr.O.P. Rawat could not have re-joined and opined vide opinion dated 19th January, 2018 after recusal on 19th April, 2017 which renders the opinion invalid; (c) Mr. Sunil Arora took charge as a member of the ECI on 19th January, 2018 and had not participated in any hearing or proceedings in the present reference, yet he was a signatory to the opinion dated 19th January, 2018. Principle that, one who hears should decide has been violated.

(iv) ECI's opinion dated 19th January, 2018 was flawed on both facts and law. Legal principle and tests applied to determine and decide when an elected person would be disqualified for holding an office of profit under the Government, were erroneous and contrary to law. Factually also, the opinion was incorrect and draws wrong and unsustainable inferences and conclusions.

Facts:

13. The petitioners, who belong to Aam Aadmi Party, were elected to the Legislative Assembly of the National Capital Territory of Delhi in February, 2015. They represent different constituencies.

14. By office order F.No. 17/57/2012/GAD/Par.Secy./356 dated 13th March, 2015 issued by the Government of NCT of Delhi, General Administration Department, petitioners were appointed as Parliamentary Secretaries to the Ministers in the Government of NCT of Delhi as indicated against their names with immediate effect. The relevant portion of the order reads as under:-

> "The Chief Minister, Delhi is pleased to appoint the following Members of Delhi Legislative Assembly as Parliamentary Secretary to the Ministers, Govt. of NCT of Delhi as indicated against their name with immediate effect:-

S.No	Name of MLA	Parliamentary Secretary to
01	Sh. Praveen Kumar	Minister of Education
02	Sh Sharad Kumar	Minister of Revenue
03	Sh. Adarsh Shastri	Minister of Information and Technology

04	Sh. Madan Lal	Minister of Vigilance
05	Sh. Shiv Charan Goel	Minister of Finance
06	Sh. Sanjeev Jha	Minister of Transport
07	Ms. Sarita Singh	Minister of Employment
08	Sh. Naresh Yadav	Minister of Labour
09	Sh. Jarnail Singh (Tilak Nagar)	Minister of Development
10	Sh. Rajesh Gupta	Minister of Health
11	Sh. Rajesh Rishi	Minister of Health
12	Sh. Anil Kumar Bajpai	Minister of Health
13	Sh. Som Dutt	Minister of Industires
14	Sh. Avtar Singh Kalka	Minister of Gurudwara Elections
15	Sh. Vijender Garg Vijay	Minister of PWD
16	Sh. Jarnail Singh (Rajouri Garden)	Minister of Power
17	Sh. Kailash Gahlot	Minister of Law
18	Ms. Alka Lamba	Minister of Tourism
19	Sh Manoj Kumar	Minister of Food and Civil Supplies
20	Sh Nitin Tyagi	Minister of Women and Child and Social Welfare
21	Sh. Sukhvir Singh	Minister of Languages and Welfare of SC/ST/OBC

The Parliamentary Secretaries will not be eligible for any remuneration or any perks of any kind from the government. However, they may use government transport for official

purposes only and office space in the Ministers office would be provided to them to facilitate their work.

This issues with the concurrence of Hon'ble Speaker, Delhi Vidhan Sabha."

15. President of India on 22nd June, 2015 received an unsigned petition, sent by one Mr. Prashant Patel, Advocate, who is respondent No.4 in the lead case i.e. W.P. (C) No.750/2018, ***Kailash Gahlot & Ors. versus Election Commission of India & Ors.***, referring to the order dated 13th March, 2015 and asserting that appointment of the petitioners as Parliamentary Secretaries with entitlement to use Government transport and Ministers' office space would result in their disqualification as members of the Legislative Assembly. Post of Parliamentary Secretary was "office of profit held under the Government", which post had not been excluded or exempted by enacting any law. A copy of the order dated 13th March, 2015 was enclosed.

16. Mr. Purshottam Das, Under Secretary, President's Secretariat by letter dated 22nd July, 2015 wrote to the Chief Election Commissioner enclosing the petition received from Mr. Prashant Patel for appropriate attention. Action taken on the petition was requested to be communicated to Mr. Prashant Patel directly, under intimation to the Secretary. A copy of this letter was also sent to Mr. Prashant Patel with a request to "liaise" with the Election Commissioner directly for further information in the matter.

17. Mr. N.T. Bhutia, Under Secretary, ECI by communication dated 24th August, 2015 returned the aforementioned note with the original petition to Mr. Purshottam Das, Under Secretary, President's Secretariat stating that as per Section 15(3) of the GNCTD Act, question whether a member of the

Legislative Assembly had incurred disqualification under sub-section (1) has to be referred by the President. Sub-section (4) to Section 14 states that the President should obtain opinion of the ECI before giving decision on the said question. Note/letter dated 22nd July, 2015, could not be treated as reference made by the President under Section 15 (4) of the GNCTD Act. Note was accordingly returned with the observation that a formal reference under Section 15 (4) should be sent if the opinion of the ECI was required.

18. By another note/letter dated 20th October, 2015, Mr. N. K. Sudhanshu, Director, President Secretariat, forwarded the communication dated 19th June, 2015 received from Mr. Prashant Patel to the ECI for deemed necessary action. By letter dated 5th November, 2015, Mr. N.T. Bhutia, Under Secretary, ECI informed Mr. N.K. Sudhanshu, Director, President Secretariat that the note could not be treated as reference to ECI and in case opinion of the Commission was required, a formal reference seeking opinion was required to be made. Attention was invited to the earlier letter of the Commission dated 24th August, 2015 and Section 15 (4) of the GNCTD Act.

19. Ms. Omita Paul, Secretary to the President of India thereafter wrote letter dated 10th November, 2015 to Dr. Nasim Zaidi, then the Chief Election Commissioner, which reads as under:-

> "This has reference to Election Commission of India communication No. 113/Misc./2015/RCC/769 dated 5 November 2015 regarding disqualification of 21 MLAs of Delhi Legislative Assembly.
>
> Kindly find enclosed a petition received from Shri Prashant Patel, Advocate, East of Kailash, New Delhi alleging

disqualification of 21 MLAs of Aam Admi Party for being a member of the Legislative Assembly of NCT of Delhi. Since the petition seeks to invoke provisions under section 15 of the Government of National Capital Territory of Delhi Act, 1991, the opinion of the Election Commission sought in the matter."

Upon receipt of this letter, Reference No. 5 of 2015 was registered by the ECI for giving opinion under Section 15 (4) of the GNCTD Act.

Validity of Reference

20. Petitioners have challenged validity of reference. Contention is that the letter dated 10th November, 2015, written by Ms. Omita Paul, Secretary to the President of India cannot be treated as a reference made by the President under Section 15 (4) of the GNCTD Act. Submission is that the letter dated 10th November, 2015 was not in hand and signed by the President of India and the letter did not in specific terms state that the President had sought opinion of the ECI. Reference was no reference in the eyes of law.

21. Section 15 of the GNCTD Act is as under:-

"**15. Disqualifications for membership**:

(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly :-

(a) if he holds any office of profit under the Government of India or the Government of any State or the Government of Union Territory other than an office declared by law made by Parliament or by the Legislature of any State or by the Legislative Assembly of the Capital or of any other Union territory not to disqualify its holder ; or

(b) if he is for the time being disqualified for being chosen, as, and for being, a member of either House of Parliament under the Provisions of sub-clause (b), Sub-clause (c) or Sub-clause (d) of

clause (1) of article 102 or of any law made in pursuance of that article.

(2) For the purposes of this section, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State or the Government of any Union territory by reason only that his is a Minister either for the Union or for such State or Union Territory.

(3) If any question arises as to whether a member of the Legislative Assembly has become disqualified for being such a member under the provisions of sub-section(1), the question shall be referred for the decision of the President and his decision shall be final.

(4) Before giving any decision on any such question, the President shall obtain the opinion of the Election.

Commission and shall act according to such opinion."

22. Clause (a) to sub-section (1) states that a member of the Legislative Assembly shall be disqualified if he holds any office of profit under the Government of India, Government of any State or the Government of Union Territory, other than an office declared by law by Parliament or Legislature of the State or Legislative Assembly of the Capital or any other Union Territory not to disqualify its holder. We need not refer to clause (b) to sub-section (1) as it is not relevant. Sub-section (2) states that a person shall not be deemed to hold an office of profit under the Government of India or any State or Union Territory by reason only that he is a Minister either for the Union or such State or Union Territory. Therefore, a Member of the Legislative Assembly, who is a Minister and part of the political executive, is deemed not to hold "office of profit" under the Government of India or any State or a Union Territory. Sub-section (3) states that where a question arises as to whether a member of the Legislative Assembly has incurred

disqualification under the provisions of sub-section (1), the question shall be referred for decision of the President and his decision shall be final. Sub-section (4) states that before giving any decision, the President shall take or obtain opinion of the ECI and shall act in accordance with such opinion.

23. It is judicially settled that the President is bound to refer to any such matter to ECI and to act and follow the opinion of the ECI. Decision of the Constitution Bench of five Judges in ***Brudaban Nayak versus Election Commission of India and Another***, (1965) 3 SCR 53 relied upon by the petitioners, had interpreted Article 102 of the Constitution and held that the words "the question shall be referred for the decision of the Governor" used in the said Article did not import assumption that any other authority has to receive the complaint and after a prima facie and initial investigation, send it or refer it to the Governor for decision. The words emphasise that when a question of disqualification of a member arises, the Governor alone or no other authority can decide it and that it was mandatory for the Governor to forward question of disqualification of a member of the Legislative Assembly to the Election Commission for its opinion. It was observed that some complaints could be frivolous or fantastic and in such cases, the Election Commission would find no difficulty in expressing its opinion that they should be rejected straightway. No person, who has incurred any disqualification, was entitled to continue as a member of the Legislative Assembly. Thus, a citizen was entitled to make a complaint to the Governor alleging that an elected member of legislative assembly had incurred one or the other disqualification and, therefore, should vacate the seat. A person, who has incurred disqualification, was not entitled to continue as a member of the Assembly as he had forfeited his status by a subsequent

disqualification. Thus, the President in the context of Section 15 of GNCTD Act has to act in his personal capacity, but by referring the question of disqualification to ECI and act as per the opinion of ECI.

24. In ***Election Commission of India versus N.G. Ranga and Others,*** AIR 1978 SC 1609, reference was made to decision in ***Brudaban Nayak*** (supra) and provisions of Articles 191, 192, 102 and 103 of the Constitution and observations in the latter case that Article 192 did not permit of any limitation and that all that the clauses required was that the question of disqualification should arise, and it did not matter in what circumstances. Further in case the complaint made was frivolous or fantastic, the Election Commission would have no difficulty in expressing its opinion that the allegation should be rejected. This, however, did not mean that issue of disqualification contemplated under Article 192(1) at the first instance had not arisen. Lastly, it was observed that the contention of the Government that it was for the Governor and not for the Election Commission to hold an enquiry since the Constitution had required the Governor to decide the particular question was unfounded. Decision of the Election Commission was decisive and therefore, it was legitimate to assume that when a complaint was received by the Governor, it would be forwarded to the Election Commission, who had power and jurisdiction to go into the matter. It was observed that the Election Commission had the authority to issue notice to the person against whom the complaint was made, calling upon him to file his statement and produce evidence in support of his case.

25. In ***Election Commission of India & Another versus Dr. Subramaniam Swamy and Another,*** (1996) 4 SCC 104, reference was made to ***N.G. Ranga*** (supra), interpreting Article 103 of the Constitution,

language of which was verbatim as Article 192 except in the former case the decision was to be taken by the President as in the present enactment. The Constitution Bench reiterated that the President was bound to seek and obtain opinion of the Election Commission and only thereafter decide the issue in accordance therewith. Election Commission's opinion was decisive.

26. We do not find any merit in the contention of the petitioners that the letter dated 10th November, 2015 written by the Secretary to the President of India cannot be treated as a reference made by the President under Section 15(3) of the GNCTD Act to the ECI. We have referred to the earlier correspondence between the President's office and ECI and quoted the letter dated 10th November, 2015 invoking provisions of Section 15 of the GNCTD Act. ECI was required by this letter to give their opinion on the petition made by Mr. Prashant Patel alleging disqualification of members of the Legislative Assembly of Delhi. Noticeably, the ECI had earlier refused to entertain and had returned two letters/notes on the ground that the President had not sought opinion of the ECI under Section 15 (4) of the GNCTD Act. Contention that the Secretary to the President of India had acted on her own without direction of the President of India is rather far-fetched and unconvincing. Submission at best asserts that the letter dated 10th November, 2015 could have been better worded and words "on the direction or as desired by the President" would have been more appropriate. Use of apt words or semantics would not negate that the letter dated 10th November, 2015 by the Secretary to the President of India was on behalf and at the behest of the President who had sought opinion of the ECI in the matter relating to disqualification. The letter was not a personal communication of Ms.Omita Paul, also working as Secretary to the

President. The letter was an official communication sent by the Secretary on behalf of the President referring to Section 15 of GNCTD Act and requiring the ECI to give their opinion. Clearly, the President had sought opinion from ECI.

27. ECI has appropriately referred to past practice of letters from President's office forwarding complaints seeking disqualifications under Article 103 of the Constitution. Further, petitioners had not pressed this objection in the proceedings before the ECI, when specific objection was raised to the written signed complaint of Mr. Prashant Patel being taken on record, which was decided partly in favour of the petitioners by the ECI vide order dated 16th September, 2016.

28. Notification dated 20th January, 2018 settles this issue beyond any debate and challenge. Notification dated 20th January, 2018 which publishes the order dated 20th January, 2018 signed by the President, begins- " Whereas a reference dated 10th November, 2015 was made to the Election commission of India under Section 15 (4) of the Government of National Capital Territory of Delhi Act,1991". Order of the President states that reference was made pursuant to petition dated 19th June, 2015 filed by Mr. Prashant Patel before the President of India on 22nd June, 2015 regarding disqualification of members of Delhi Legislative Assembly on the ground of holding “office of profit" under the Government of Delhi as Parliamentary Secretaries to the Ministers. The last paragraph states that in the light of the opinion expressed, in exercise of power conferred under Section 15 (4) of the GNCTD Act, the President hereby holds that the 20 petitioners stand disqualified from being members of the assembly. To allege and assert that

reference was made and opinion was sought by Ms. Omita Paul and not by the President has to be rejected.

29. Similarly, submission that the President should not have acted and made reference on the basis of the unsigned petition by Mr. Prashant Patel is unacceptable and deserves rejection. Section 15 (3) of the GNCTD Act stipulates that if a question arises whether a member of the Legislative Assembly has incurred disqualification under sub-section (1), the question shall be referred for the decision of the President, whose decision shall be final. Sub-section (3) to Section 15 does not stipulate any procedure or the manner in which the question can be raised before the President. Issue and question with regard to disqualification could be raised and arise before the President in varied and diverse manner and ways. Sub-section (3) does not provide that the complaint should be made in writing or signed by the person. When issue of disqualification arises or is raised in any form, the President must make reference to the ECI under sub-section (4) to Section 15 for their opinion, for the said Sub-Section mandates that before giving any decision, the President shall obtain such opinion. President does not in this sense decide. He acts on and as per the opinion given by the ECI, which is binding. Therefore, it was the ECI to examine, consider and opine on the petition sent to them.

30. The petitioners do not dispute the issue and existence of the order dated 13th March, 2015 and also that this order was enclosed with the petition dated 19th June, 2014, received in the office of President on 22nd June, 2015.

31. It is also apparent that the ECI had subsequently written to Mr. Prashant Patel, who had then made a signed petition dated 28th December,

2015. We do not find anything wrong in ECI's taking the signed petition from Mr. Prashant Patel on record for a number of reasons including Section 146B of the Representation of People Act, 1951 ('1951 Act', for short), as per which, the ECI can follow its own procedure. We would also reject the contention of the petitioners that the ECI by taking the written petition dated 28th December, 2015 on record had exceeded their jurisdiction and scope. Pertinently, the order of the ECI dated 16th September, 2016 on the aspect has not been specifically challenged.

Validity of order dated 23rd June, 2017 of ECI

32. Delhi High Court vide order dated 8th September, 2016 passed in W.P.(C) No.4714/2015 (***Rashtriya Mukti Morcha versus Government of NCT of Delhi***) had struck down appointment of Parliamentary Secretaries to the Ministers vide order dated 13th March, 2015, which reads:

> "1. This petition by way of Public Interest Litigation has been filed challenging the order of the Government of Delhi dated 13.03.2015 appointing the Members of Delhi Legislative Assembly named therein as Parliamentary Secretaries to the Ministers, Government of NCT of Delhi.
>
> 2. One of the grounds of challenge is that the said order was passed without communicating the decision to the Lieutenant Governor for his views/concurrence as required under Article 239AA of the Constitution of India.
>
> 3. Having considered the very same issue in W.P.(C) No.5888/2015 and batch titled Government of NCT of Delhi v. Union of India & Ors., by judgment dated 04.08.2016 this Court held that-
> "It is mandatory under the constitutional scheme to communicate the decision of the Council of Ministers to the Lt. Governor even in relation to the matters in respect of which power to make laws

has been conferred on the Legislative Assembly of NCT of Delhi under clause (3)(a) of Article 239AA of the Constitution and an order thereon can be issued only where the Lt. Governor does not take a different view and no reference to the Central Government is required in terms of the proviso to clause (4) of Article 239AA of the Constitution read with Chapter V of the Transaction of Business of the Government of NCT of Delhi Rules, 1993."

4. The specific plea of the petitioner that the impugned order dated 13.03.2015 was passed without communicating the decision to the Lieutenant Governor for his views/concurrence has not been disputed by the learned counsels appearing for the respondents.

5. Therefore, we find force in the submission of the learned counsel for the petitioner that the issue is squarely covered by the decision in W.P.(C) No.5888/2015 and batch titled Government of NCT of Delhi v. Union of India & Ors. Accordingly, without going into the other contentions raised in the writ petition, the impugned order dated 13.03.2015 is hereby set aside.

The writ petition is accordingly allowed. No costs."

33. By order dated 23rd June, 2017, the ECI has held, and in our opinion rightly, that the High Court's order dated in 8th September, 2016 in ***Rashtriya Mukti Morcha*** (supra) declaring the appointment order dated 13th March, 2015 as illegal was inconsequential and would not matter for the *de facto* effect of the order dated 13th March, 2015 appointing the petitioners as Parliamentary Secretaries to the Ministers would not be undone or erased merely because subsequently the appointment order was held to be wrong and illegal. The court order in ***Rashtriya Mukti Morcha*** (supra) did not determine and answer the question whether or not the petitioners had

incurred disqualification under clause (a) to Section 15 (1) of the GNCTD Act.

34. Appointment of the petitioners as Parliamentary Secretaries vide order dated 13th March, 2015 is not disputed. If the petitioners had worked and performed their duty as Parliamentary Secretaries on appointment with effect from 13th March, 2015, the Court order more than a year thereafter dated 8th September, 2016 would not nullify or pardon the legal ill-effect and consequences thereof. No doubt, order dated 13th March, 2015 was struck down by the Delhi High Court vide order dated 8th September, 2016 as it was issued without concurrence or views of the Lt. Governor under Article 239AA of the Constitution, the Court order would not in any manner affect the factum that the petitioners were appointed as Parliamentary Secretaries. Consequences of having worked and functioned as Parliamentary Secretaries till their appointment was struck down, was not the question and issue in ***Rashtriya Mukti Morcha*** (supra) and would not be undone.

35. Order dated 23rd June, 2017 passed by the ECI holds that the Delhi High Court had set aside the appointment and even if the effect was to annul, quash or declare void the appointment order, *de facto* doctrine would apply. Reference was made to a number of judicial decisions on the said aspect. It has been rightly observed that the Delhi High Court in ***Rashtriya Mukti Morcha*** case (supra) had set aside appointment order as the requisite procedure under law was not complied with, but this would not affect the factum that the petitioners were appointed. Illegal or wrong appointment would not in any way prevent and impact the disqualification, if incurred. Reference was appropriately made to the decision of the Rajasthan High

Court in ***Hoti Lal versus Shri Raj Bahadur***, AIR 1959 Raj 227, which had observed that even if appointment was irregular it would not save the member from disqualification under Article 102, for the disqualification arises from holding of an office of profit under the Government. It would not matter if there was some defect, legal or otherwise in making the appointment. If contra argument as raised by the petitioners was to be accepted, a member who was actually appointed to an office of profit would not be disqualified, if he was able to show that there was defect, legal or otherwise in the appointment. Defect in appointment or illegal order of appointment, therefore, was rightly held to be inconsequential, when the question of disqualification was examined. We entirely concur with the reasoning given by the ECI in their order dated 23rd June, 2017 on the said aspect.

Violation of Principles of Natural Justice

36. As noticed above, the issue of violation of principles of natural justice in the present case have several aspects. We begin by referring to opposite positions canvassed by the petitioners and the ECI on the requirement and need of personal hearing or addressing oral arguments. It is an accepted position that the petitioners were not given an opportunity to oral hearing and address arguments before the opinion on merits dated 19th January, 2018 was authored.

37. The stand of the petitioners is that the orders of ECI being quasi-judicial in nature and akin to court proceedings, oral hearing was mandatory. Reference and reliance was placed on the Election Commission of India (Procedure) for Conduct of Enquiries in Reference Cases, 2016

framed under Section 146B of the 1951 Act. In particular Rules 20, 21 and 22 were highlighted as they refer to 'date of hearing', 'date fixed for hearing and adjourn' and 'taken up for hearing'.

38. The ECI, on the other hand, submits that oral hearing was not mandatory for the proceedings before the ECI were not quasi-judicial but inquisitional in nature.

39. We would elaborate and answer the contentions raised, after referring to the decisions and case law. We would first reproduce Section 146, 146A, 146B and 146C of the 1951 Act which read:-

> "146. **Powers of Election Commission**. - (1) Where in connection with the tendering of any opinion to the President under article 103 or, as the case may be, under sub-section (4) of section 14 of the Government of Union Territories Act, 1963 (20 of 1963), or to the Governor under article 192, the Election Commission considers it necessary or proper to make an inquiry, and the Commission is satisfied that on the basis of the affidavits filed and the documents produced in such inquiry by the parties concerned of their own accord, it cannot come to a decisive opinion on the matter which is being inquired into, the Commission shall have, for the purposes of such inquiry, the powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—
>
> (a) summoning and enforcing the attendance of any person and examining him on oath;
>
> (b) requiring the discovery and production of any document or other material object producible as evidence;
>
> (c) receiving evidence on affidavits;
>
> (d) requisitioning any public record or a copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents.

(2) The Commission shall also have the power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as in the opinion of the Commission may be useful for, or relevant to, the subject-matter of the inquiry.

(3) The Commission shall be deemed to be a civil court and when any such offence, as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860), is committed in view or presence of the Commission, the Commission may after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1898 (5 of 1898), forward the case to a magistrate having jurisdiction to try the same and the magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case had been forwarded to him under section 482 of the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

146A. **Statements made by persons to the Election Commission**. — No statement made by a person in the course of giving evidence before the Election Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement —

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject-matter of the inquiry.

> 146B. **Procedure to be followed by the Election Commission** — The Election Commission shall have the power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private).
> 146C. **Protection of action taken in good faith**. - No suit, prosecution or other legal proceeding shall lie against the Commission or any person acting under the direction of the Commission in respect of anything which is in good faith done or intended to be done in pursuance of the foregoing provisions of this Chapter or of any order made thereunder or in respect of the tendering of any opinion by the Commission to the President or, as the case may be, to the Governor or in respect of the publication, by or under the authority of the Commission of any such opinion, paper or proceedings."

40. Section 146B of the 1951 Act stipulates that the ECI will regulate its own practice and procedure. In other words, ECI has been given freedom and flexibility to adapt procedure to be followed while exercising power under Chapter IV of the 1951 Act in connection with inquiries as to disqualification of members. The bracketed portion in Section 146B clarifies that power to regulate its own procedure includes power to fix places and times of sitting and to decide whether the sittings would be in public or in private. Use of the words 'sitting' and 'the power of ECI to decide whether the sitting should be in public or private' and the stipulation regarding place and time of sitting would indicate that the procedure could involve sittings in which "hearings" would be held. Therefore, by implication the 1951 Act does postulate that ECI would have hearings, which could be in private or in public. In the context of the provisions, 'hearing' would refer to oral hearings. Section 146 gives "statutory protection" for statements made by persons before the Election Commission. This ensures that deposition by witnesses are not used against

the person in civil or criminal proceedings, the exception being when a person is tried for giving false evidence by such statements. This provision is much wider than proviso to Section 132 of the Evidence Act. Protection ensures that the person testifying before the Commission speaks the truth without fear of criminal or civil implication, except fear of perjury for making false statement before ECI. Sub-section (3) and (4) of Section 146 state that the Commission is deemed to be a civil court and when offences under Section 175, 178, 179, 180 and 228 of the Indian Penal Code are committed in the presence of the Commission, the ECI can, after recording facts constituting the offence and statement of the accused, forward the case to the magistrate having jurisdiction to try the same. Magistrate to whom the case is forwarded shall proceed to hear the complaint against the accused as if the complaint had been forwarded to him under the Code of Criminal Procedure.

41. Sub-section (2) to Section 146 authorizes the Commission to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters which in the opinion of the Commission are useful or relevant to the subject matter of the inquiry.

42. ECI had relied on and referred to sub-section (1) to Section 146 and it was submitted that it consists of three parts. The first part deals with the situation where the ECI, while tendering opinion on the aspect of disqualification, does not consider it necessary to make an inquiry. The second part deals with the situation where ECI is satisfied on the affidavit filed and documents produced that they could reach a decisive opinion in the matter on the basis of affidavits filed and documents produced by the

parties on record. The third part deals with the situation where the ECI considers it necessary and proper to make further inquiry even after the affidavits and documents have been filed by the parties on their own accord. For third part to apply, ECI should be satisfied that they cannot reach a decisive opinion on the basis of the said affidavits and documents produced by the parties on their own accord. In such cases, ECI exercises power of the civil court to summon and enforce attendance of any person, discovery and production of documents or any material object etc.

43. Having considered the contention, we do not find any substance and merit in the submission as made by ECI with reference to sub-section (1) to Section 146. Section 146 should not be bifurcated and divided into parts as suggested. Section 146 in simple words is an enabling provision which gives power to the Commission to ask the parties to file affidavit and submit documents in connection with any inquiry. Where the ECI for decisive opinion deems it appropriate, it could direct issue of summon and enforce attendance of any person and examine him on oath, require discovery and production of documents etc. Commission while doing so, exercises power as exercised by civil courts while trying a suit under Code of Civil Procedure, 1908.

44. Looking at the nature of powers conferred on the ECI which are similar to powers of the civil court, it would be correct and appropriate to hold that inquiry proceedings under Chapter IV relating to disqualification of members are in the nature of quasi-judicial proceedings. In ***Dr. Subramaniam Swamy and Another*** (supra) Supreme Court in paragraph 12 of the SCC citation had observed that the procedure before the ECI was one which a civil court follows in deciding the matter before it. Section 146B

gives an element of discretion, latitude and flexibility to the Commission to regulate its own procedure while conducting the quasi-judicial inquiry. In a given case, therefore, the Commission can come to the conclusion that the allegations made against the sitting member of Assembly/Parliament are frivolous and ill-founded and should be closed or rejected. In such cases, the Commission may not call on the elected members to submit their replies etc. In another matter or inquiry, the Commission may dispose of and give its final opinion on the basis of affidavits filed and documents produced by the parties concerned. In a third case, the Commission/ECI may ask third parties to make statement on oath, require discovery and production of documents or material object, requisition public record or issue commission for examination of witnesses or documents. ECI/Commission, a constitutional authority of highest eminence and stature has been bestowed with flexibility and discretion. Deference must be given on the nature of the procedure which they adopt and follow in a particular matter.

45. Supreme Court in ***Brudaban Nayak*** (supra) and ***N.G. Ranga and Others*** (supra) have referred to situations where that the complaints received and forwarded to the ECI could be frivolous and fantastic and in such cases the ECI would face no difficulty in expressing the opinion that they should be rejected straightway. These judgments endorse and affirm elasticity and flexibility ingrained in the 1951 Act. Procedure cannot be put in a strait-jacket and could vary and moulded from case to case. It is for the Election Commission to determine fair procedure appropriate and proper in the particular legal and factual matrix.

46. Supreme Court in ***Purno Agitok Sangma versus Pranab Mukherjee***, (2013) 2 SCC 239 had dealt with challenge to the election of the President

on the ground that the President elected was holding office of profit under the Government on two counts, that he was Leader of the House and also Chairman of the Indian Statistical Institute, Kolkata. Important in the context of the present issue are the views of the majority and minority on the question of full and regular hearing in terms of Order 39 of Supreme Court Rules, 1966. Summary procedure and not full and regular hearing could be certainly adopted where the complaint did not disclose cause of action or was barred by law or when the Court was satisfied that no triable issue arose or when trial of the issue raised was not necessary and justified in the totality of facts stated being assumed to be proved and correct. Majority judgment had expanded the ambit and scope even further, albeit with oral hearing but without oral evidence being adduced and recorded. Chamleswar, J. in his dissenting opinion had observed that it was not possible to give exhaustive list of circumstances in which an election petition should be dismissed at the stage of preliminary hearing. An observation and pertinent comment by the majority of relevance was that Courts have repeatedly cautioned that an election of a candidate who has won, should not lightly be interfered unless circumstances so warrant. This would matter when question of procedure to be adopted is considered.

47. It is obvious that the discretion is given to the Election Commission on the matter of procedure when it is required to give its opinion. The GNCTD Act and 1951 Act did not deem it appropriate to prescribe a procedure. No statutory limitations and restrictions are postulated. This is appropriately left to the sagacity and wisdom of the Election Commission. We would hesitate to comment and lay down any procedure for it would be contrary to and conflict with the constitutional mandate, pre-eminence and

primacy of ECI and flexibility required and necessary in such matters. However, the assumption is that the procedure followed would be reasonable, fair and just. Discretion connotes absence of hard and fast rules and gives latitude and liberty in adjudication and deciding matters taking into consideration facts and circumstances, but the procedure followed must be sound, fair and just.

48. ECI has, along with the written submissions, filed a list of reference cases from 2008 onwards where no hearing or hearing was given. In most of the cases, it was stated that no hearing was given. The said list was also handed over in the Court on the last date of hearing. The petitioners have responded by stating that the list does not indicate whether no hearing was given in cases where reference was answered in affirmative disqualifying the elected member. The outcome of the opinion was not indicated. This is correct. Legally, we would uphold the stand of the Commission that when the reference can be answered without taking evidence or even affidavits or documents from any side, ECI is competent and has the power to give its opinion, without being fettered and restricted by strict rules of procedure in the Code of the Civil Procedure. These would be References to be answered in the negative, i.e. in favour of the elected member. This happens in court proceedings when the suit or a private complaint etc., is dismissed at the initial stage without summons or notice being issued to the opposite side. Civil suits can also be decided on the basis of pleadings on record and affidavits and documents filed by the parties. In another set of cases, affidavits of third parties and documents from third parties are summoned and placed on record before final adjudication is made.

49. It would be important here to reproduce Rules 20, 21 and 22 of the Procedure Regulations which have been framed by the ECI and read as under:

> "20. **Completion of pleadings**: The Registrar shall place the matter before the Commission after completion of the pleadings for fixing the date of hearing.
>
> 21. **Adjournment**: The Commission may take up the matter on the date fixed for hearing and adjourn it for further hearing.
>
> 22. **Synopsis**: The parties shall file written synopsis, consisting of brief facts, propositions of law and judgments (if any), in the Registry before the matter is taken up for hearing."

50. The aforesaid Rules fall under Chapter V with the heading "Procedure for Hearing". Rule 20 applies after pleadings are completed. The stage would occur where the Commission does not give and render its final opinion at the initial stage and the parties have filed their pleadings. The Commission under Rule 20 is required to fix a date of hearing. The hearings fixed can be adjourned. Rule 22 stipulates that the parties shall file written synopsis in the Registry before the matter is taken up for hearing.

51. The heading of the Procedure Rules states that they have been framed in exercise of power given under Section 146B of the 1951 Act and all other powers enabling the Commission to regulate its own practice and procedure in References made to them by the President of India or the Governor of the States. These Rules came into force with effect from 15th December, 2016.

52. The petitioners have contended that the aforesaid Rules are statutory in nature and have relied on ***Roop Lal Sathi versus Nachhattar Singh Gill***, (1982) 3 SCC 487 which judgment we feel would not directly support the

contention raised. The Procedure Rules, we would observe, have not been framed in exercise of specific power given to the ECI to frame rules. The Procedure Rules are in nature of general practice directions formulated by the ECI on the procedure they should follow while dealing with reference cases. Framing of the Procedure Rules ensures uniformity and consistency. Parties are made aware of the procedure which would be adopted and applied. This brings about transparency and objectivity. Procedure Rules once framed should be adhered to and followed, though for good grounds and reasons, Procedure Rules would not curtail and foreclose right of the ECI when required and necessary to follow a different or modified procedure.

53. We have already indicated that Reference proceedings would be quasi-judicial in nature. Distinction between quasi-judicial and administrative decisions is rather thin and whether the exercise of power is administrative or quasi-judicial can be a difficult and tricky issue to answer in several situations. Test which is sometimes adopted to distinguish between quasi-judicial and administrative decisions is that whether the decision by the legal authority or person would determine question affecting rights of the subjects and whether it was the duty of the authority to act judicially. Supreme Court in ***Indian National Congress (I) versus Institute of Social Welfare and Others***, AIR 2002 SC 2158, has observed and laid down certain principles to determine whether function of the authority was quasi-judicial or not. These are (a) whether the authority was empowered under the statute to do an act; (b) that would prejudicially affect the subject; (c) although there is no *lis* or two competing parties,

contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute.

54. With regard to the power and the role assigned to the ECI under Chapter IV of the 1951 Act, conditions (a), (b) and (d) are certainly satisfied. We would accept that there is *per se* no lis or contending parties or for that matter contest between the authority and the subject when the ECI gives its opinion or final decision but this would not make the opinion or the decision less quasi-judicial. Consequences of disqualification are serious as an elected representative of the people would cease to be a member of the Legislature. Factual disputes and legal issues could arise and require determination. As noticed above, the aforesaid decision/opinion can be challenged before the constitutional courts, *albeit* on limited grounds available when Constitutional Court exercise power of judicial review.

55. In ***A.K. Kraipak versus Union of India,*** (1969) 2 SCC 262, a Constitution Bench of Five Judges had stated that aim of Rules of Natural Justice is to secure justice, or rather to prevent miscarriage of justice. Violation occurs when the party is not afforded opportunity of reasonable hearing (*audi alteram partem*) or when the authority acts as a judge of its own case. The third rule is that quasi judicial inquiry must be held in good faith and without bias and not arbitrarily or unreasonably. Subsidiary rules have subsequently developed and added. This judgment accepts that the line that demarcates administrative enquiry from quasi judicial enquiry was difficult to draw and not easy to demarcate. Distinction between administrative enquiry and quasi judicial enquiry had evaporated for former could also have far reaching and grave effect as latter and just and fair decision was the aim of both, whether quasi judicial enquiry and

administrative enquiry. The test applied to ascertain whether principle of natural justice had been contravened, was to put and decide the question whether compliance of the particular "rule" of natural justice was necessary for just decision on the facts of that case.

56. In ***Mohinder Singh Gill and Another versus Chief Election Commissioner, New Delhi and Others,*** (1978) 1 SCC 405 it was observed that though decision to cancel the polls was an administrative act, that *per se* would not repel application of principles of natural justice. Reference was made to ***Ridge versus Baldwin,*** (1963) 2 All ER 66, observing that the decision had restored light to an area benighted by narrow conceptualism of the previous decade to affirm that good administration demands fairplay in action and that this simple desideratum was the fount of natural justice. Fairplay mandate in administration would be in accord with jurisprudence, even if it was attributable as a result of judicial creativity. In ***Competition Commission of India versus Steel Authority of India Limited and Another,*** (2010) 10 SCC 744, principle of *audi alteram partem,* which means hearing the other side or hearing both the sides before the decision was arrived at, was discussed, to observe that it was well founded. Principle should be applied with similar limitations even to the field of administrative law. This rule of Natural Justice was expanded to include within its purview the right to notice and requirement of reasoned order after due application of mind etc. In other words, it was expected that a tribunal or quasi judicial body would ensure compliance of rule of *audi alteram partem* before any adverse order to the interest of a party was passed. This rule could be excluded in larger public interest and for valid reasons. This could be where principles

of natural justice have been excluded by specific legislation. On application of the principle/rule of *audi alteram partem*, it was observed:

> "**68.** Generally, we can classify compliance or otherwise, with these principles mainly under three categories. First, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance with the provisions of the principles of natural justice and default in compliance therewith can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance with these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and therefore, the court has to examine the facts of each case in light of the Act or the rules and regulations in force in relation to such a case. It is not only difficult but also not advisable to spell out any straitjacket formula which can be applied universally to all cases without variation.
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> **82.** The exclusion of principles of natural justice by specific legislative provision is not unknown to law. Such exclusion would either be specifically provided or would have to be imperatively inferred from the language of the provision. There may be cases where post-decisional hearing is contemplated. Still there may be cases where "due process" is specified by offering a full hearing before the final order is made. Of course, such legislation may be struck down as offending due process if no safeguard is provided against arbitrary action. It is an equally settled principle that in cases of urgency, a post-decisional hearing would satisfy the principles of natural justice. Reference can be made to *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] and *State of Punjab* v. *Gurdial*[(1980) 2 SCC 471 : AIR 1980 SC 319] .

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85. Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in *Canara Bank* v. *Debasis Das* [(2003) 4 SCC 557 : 2003 SCC (L&S) 507] .

86. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. "Natural justice" is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well-defined principles enunciated by the courts. Every quasi-judicial order would require the authority concerned to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness."

57. We would now refer to some other decisions relied upon by the petitioners. ***Manohar versus State of Maharashtra,*** (2012) 13 SCC 14, was a case arising from an order passed by the State Information Commissioner under Right to Information Act, 2005 which exercises wide and quasi judicial powers, somewhat different from the executive decision making process. Quasi judicial powers included power to impose penalty or direction to take disciplinary action against an employee. Direction and mandate could adversely affect and bring civil consequences to the delinquent. Adjudicatory function was when where two parties raise their

issues, to which the Commission was expected to apply its mind and adjudicate upon. Hearing of the parties, application of mind, and recording of reasons for decision were basic elements which must be complied with. In ***Babloo Pasi versus State of Jharkhand,*** (2008) 13 SCC 133, reference was made to principle of *audi alteram partem* that no party shall be condemned unheard. In the context of Juvenile Justice (Care and Protection of Children) Act, 2000, it was held that non-grant of opportunity would violate fairness in action that would vitiate the order.

58. In ***Automotive Tyre Manufacturers Association versus Designated Authority And Others,*** (2011) 2 SCC 258, the Supreme Court authoritatively held that unless by specific provision or by other necessary implication, the statutory provision excludes application of principles of natural justice, the Court would not ignore legislative mandate, but otherwise requirement of giving reasonable opportunity of being heard before an order was made was generally read into provisions of statute particularly when the order has adverse civil consequences which could cause infraction of property, personal rights and material deprivation of the party affected. It did not matter whether the power was conferred to the statutory body/tribunal was administrative or quasi judicial. The question whether the principles of natural justice should be applied or not, was to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power was conferred and the final effect of the exercise of that power as held in ***Union of India versus Col. J.N. Sinha and Another,*** (1970) 2 SCC 458. The decision in ***Automotive Tyre Manufacturers Association*** (supra) was relating to proceedings initiated in

respect of levy of anti-dumping duty and the right of the parties adversely affected to be heard. *Pertinently,* it was observed that written arguments were not effective substitute for oral hearing. In the said case, reference was made to the rules that had required affording opportunity to all parties who had filed objections to adduce evidence. Personal hearing enabled authorities concerned to clear up doubts during the course of arguments. Referring to ***Gullapalli Nageswara Rao and Others versus A.P. State Road Transport Corporation and Another,*** AIR 1959 SC 308, it was held that if one person hears and another decides then it becomes an empty formality. This decision specifically refers and had dealt with the rule position applicable.

59. Petitioners had also drawn our attention to a decision ***Arun Tyagi versus Election Commission of India and Another,*** ILR (2011) 4 Delhi 508, a decision relating to deletion of name of a voter from the Electoral Roll, and whether it was incumbent upon the authorities to follow principles of natural justice before deleting the name of the appellant from the electoral roll of the constituency. Referring to several decisions some of which have been mentioned above and ***State of Orissa versus Dr.(Miss) Binapani Dei and Others,*** AIR 1967 SC 1269, ***K.I. Shephard and Others etc. versus Union of India and Others,*** AIR 1988 SC 686, ***Swadeshi Cotton Mills versus Union of India,*** (1981) 1 SCC 664, **Liberty Oil Mills and Others versus Union of India and Others,** (1984) 3 SCC 465, ***Canara Bank and Others versus Debasis Das and Others,*** (2003) 4 SCC 557, ***Managing Director, ECIL, Hyderabad and Others versus B. Karunakar and Others,*** (1993) 4 SCC 727 and ***Ajit Kumar Nag versus General Manager (PJ), Indian Oil Corporation Limited, (Haldia) and Others,***

(2005) 7 SCC 764, it was held that though inclusion or deletion of name may not be a ground to set aside an election but the competent authority under the Act cannot be granted leverage to proceed in an arbitrary manner without complying with the proviso to Section 22 (c) of The Representation of People Act,1950, which requires a reasonable opportunity to a person of being heard. It was held that deletion was unsustainable because of procedural non-compliance and failure to abide by principles of natural justice.

60. We would now refer to the judgments relied upon by the respondent / ECI to contest the said assertion. We begin by referring to ***S.L. Kapoor versus Jagmohan and Others,*** (1980) 4 SCC 379, which decision if read carefully would support the petitioners. Lieutenant Governor of Delhi in exercise of powers had re-constituted New Delhi Municipal Committee well before the expiry of the term of the earlier members. There were allegations against the earlier committee. Referring to the statutory provision in the form of Section 238 (1) of the Punjab Municipal Act, 1911 and the contention that there could be emergent situations warranting swift action to avert disaster and, therefore, if natural justice was required to be met the very object of the provision would be frustrated, it was observed that Municipal Committee consisting of both officials and non-officials would not normally face sudden and calamitous situation requiring action in minutes or seconds. Further natural justice could be tailored to a situation. Minimal natural justice, bare notice and the 'littlest' opportunity in the shortest time would serve the purpose.

61. Reference was made to ***Madhya Pradesh Industries Limited and Others versus Union of India and Others,*** (1966) 1 SCR 466, wherein the

Supreme Court was adjudicating an appeal arising from an order of the Government of India relating to a mining lease of land for a term of 15 years. In the context of the rule position, it was held that the lessee was not entitled to right to personal hearing in view of Rule 55 which had postulated right to representation, that need not necessarily be personal hearing. In the facts of the case it was held that written representation had effectively met the requirement of natural justice. We shall examine this aspect subsequently when we deal with and examine the question of office of profit and the other contentious issues which had arisen. Statutory provisions were different and distinct.

62. We would now refer to two other judgments in which Election Commission of India was a party. In ***N.G. Ranga and Others*** (supra) it was observed that Articles 191, 192 and Articles 102 and 103 do not permit of any limitations and give vast powers and flexibility to the Election Commission, an aspect there cannot be any debate or doubt. There is difference between existence of discretion and exercise or failure to exercise discretion in a judicious and fair manner resulting in miscarriage of justice, which is fact specific. ***N.G. Ranga and Others*** (supra) observes that difficulty and complexity involved in a matter for the deciding the question of disqualification could be a relevant consideration for deciding the procedure to be adopted. Thus the issue of violation of principles of natural justice. This decision, therefore, would not help and assist the ECI in the manner suggested.

63. In **State of Himachal Pradesh versus Nirmala Devi**, (2017) 7 SCC 262, A.K. Sikri, J. on the question of exercise of discretion had quoted with

approval the following passage from ***Ramji Dayawala and Sons (P) Ltd. versus Invest Import***, (1981) 1 SCC 80 :-

> "20. … when it is said that a matter is within the discretion of the court it is to be exercised according to well-established judicial principles, according to reason and fair play, and not according to whim and caprice. "Discretion", said Lord Mansfield in R. v. Wilkes, 'when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular' (see Craies on Statute Law, 6th Edn., p. 273)."

It was observed that the use of discretion has to be guided by law, and what was fair under the obtaining circumstances. Discretion connotes latitude and flexibility in procedure while deciding but with due regard and taking into consideration facts and circumstances. The procedure adopted must be sound, fair and just.

64. ***Abdus Salam versus Election Commission of India,*** (2004) 55 ALR 12 is a decision of the Division Bench of the Allahabad High Court pronounced on 6th February, 2004, in which it has been held as under:

> **"14.** We are clearly of the opinion that the duty to hear does not necessarily mean affording of personal hearing or audience and an aggrieved party may be heard orally or through the medium of written representation ensuring that no prejudice is caused.
>
> **15.** Considering the peculiar facts and circumstances of the present case, we are clearly of the view that the impugned order cannot be held to be vitiated in law on account of its having been passed in violation of principles of natural justice, as claimed and further that an effective opportunity had been afforded to the petitioner.
>
> **17.** It should not be lost sight of that for considering the question of violation of principles of natural justice, all that has to be seen

> is, as to whether the concerned authority had acted in a fair manner. There is nothing rigid or mechanical about the principles of natural justice. Whenever, there is a reference to the rules of natural justice, it signifies that the principle and procedure which are to be applied have to be such which in any particular set of circumstances, are right, just and fair."

This judgment refers to ***Madhya Pradesh Industries Limited and Others*** (supra) and observes that the Supreme Court had expressed doubt whether effective opportunity for meeting allegations would include opportunity of personal hearing, or written representation could be sufficient. This would depend upon facts of each case and normally would be a matter of discretion. Reference was also made to ***The State of Assam versus The Gauhati Municipal Board, Gauhati,*** AIR 1967 SC 1398 and ***State Bank of Patiala versus Mahendra Kumar Singhal,*** 1994 Supp (2) SCC 463 and ***F.N. Roy versus Collector of Customs, Calcutta***, 1957 SCR 1151 to the effect that rule of natural justice did not necessarily confer in all cases right to audience or right to personal hearing at every stage.

65. It is necessary to examine facts of the case in ***Abdus Salam*** (supra) to understand the ratio and notice the distinguishing factors. The issue related to disqualification/ban under Section 10A of the 1951 Act on account of the non-submission of election expenditure. Unsuccessful candidate adversely affected though served with notice had not furnished any explanation. This was the undisputed position. Further correctness of the recitals contained in the order passed by the Election Commission was not questioned. Non submission of the election expenditure was not an issue. ***Abdus Salam*** (supra) was a peculiar case as was noticed in paragraph 15 of the judgment itself by the Allahabad High Court. In the context of the present case, we

have to refer to the Procedural Rules of 2016 and the relevant Sections of 1951 Act relating to proceedings regarding disqualification incurred by elected members.

66. Lastly, we would refer to ***Jagjit Singh versus State of Haryana and Others,*** (2006) 11 SCC 1, a decision relating to legality of the order passed by the Speaker of the Haryana State Legislative Assembly, disqualifying members of the Assembly. Supreme Court held that the yardstick to judge whether reasonable and adequate opportunity was afforded would be different from failure to grant any opportunity. When issue of sufficiency or reasonableness of the opportunity arises, if the view taken by the Tribunal was a reasonable one, the court would not interfere and strike it down on the ground that other view or more indulgence would have been reasonable and proper. The said case was not dealing with the question of want of opportunity but sufficient opportunity.

67. The offshoot of the aforesaid discussion is that ECI exercises wide discretion, latitude and flexibility on the matter of procedure to be followed when examining whether an elected member has incurred disqualification, yet the procedure adopted and followed must be just, fair and equitable. This is inherent and forms the edifice and cornerstone of the discretion vested.

68. The facts of the present case would exposit that it is in exercise of powers under Section 146 that the ECI had written to the Government of Delhi and had required them to submit documents and papers. The ECI therefore was clearly of the opinion that the issue could not be resolved and decisive opinion formulated without resort to power to summon documents and papers from third parties under Section 146 of the 1951 Act. The

Government of NCT of Delhi was mandated to discover and produce documents and materials. It is pertinent to state that the powers given under Section 146, 146A, 146B and 146C were as a result of Act 17 of 1965 with effect from 22.09.1965. Procedural rules and the statutory provisions which stipulate summons to witnesses for production of documents etc. were invoked as it was not considered possible to decisively decide the question of disqualification. Given the complexities involved and elaboration required extensive oral arguments were addressed on preliminary issues which were disposed of and decided by different orders. By order dated 16th September, 2016, while disposing of the preliminary issue raised by the petitioners on submission of signed written petition, the Commission had observed in the last paragraph as under:-

> "44. The matter will now be further heard on the main question referred on 10th November, 2015 by the President to the Commission for its opinion on 23rd September, 2016 (Friday) at 03.00 p.m. in the Commission's Secretariat."

69. Thereafter, disposing of contention of the petitioners on the effect of setting aside of the order dated 13th March, 2015, appointing the petitioners as Parliamentary Secretaries vide judgment dated 8th September, 2016 in W.P. (Civil) No. 4714/2015, ***Rashtriya Mukti Morcha versus Government of NCT of Delhi,*** the order dated 23rd June, 2017 had observed:-

> "41. The Commission will intimate the next date of hearing to all the concerned parties in the present proceedings in due course."

Next date of hearing thereafter was never communicated and no hearing was fixed and held.

70. In view of the aforesaid position, question would arise whether the doctrine of *audi alteram partem* or oral hearing was required to be followed and was mandated in the present case. We have already observed and held that the ECI need not give oral hearing where it can dispose of and give its opinion at the initial stage or even after the pleadings or documents in favour of the elected member. However, where the situation is converse and contentious and complicated issue arises for consideration, or when the final decision or opinion would be or could go against the elected representative, hearing is mandated and compulsory, for otherwise there would be violation of principles of natural justice and fairness. The Procedure Rules framed by the ECI themselves proceed on the said basis. Thus, while the ECI has flexibility and freedom to not give hearing to elected members where the reference is to be answered in negative as complaints are frivolous, thoughtless or pointless, hearing would be required and is necessary where the ECI feels a deeper scrutiny of facts or legal position is required before a final opinion and decision can be given.

Facts subsequent to 23rd June, 2017, recusal of Mr. O.P. Rawat and rejoining of Mr. O.P. Rawat and appointment of Mr. Sunil Arora, as Election Commissioner

71. Order dated 23rd June, 2017 was signed by Dr. Nazim Zaidi, Chief Election Commissioner and Mr. A.K Joti, Election Commissioner. Mr. O.P. Rawat, Election Commissioner was not a signatory to this order as by recusal order dated 19th April, 2017 he had expressed his desire not to participate in the Reference. The recusal order dated 19th April, 2017 was not communicated to the petitioners and was not filed alongwith pleadings by either side. However, true copy of the office order was made available to

the Court during the course of hearing and for completeness is reproduced below:-

> "In view of the interview of Sh. Arvind Kejriwal, Chief Minister of NCT of Delhi published in Times of India, Delhi edition on 19th April, 2017 wherein he has expressed doubts on the impartiality of undersigned, I hereby recuse myself from all the cases pertaining to Aam Aadmi Party so that Sh. Arvind Kejriwal and his Aam Aadmi Party not only get justice but they also perceive that Election Commission has been fair beyond any shred of doubt. This step is also required to uphold the public perception of impartiality and objectivity of the Election Commission of India."

72. The petitioners, it is apparent, were aware of possibility of recusal possibly due to displeasure and anguish expressed by Mr. O.P. Rawat. Petitioners thereafter had sent e-mail dated 21st April, 2017 expressing full faith in Mr. O.P. Rawat with the request that he should not recuse.

73. The petitioners had filed writ petitions before the High Court impugning the order dated 23rd June, 2017 alongwith an application for stay of proceedings before the ECI. On the writ petitions coming up for hearing before the single Judge of this High Court, notice was issued and accepted by the counsel for the ECI. On the stay application, it was recorded that the petitioners were not pressing the application for the time being in view of the fact that no date had been fixed by the ECI in the matter. Liberty was granted to the petitioners to move an appropriate application, as and when advised. Last paragraph of the order dated 23rd June, 2017 had stated that the Commission would intimate the next date of hearing to all concerned parties in the proceedings in due course. This was obviously the comforting factor and an assurance that date of hearing would be fixed.

74. It is the case of the petitioners that thereafter no date of hearing was fixed by the ECI before opinion dated 19th January, 2018 was authored and communicated to the President. This is factually correct and not disputed.

75. In the meanwhile, the Chief Election Commissioner, Dr. Nazim Zaidi had demitted office on 6th July, 2017. Mr.Sunil Arora was appointed and took charge as Election Commissioner on 1st September, 2017.

76. ECI thereafter had issued two notices dated 28th September, 2017 and 2nd November, 2017 to the petitioners. In the first notice dated 28th September, 2017, reference was made to the ECI's letter dated 29th September, 2016 whereby documents submitted by the Secretary, GNCTD, affidavit and other papers were made available to the petitioners to submit self-contained reply dealing with relevant issues. This was followed by letter dated 10th October, 2016 whereby further time was granted to submit reply by 17th October, 2016 to the information/documents furnished by the Secretary, GNCTD. Reference was made to the order passed in Writ Petition (Civil) No. 4714/2015, ***Rashtriya Mukti Morcha versus Government of NCT of Delhi and Others*** and the order dated 23rd June, 2017 passed thereafter by the ECI holding that the Reference was maintainable. It was mentioned that the Reference had remained pending for considerable time and expeditious disposal of the proceedings was required. Petitioners were required to submit a detailed reply on the documents furnished by the Secretary, GNCTD alongwith the written arguments latest by 16th October, 2017. The petitioners were told that the detailed arguments alongwith the documentary evidence should be supported by duly sworn affidavit etc., after service on Mr. Prashant Patel. The petitioners responded by communication dated 16th October, 2017

stating that 20 MLAs had filed respective writ petitions impugning the order dated 23rd June, 2017 passed by the ECI. It was observed that certain important issues were yet to be decided by the ECI on the question of maintainability of the proceedings, which should be decided first before merits were examined. The petitioners had also prayed that they would like to exercise right to cross-examine the complainant for "scandalous", irresponsible and false allegations having been made and these could not go unchallenged or unrebutted. Reference was also made to newspaper reports that Mr. O.P. Rawat had recused though no official communication or order had been passed. The petitioners had submitted that the three Commissioners should hear and decide the Reference as the matter involved important rights of 20 MLAs. With the recusal of Mr. O.P. Rawat, the quorum was incomplete and proceedings would not be in order. Proceedings should commence only when full quorum was available, "sans" Mr. O.P. Rawat, who had recused. The petitioners asserted that they had not taken unnecessary adjournments and the notice itself had stated that the matter was heard at length on several dates.

77. ECI thereafter sent second communication dated 2nd November, 2017 making reference to the letter dated 29th September, 2016, which had required the petitioners to submit written submissions on the documents supplied by the Secretary, GNCTD alongwith the material, which they want to rely upon. Referring to reply dated 16th October, 2017 submitted by the petitioners, it was stated that they had not made substantial submission on merits, including the documents submitted by the Secretary, GNCTD, affidavit, etc. The petitioners were given last and final opportunity to file their written submissions on merits of the case alongwith the material,

which they want to rely upon latest by 20th November, 2016. If the written submissions were not received by the said date, it would be perceived that the petitioners had nothing further to submit in the matter. Submissions alongwith the material were required to be submitted by the petitioners supported by duly sworn affidavit.

78. The petitioners responded vide reply and application dated 20th November, 2017 reiterating the stand that the Reference should be heard by the three Election Commissioners as any order or decision would have great ramifications and civil consequences. Reference was obviously to the recusal of Mr. O.P. Rawat and in his absence, there would be only two Members, who would hear and decide the matter. In this reply/response dated 20th November, 2017, the petitioners had made the following prayers:-

> "1. That the application dated 16.10.2017 and the present application be taken into consideration and the queries/submissions of the answering respondents be answered.
>
> 2. The Respondents be provided with the names of all the three Hon'ble Commissioners who would be hearing the present Reference Petition.
>
> 3. Till such time the Hon'ble High Court is seized with the writ petitions, wherein the legality of order dated 23.06.2017 is under challenge, the Hon'ble Commission may kindly refrain itself from fixing any date from hearing the present matter."

79. It is an accepted and admitted case that thereafter no communication or reply was sent by ECI to the petitioners till opinion dated 19th January, 2018 was forwarded to the President of India. This opinion was signed by Mr. O.P. Rawat, Mr. A.K. Joti and Mr. Sunil Arora. The opinion in paragraph 25 states that Mr. O.P. Rawat, who had earlier recused, had

rejoined proceedings and hence full quorum was complete with effect from 1st September, 2017 to render the opinion on examination of all submissions and documents available on record. The said paragraph also states that unsubstantiated allegations against one of the Election Commissioners had resulted in his recusal and thereupon the petitioners had taken a specific plea that ECI cannot proceed in the absence of full quorum. On the aspect of quorum, reference was made to Section 10 of the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 and Section 146B of the 1951 Act, i.e. Representation of People Act, 1951, which gives complete autonomy to the ECI to regulate its procedure for transacting its business and the decision could be taken unanimously or by majority. Referring to the two communications received from the petitioners in response to notices dated 28th September, 2017 and 2nd November, 2017, it was observed that the petitioners did not have anything further to add to the written submissions already made and the petitioners had also failed to highlight any new or specific preliminary issue. In these circumstances, ECI observed that the petitioners had failed to make further submissions on the details provided by the Secretary, GNCTD despite multiple opportunities and considerable period of time. Therefore, ECI had decided to conclude the proceedings in the matter and render its opinion.

80. Two notices dated 28th September, 2017 and 2nd November, 2017 did not make reference to the noting dated 22nd September, 2017 or that Mr. O.P. Rawat had rejoined the proceedings. Rejoining order was not filed alongwith the pleadings and with the consent of the parties was taken on

record in the Court and for convenience relevant portion of the file notings is reproduced below:-

> "I had recused myself from these proceedings.
>
> O.P. Rawat
> 22/9/17
>
> It is requested that EC (R) Shri Rawat may now join the Proceedings before the Commission.
>
> A.K. Joti
> 22/9/17
>
> Sure, no issue.
>
> O.P. Rawat
> 22.9.17"

81. Contention of the petitioners is that they were never intimated and informed that Mr. O.P. Rawat had rejoined the proceedings and their contention that quorum was incomplete or that ECI must consists of three Members without which the quorum would be incomplete, was never rejected and answered.

82. Recusal signifies withdrawal and has its origin in a religious concept of recusing. Of late, principle of recusal has become subject matter of judicial decisions in ***Supreme Court Advocates-on-Record Association and Another versus Union of Indi (Recusal Matter),*** (2016) 5 SCC 808, ***Subrata Roy Sahara versus Union of India and Others,*** (2014) 8 SCC 470 and ***R.K. Anand versus Registrar, Delhi High Court,*** (2009) 8 SCC 106. In the context of the present case, the issue raised by the petitioners is distinctly different for it does not relate to recusal by Mr.O.P. Rawat on 19th April, 2017, but his re-joining on 22nd September, 2017. Contention of the

petitioners was that after recusal, Mr.O.P. Rawat could not have withdrawn his recusal, and that too without notice and information. Rejoining would require consent of the petitioners. Non-communication or information of withdrawal of recusal to the petitioners would result in violation of principles of natural justice and consequent decision/opinion would be bad and violate the law. In particular our attention was drawn to the reasons recorded by Mr.O.P. Rawat for recusal.

83. It is a fact that order/notings made by Mr.O.P. Rawat dated 19th April, 2017 recording recusal and his subsequent decision dated 22nd September, 2017 to rejoin were never communicated and made known to the petitioners. Without doubt, this should have been done, once Mr.O.P. Rawat had expressed that he would rejoin and participate.

84. However, it is obvious that the petitioners were aware and knew that Mr.O. P. Rawat was likely or had recused, as their Advocate had sent an email dated 21st April, 2017 requesting and pleading Mr.O.P. Rawat not to recuse. Mr.O.P. Rawat was not a signatory and a party to the Order dated 23rd June, 2017, affirming the fact that he had recused. The petitioners' Advocate having written letter dated 21st April, 2017 requesting Mr.O.P. Rawat to not recuse, it is apparent, would contradict their contention that Mr.O.P. Rawat could not have re-joined or withdrawn his recusal. However, the issue is different for the contention raised is that the email of the petitioners' Advocate dated 21st April, 2017 had no effect for Mr.O.P. Rawat had not participated and was not a signatory to the order dated 23rd June, 2017. Further, the petitioners should have been informed and told that Mr.O.P. Rawat had agreed to rejoin and participate. On the said aspect, the petitioners rightly submit that they were kept in dark and not informed. Our

attention was drawn to the replies of the petitioners dated 16th October, 2017 and 20th November, 2017 to the notices dated 28th September, 2017 and 02nd November, 2017 sent by the ECI.

85. We would unhesitatingly and without any reservation hold that the re-joining or withdrawal of recusal by Mr.O.P. Rawat should have been communicated and informed to the petitioners. This would have materially affected the response and reply of the petitioners dated 16th October, 2017 and 20th November, 2017 to the notices dated 28th September, 2017 and 02nd November, 2017. There is also difference between recusal and re-joining on withdrawal of the recusal. These were two separate stages and have different connotations and consequences.

86. Learned counsel for ECI has referred notes/ order-sheets in American cases where judges had unrecused or re-joined without assigning or stating any reason. He has also referred to the judgment of the High Court of Madras at Madurai in ***Dudnik Valentyn versus Inspector of Police,*** Criminal Appeal No.41/2016 wherein a single Judge had recused himself and thereafter had passed the final judgment. Reference was made to the decision dated 21st June, 2013 of Lucknow Bench of the Income Tax Appellate Tribunal in ***Kanpur Plasticpack Limited versus Income Tax Officer,*** ITA No.1002/Lkw/2006.

87. We would accept that re-joining or withdrawal of recusal is permissible in law. Recusal could happen for different causes or reasons and can be temporary or till the reason or cause for recusal subsists. Doctrine of necessity could apply, as was held in ***Dr. Subramaniam Swami*** (supra). Reference to the decisions in cases pertaining to United States could not be apposite as the law of recusal in the said country is codified. None of the

orders of the American Courts placed before us, give reason why the judge was rejoining or withdrawing the recusal. There is also no discussion on whether this was permissible. Possibly the parties did not object to re-joining and had waived right to object.

88. More relevant, to our mind, is the decision of the Supreme Court in ***Narinder Singh Arora versus State (Govt. of NCT of Delhi)and Others,*** (2012) 1 SCC 561. In the said case, a Criminal Revision Petition preferred before the High Court was dismissed by the judge who had earlier recused from hearing the case pending trial as an Additional Sessions Judge. The recusal, as Additional Session's Judge was for personal reasons and this order of recusal was not brought to the notice of the judge while he was deciding the revision petition in the High Court. Impliedly, therefore, plea of waiver was raised before the Supreme Court. Principle of waiver, though waiver is a difficult term and has divergent legal meanings, has been applied when the issue whether a judge should have recused is raised in appeal. Principle of waiver was not applied. After referring to the decisions in ***Manak Lal (Shri) Advocate versus Prem Chand Singhvi and Others,*** AIR 1957 SC 425***, A.K. Kraipak*** *(supra)****, S. Parthasarathi versus State of Andhra Pradesh,*** (1974) 3 SCC 459**, Dr. *G. Sarana versus University of Lucknow and Others,*** (1976) 3 SCC 585***, Ranjit Thakur versus Union of India and Others,*** (1987) 4 SCC 611**, Government of T.N.** ***versus Munuswamy Mudaliar and Another,*** 1988 Supp. SCC 651***, R. versus Camborne JJ, ex p Pearce,*** (1955) 1 QB 41***, R. versus Sussex JJ, ex p McCarthy,*** 1923 All ER Rep 233 (DC) and ***R. versus Gough,*** (1993) 2 All ER 724 (HL), it was held that the person who had tried and decided the case should be able to deal with the matter placed before him objectively, fairly

and impartially. No one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind and impartially. The broad principle being that the person trying a case must not only act fairly but his act should be above suspicion of unfairness and bias. These observations, we would observe, are relevant on the question of re-joining after recusal. However, when the question of recusal is raised we would abide by and follow the direct and affirmative pronouncements in the case of ***Supreme Court Advocates-on-Record Association***, ***Subrata Roy Sahara*** and ***R.K. Anand*** (supra). Accordingly, in ***Narinder Singh Arora*** (supra) the order under challenge was set aside and the revision petition was directed to be heard afresh by another Judge in accordance with law.

89. Petitioners had also made reference to ***Dr. Subramaniam Swami*** (supra) which we do not think is relevant and material for the purpose of the present decision on the question of re-joining after recusal. This judgment refers to the doctrine of necessity, which has no application in the present case. Reference was also made by the petitioners to ***Ranjit Thakur*** (supra) which again we do not find is relevant to the issue in question. However, this judgments does hold that the essence of law was that the judgment should be passed after due observance of judicial process and the Court or the Tribunal passing the judgment should adhere to at least minimum requirements of natural justice and should be composed of impartial persons acting fairly and without bias and in good faith.

90. On a hypothetical question being put to the petitioners whether they would object to the presence of Mr.O.P. Rawat on remand, counsel for the petitioners on instructions had stated that they would leave it to the wisdom of Mr.O.P. Rawat and they would not object.

91. Counsel for the ECI had pointed out and in his written submissions has stated that the note of Mr.O.P. Rawat dated 19th April, 2017 exposits his pain and anguish in view of the baseless allegations of impartiality and bias. In view of the statement now made by counsel for the petitioners, we are not making any further comment, as recusal itself is not a direct issue and question before us.

92. In the facts of the present case it is admitted position that Mr.Sunil Arora was appointed as a Member of the Election Commission and took charge on 1st September, 2017. Mr. Sunil Arora had not participated in any hearing or heard arguments in the Reference, though he is one of the co-authors of the Opinion dated 19th January, 2018. Mr.O.P. Rawat, as noted above had recused himself from the deliberations with effect from 19th April, 2017. No information as regarding re-joining etc. was furnished. Order dated 23rd June, 2017 which had disposed of preliminary issue had observed that further date of hearing would be communicated to the petitioners.

93. Opinion given by the ECI dated 19th January, 2018 was pronounced more than six months after the last order dated 23rd June, 2017, which had stated that next date of hearing would be intimated. No doubt in between two notices dated 28th September, 2017 and 2nd November, 2017 were issued by the Election Commission, calling upon replies from the petitioners on the documents and papers submitted by the Government of NCT of Delhi, but no date of hearing was fixed or indicated in these notices. These notices did not state that the ECI did not intend to give any oral or personal hearing. These notices were duly replied by the petitioners, who had raised objections, submitting that there was lack of quorum as Mr.O.P. Rawat had

recused and ECI did not inform that Mr.O.P.Rawat had agreed to rejoin and participate. Thus there have been errors and lapses, which would vitiate the opinion.

Meaning of the expression "office of profit under the Government", finding of the ECI in their opinion and the controversy

94. We would briefly refer to this primary and seminal question as we intend to pass an order of remand for fresh decision/opinion. Any observation on merits would cause prejudice. However reference to findings in the impugned opinion and arguments and contentions of the petitioners is required to highlight divergent stands on interpretation of the expression "office of profit under the government" expositing complexity and far reaching consequences. Complexity and intricacy involved, as noticed above, is a relevant consideration for the procedure to be adopted.

95. There is a detailed exposition in the opinion of the ECI dated 19th January, 2018 on interpretation of the term "office of profit under the Government" under the heading "Analysis of the Legal Position". ECI has stressed that there should not be any conflict between duties and role as an elected member of the Legislature towards the House, which would be compromised and dented if the elected member had received benefit from the Executive and consequently could come under their obligation and influence. This would be incompatible with the independence that an elected representative of people was constitutionally mandated and required to maintain, and would affect his/her duty as an elected member to fearlessly express his/her view on governance, without being subjected to governmental or Executive pressure. Opinion refers to ***Maulana Abdul Shakur versus Rikhab Chand and Another***, AIR 1958 SC 52, ***Guru***

Gobinda Basu versus Shankari Prasad Ghosal and Others, AIR 1964 SC 254, ***Biharilal Dobray versus Roshan Lal Dobray***, (1984) 1 SCC 551 and ***Pradyut Bordoloi versus Swapan Roy***, (2001) 2 SCC 19 and others, and thereafter observes:

> "**6.**The phrase "office of profit" is not defined in the Constitution. By a series of decisions (see *Abdul Shakur* v. *Rikhab Chand* [AIR 1958 SC 52 : 1958 SCR 387] ; *M. Ramappa* v. *Sangappa* [AIR 1958 SC 937 : 1959 SCR 1167] ; *Guru Gobinda Basu* v. *Sankari Prasad Ghosal* [AIR 1964 SC 254 : (1964) 4 SCR 311] and *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanappa* [(1971) 3 SCC 870] this court has laid down the tests for finding out whether the office in question is an office of profit under a Government. These tests are (*1*) whether the Government makes the appointment; (*2*) whether the Government has the right to remove or dismiss the holder; (*3*) whether the Government pays the remuneration; (*4*) what are the functions of the holder? Does he perform them for the Government; and (*5*) does the Government exercise any control over the performance of those functions?
>
> **7.** In *Guru Gobinda Basu* v. *Sankari Prasad Ghosal* [AIR 1964 SC 254 : (1964) 4 SCR 311] the Constitution Bench emphasised the distinction between the holder of an office of profit under the Government and the holder of a post or service under the Government and held that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. Several factors entering into the determination of question are: (*i*) the appointing authority, (*ii*) the authority vested with power to terminate the appointment, (*iii*) the authority which determines the remuneration, (*iv*) the source from which the remuneration is paid, and (*v*) the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf. But all these factors need not coexist. Mere absence of one of the factors may not negate the overall test. The decisive test for determining whether a person holds any office of profit under

> the Government, the Constitution Bench holds, is the test of appointment; stress on other tests will depend on facts of each case. The source from which the remuneration is paid is not by itself decisive or material.
>
> XXXXX
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> **14.** Posed with the perplexed problem — whether a person holds an office under the Government, the first and foremost question to be asked is: Whether the Government has power to appoint and remove the person on and from the office? If the answer is in the negative, no further inquiry is called for, the basic determinative test having failed. If the answer be a positive one, further probe has to go on finding answers to questions framed in *Shivamurthy case* [(1971) 3 SCC 870] and searching for how many of the factors pointed out in *Guru Gobinda Basu case* [AIR 1964 SC 254 : (1964) 4 SCR 311] do exist? The totality of the facts and circumstances reviewed in the light of the provisions of relevant Act, if any, would lead to an inference being drawn if the office held is *under* the Government. The inquisitive overview-eye would finally query: On account of holding of such office would the Government be in a position to so influence him as to interfere with his independence in functioning as a Member of Legislative Assembly and/or would his holding of the two offices — one under the Government and the other being a Member of Legislative Assembly, involve a conflict of interests inter se? This is how the issue has to be approached and resolved."

96. Dwelling further, reference was made to Mr. P.D.T. Achary, former Secretary General of the Lok Sabha, note on history of "Office of Profit" and Nineteenth Report of the Joint Parliamentary Committee on Offices of Profit (Sixteenth Lok Sabha) presented to the Lok Sabha on 28th March, 2017 and laid before the Rajya Sabha on 28th March, 2017 and Bhargava Committee Report on Office of Profit dated 22nd October, 1955 to the effect that remuneration or pecuniary gains could be tangible and intangible in

nature, flow from such office irrespective of whether the holder for the time had actually received such remuneration or gain or not. To hold otherwise would be to nullify the object of imposition of disqualification, which would get frustrated.

97. Opinion refers to ***Jaya Bachchan versus Union of India and Others***, (2006) 5 SCC 266, paragraph 6 of which reads as under:-

> "**6.** Clause (1)(*a*) of Article 102 provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. The term "holds an office of profit" though not defined, has been the subject-matter of interpretation, in several decisions of this Court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is "holding an office of profit". The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word "honorarium" cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles

> the holder to, any pecuniary gain other than reimbursement of out of pocket/actual expenses, then the office will be an office of profit for the purpose of Article 102(1)(*a*). This position of law stands settled for over half a century commencing from the decisions of *Ravanna Subanna* v. *G.S. Kaggeerappa* [AIR 1954 SC 653] , *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanappa*[(1971) 3 SCC 870] , *Satrucharla Chandrasekhar Raju* v. *Vyricherla Pradeep Kumar Dev* [(1992) 4 SCC 404] and *Shibu Soren* v. *Dayanand Sahay* [(2001) 7 SCC 425] ."

98. Thus, the opinion holds that it was not actual receipt of profit, but potential of profit, was the deciding factor, which would prevent the holder to stand for election and incur disqualification. Reference was also made to judgment of the Supreme Court in ***Bimolangshu Roy (Dead) Through LRs versus State of Assam and Another***, 2017 SCC Online SC 813 interpreting Articles 194 and 164(1A), and declaring that the Assembly of the State of Assam could not have enacted a law creating office of Parliamentary Secretaries. Constitutional arrangement did not authorise the State Legislature to create offices such as office of the Parliamentary Secretary. Thus, the State Legislative Assemblies do not have competence to create posts of officers of State Legislature.

99. Opinion also refers to judgments of the High Courts in ***Banomali Behera versus Markanda Mahapatra***, AIR 1961 Orissa 205, ***Laljibhai Jodhabhai Bar versus Vinodchandra Jethalal Patel***, AIR 1963 Guj 297 and ***Aires Rodrigues versus State of Goa***, (2009) Supp Bom CR 16.

100. Opinion examines the factual matrix under the heading whether the office of Parliamentary Secretaries was an office that yielded profit or had the potential to yield profit. Reference was made to introduction of the Delhi Members of Legislative Assembly (Removal of Disqualification)

(Amendment) Bill 2015 on 23rd June, 2015, passed by the Legislative Assembly on 24th June, 2015 that allocation of office of Parliamentary Secretaries in the Legislative Assembly Secretariat would not amount to disqualification. The argument with regard to the Bill on the principle of *ex abundanti cautela* (abundant caution) was rejected as legally untenable. Reference was made to documents and "voluminous reply" received from Government of NCT of Delhi, several portions of which have been quoted. Paragraphs 99 to 102 refer to specific facts against some of the disqualified petitioners. Paragraph 107 under the heading whether the office of the Parliamentary Secretary was Executive in nature or functions, summaries meetings chaired and attended by some of the disqualified members. Paragraph 113 opines that appointment of 21 members of the Legislative Assembly as Parliamentary Secretaries to the Ministers of Delhi Assembly, would mean that 40% of the elected members would become part of the Executive, which would be in flagrant violation of clause (4) of Article 239AA of the Constitution of India, which permits maximum of 10% MLAs to be appointed as Ministers. There was an attempt to bypass constitutional provisions of paramount importance. Relying on principle of purposive interpretation and construction, it was held that the very nature of office of Parliamentary Secretaries was Executive.

101. Elaborating on the same, learned counsel appearing for the ECI had submitted that the Parliamentary Secretaries had taken oath of office as would be taken by Ministers and as per Staff Car Rules, "Minister" would include Parliamentary Secretary. In other words, the Parliamentary Secretaries were entitled to same entitlement and benefits under the Staff Car Rules as Ministers. Reference was made to provision for 400 litres for

petrol, etc. In particular our attention was drawn to several committees meetings, chaired and attended by the Parliamentary Secretaries. Thereby the elected members had taken over and had performed role and functions of political Executive clearly showing conflict of interest and, therefore, disqualification was justified. Argument proceeded drawing attention to the constitutional philosophy of separation of powers, and that even in Parliamentary democracy distinction and separation between the Legislature, Executive and the Judiciary exists and must be respected and that the Legislative Members could be appointed as Ministers, but within the maximum limits and numbers specified. Elected members cannot become political Executive beyond the said limit and take over and control day-to-day administration by giving directions and instructions.

102. Per contra, the petitioners relying on ***Madhukar G.E. Pankakar versus Jaswant Chobbildas Rajani and Others***, (1977) 1 SCC 70 submit that the expression "office of profit under the Government" postulates and requires that (i) there should be an office, (ii) office should carry profit, i.e., pecuniary gain and (iii) the office should be under Government. Three conditions were not satisfied. Purposive interpretation and construction has no role and strict interpretation is required.

103. Office of Parliamentary Secretary was not in existence, prior in point of time and was not created. The post /designation had no permanency independent of the occupant and reliance was placed upon ***Madhukar G.E. Pankakar (supra)*** and ***Srimati Kanta Kathuria versus Manak Chand Surana***, (1969) 3 SCC 268. (Opinion dated 19th January, 2018 on the said aspect is detailed and the issue has been examined under the heading whether the office of Parliamentary Secretary was an office under the

Government.) Referring to ***Srimati Kanta Kathuria*** (supra), it was highlighted that the word "office" had various meanings and with reference to Article 191, the words "its holder" indicates there must be an office which exists independently of the holder of the office. A reference was made to Justice Rowlatt's definition in ***Great Western Railway Company versus Bater,*** (1992) 8 TC 231 of the term "office" or "employment" as meaning subsisting, permanent or substantive position that had an existence independent of the person who fills it. Reference was also made to ***D.R. Gurushantappa versus Abdul Khuddus Anwar and Others,*** (1969) 1 SCC 466, ***Shivamurthy Swami Inamdar versus Agadi Sanganna Andanappa***, (1971) 3 SCC 870, ***Anokh Singh versus Punjab State Election Commission***, (2011) 11 SCC 181.

104. Referring to the five-test criteria mentioned by the ECI in their opinion, it was argued that the said test applies when determining whether or not the office of profit was "under the Government of India or Government of any State", for this was the issue raised and decided in ***Guru Gobinda Basu*** (supra). Five-test criteria would not determine the second requirement that the office should have yielded or had potential to yield profit. ***Pradyut Bordoloi*** (supra) had also dealt with the perplexed issue/question whether the person had held "an office under the Government" and in that context had noted and referred to ***Guru Gobinda Basu*** (supra).

105. Petitioners have referred to ***Madhukar G.E. Pankakar*** (supra), which observes:-

> "22. Back to the issue of "office of profit". If the position of an insurance medical officer is an "office", it actually yields profit

or at least probably may. In this very case the appellant was making sizeable income by way of capitation fee from the medical services, rendered to insured employees. The crucial question then is whether this species of medical officers are holding "office" and that "under Government". There is a haphazard heap of case-law about these expressions but they strike different notes and our job is to orchestrate them in the setting of the statute. After all, all law is a means to an end. What is the legislative end here in disqualifying holders of "offices of profit under the "government"? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time government servants but as part-time participants in people's projects sponsored by government? For instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part-time in the ennobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative Government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of "office of profit" to cast the net so wide that all our citizens with specialities and knowhow are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by Government or corporations controlled by the State may be detrimental to democracy itself. Even athletes may

hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view, even if it involves "judicious irreverence" to vintage precedents, is the wiser desideratum.

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40. In the present case, can we say that the post (forgetting the finer issue of office, as distinguished from post) is under the State Government? The capitation fee is the remuneration the doctor is paid and this comes not from the Government direct but from a complex of sources. But Gurugobinda and Gurushantappa [D. R. Gurushantappa v. Abdul Khuddus Anwar, (1969) 1 SCC 466 : (1969) 3 SCR 425] took the view that payment of remuneration not from public revenue is a neutral factor. Is the degree of control by Government decisive? The power to appoint, direct and remove, to regulate and discipline, may be good indicia but not decisive, as pointed out in Gurushantappa. In our case, Government does have, partly direct and partly indirect control, but the conclusion is not inevitable because the doctor is put in the list not by Government directly but through a prescribed process where the Surgeon General has a presiding place. How proximate or remote is the subjection of the doctor to the control of Government to bring him under Government is the true issue. Gurushantappa has highlighted this facet of the question. Indirect control, though real, is insufficient, flows from the ratio of Abdul Shakur. The appellant, as elaborated by Ray, J. (as he then was) in the Calcutta case, was not a servant of Government, but a private practitioner, was not appointed directly by Government, but by an officer of government on the recommendation of a committee, was paid not necessarily out of government revenue and the control over him in the scheme was vested not in Government but in an Administrative Medical Officer and Director whose position is not qua government servant but creatures of statutory rules. The ultimate power to remove him did lie in Government even as he enjoyed the power to withdraw from the panel. The mode of medical treatment was beyond Government's control and the clinic was a private one. In sum, it

> is fair to hold that the insurance medical practitioner is not a freelancer but subject to duties, obligations, control and rates of remuneration under the overall supervision and powers of Government. While the verdict on being under the Government is a perilous exercise in judicial brinkmanship, especially where the pros and cons are evenly balanced, the ruling in Kanta which binds us and the recondite possibility of conflict of duty and interest for a Municipal President who is an insurance medical practitioner under an arrangement with Government induce us to hold that though the line is fine, the appellant is not functioning under the Government in the plenary sense implied in electoral disqualification. After all, the means i.e. the ban on candidature, must have a substantial link with the end viz. the possible misuse of position as insurance medical practitioner in doing his duties as Municipal President."

In this case, the elected member was a doctor and on the date of the nomination was working as a panel doctor under the Employees State Insurance Corporation. Appeal was allowed by the Supreme Court holding that the elected member had not incurred disqualification as the panel doctor under the Corporation, though he was subjected to responsibilities, eligible to remuneration and liable to removal, as he did not squarely fall within the expression "holding office under Government". Referring to the decision in the case of ***Guru Gobinda Basu*** (supra) which was a case of a Chartered Accountant who was auditor of government companies and director with State Government Financial Corporation, it was held that disqualification had indeed occurred.

106. It was vehemently submitted that there was a difference between the case law relating to determine whether the office was "under the Government" and the test or parameter to be applied to satisfy the second requirement of pecuniary gain or profit. Reimbursement of expenses in

form of official car for official work or even expenditure of setting up of office, which could be used by others and creating physical infrastructure, it was urged, would not constitute pecuniary gain and thus disqualification. Reference was made to ***Jaya Bachachan*** (supra), ***U.C. Raman versus PTA Rahim and Others***, (2014) 8 SCC 934, ***Divya Prakash versus Kultar Chand Rana and Another***, (1975) 1 SCC 264, ***Karbhari Bhimaji Rohamare versus Shanker Rao Genuji Kolhe and Others***, (1975) 1 SCC 252 and ***Gajanan Samadhan Lande versus Sanjay Shyamrao Dhotre***, (2012) 2 SCC 64.

107. Reliance was placed on ***Anokh Singh*** (supra), which decision referred to the five-test criteria, to argue that it was necessary to value the nature and importance of the functions performed and whether it would be necessary for the person holding the office under the Government to incur an expenditure in performance of functions. These matters would then have to be correlated to honorarium, allowance or stipend attached to the office and without examining these aspects, it cannot be concluded whether the amount received was compensatory in nature or profit. In the said case, it was held that the amount paid as honorarium to the lambardar was not office of profit. Reference was made to ***S. Umrao Singh versus Darbara Singh and Others,*** AIR 1969 SC 262 where an out of pocket expense paid to Chairman, Panchayat Samiti was not treated as office of profit. It was held that the burden lay on the complainant to show that the amount paid was in excess of the expenses. It was observed that the matter must be considered as a matter of substance rather than of form, the essence of payment rather than nomenclature. However, the question should be answered reasonably having regard to the circumstances of the case, the class of persons whose

case was being dealt with and not divorced from the reality. A practical and not a pedantic view given the nature of rights involved would guide the decision.

108. In ***Karbhari Bhimaji Rohamare*** (supra), the question whether the successful candidate was disqualified as he was a member of the Wage Board was considered. It was observed that the word "profit" connotes idea of pecuniary gain and if there was really a gain, quantum or amount would not matter, but the amount of money receivable by a person in connection with the office he holds could be material in deciding whether the office really carries any profit. The stress, it was observed, was on pecuniary gain. Referring to ***S. Umrao Singh*** (supra), it was observed that the amount drawn by the Chairman for travelling allowance or daily allowance would not be pecuniary gain. The verdict nevertheless highlighted that the question whether the office had resulted in profit to the holder of the office, even if small, was material, but there would not be a breach where the order of appointment itself was made in honorary capacity. Reference was also made to ***Rabindra Kumar Nayak versus Collector, Mayurbhanj, Orissa and Others,*** (1999) 2 SCC 627.

109. In ***U.C. Raman versus PTA Rahim and Others***, (2014) 8 SCC 934, it was held as under:

> **"16.** The plea raised by Mr.Andhyarujina, learned Senior Advocate for the appellant that the word "profit" should include even status and influence, etc. besides the pecuniary profits, is not found acceptable in view of long line of judgments of this Court, some of which have been cited by both the parties and have been noticed above. This Court has given categorical clarification on more than one occasion that an "office of profit" is an office which is capable of yielding a

> profit or pecuniary gain. The word "profit" has always been treated equivalent to or a substitute for the term "pecuniary gain". The very context, in which the word "profit" has been used after the words "office of", shows that not all the offices are disqualified but only those which yield pecuniary gains as profit other than mere compensatory allowances, to the holder of the office. There is no requirement to make a departure from the long line of established precedents on this issue. If the submissions of the learned counsel for the appellant were to be accepted, it would add a great amount of uncertainty in deciding whether an office is an "office of profit" or not."

110. We have deliberately not commented, given our opinion and interpreted the expression "office of profit under the Government" after quoting the judgments and noting the respective point of views, as order of remand is required and necessary. The reason why we have referred to the respective stands and position is to highlight the complexity and divergent views which require consideration before a firm and decisive opinion can be formed and given in a case of this nature. In the context of the present case, therefore, oral arguments and elucidation on the legal position as well as factual matrix is required and necessary. This is apparent also from the orders passed by the Commission on 16th September, 2016 and then on 23rd June, 2017.

Question of remand

111. On the question of remand we have no doubt and reject the contention that ECI having given their opinion have become *functus officio* and hence remand is not possible. This argument of ECI is untenable. Once the impugned opinion and order/notification are set-aside, proceedings before the ECI would continue from the stage the error and lapse had occurred. If the contention of the ECI is to be accepted, it would result in an incongruous

situation, as the reference remains unanswered and has to be decided. We have upheld validity of reference made by the President. The President need not make a fresh reference. In light of the statutory provisions and the legal position ECI has to render and give their opinion on the Reference. Petitioners have relied on ***Uma Shanker Singh versus Principal Secretary to his Excellency the Governor of U.P., Lucknow,*** (2015) 5 Allahabad Law Journal 225, in which an order of remand to ECI was made. SLP preferred against the said order/judgment was dismissed. High Courts while exercising power under Article 226 are entitled to mould reliefs to suit the fact situation, otherwise it could make the power under Article 226 ineffective. In ***Grindlays Bank Limited versus Income-tax Officer, Calcutta and Others***, (1980) 2 SCC 191, question arose whether the High Court could direct fresh assessment, as in the meanwhile assessment order had been passed pursuant to the quashed notice. Supreme Court observed that the High Court would not ordinarily substitute his own order for the order quashed. High Courts could draw on an inherent power to make an order as was necessary for doing complete justice between the parties. Accordingly, High Court could have directed fresh assessment even if the assessment proceeding had become barred by limitation. The reason being that the defect complained was a procedural lapse and could have been corrected by following proper procedure. This decision was followed by the Supreme Court in ***Commissioner of Trade and Taxes and Others versus Ahluwalia Contracts (India) Limited,*** C.A. No.15605-06 of 2017 decided on 4th October, 2017.

112. In ***Commissioner of Sales Tax, U.P. versus R.P. Dixit Saghidar*** (2001) 9 SCC 324, the Supreme Court reversed a decision of the High Court

and had directed remand observing that when principles of natural justice are stated to have been violated, it is open to the appellate authority in appropriate cases to set aside the order with direction to decide the case *de novo*.

Conclusion

113. In view of the aforesaid discussion, our findings on different issues and questions are as under:-

(i) Reference made by the President to the ECI is valid.

(ii) Order dated 23rd June, 2017 passed by the ECI is valid and in accordance with law.

(iii) Opinion of the ECI dated 19th January, 2018 is vitiated and bad in law for failure to comply with the principles of natural justice. Accordingly, Writ of Certiorari is issued quashing the said opinion dated 19th January, 2018 and the consequent order/notification dated 20th January, 2018 for violation of principles of natural justice, namely, failure to give oral hearing and opportunity to address arguments on merits of the issue whether the petitioners had incurred disqualification and also on account of failure to inform that Mr. O.P. Rawat had expressed his intention to rejoin proceedings after his recusal and lastly because Mr. Sunil Arora had not participated and no hearings were held before him.

(iv) Order of remand is passed to the ECI to hear arguments and thereafter decide the all important and seminal issue; what is meant by the expression "office of profit held under the Government" and re-

examine the factual matrix to decide whether the petitioners had incurred disqualification on appointment as Parliamentary Secretaries, without being influenced by the earlier order or observations on the said aspect in this order.

114. The writ petitions are accordingly partly allowed in the aforesaid terms, without any order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(CHANDER SHEKHAR)
JUDGE

MARCH 23, 2018
NA/ssn/VKR/pk