Desiya Murpokku Dravida Kazhagam & Anr vs Election Commission Of India on 18 April, 2012

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Bench: Altamas Kabir, J. Chelameswar

|REPORTABLE |

IN THE SUPREME COURT OF INDIA
EXTRAORDINARY ORIGINAL JURISDICTION

WRIT PETITION (C) No.532 of 2008

1 DESIYA MURPOKKU DRAVIDA KAZHAGAM & ANR. PETITIONERS

VS.

2 THE ELECTION COMMISSION OF INDIA RESPONDENT

WITH

WRIT PETITION (C) NOS.315 OF 2009, 422 OF 2009, 426 OF 2009, 444 OF 2009, 454 OF 2009, 463 OF 2009, 447 OF 2009 & 132 OF 2009, SPECIAL LEAVE PETITION (C) NOS.23494 OF 2009 & 7379-7380 OF 2009 AND WRIT PETITION (C) NOS.111 OF 2011, 117 OF 2011, 125 OF 2011, 124 OF 2011 & 128 OF 2011

J U D G M E N T

ALTAMAS KABIR, J.

1. Writ Petition (Civil) No.532 of 2008 was filed by Desiya Murpokku Dravida Kazhagam and Colonel Edwin Jesudoss (Retd.), challenging the constitutional validity of the amendment of the Election Symbols (Reservation and Allotment) Order, 1968, hereinafter referred to as the "Election Symbols Order, 1968", vide Notification No.O.N.56/2000/Jud-III dated 1st December, 2000, substituting Clause 6 with 6A(i) and (ii) and Clause 6B therein. The same was taken up for final hearing along with several other Writ Petitions on account of the common issue involved therein. The common grievance in all these writ petitions is with regard to the amendment which mandates that in order to be recognized as a State party in the State, it would have to secure not less than 6% of the total valid votes polled in the State and should also have returned at least 2 members to the Legislative Assembly of the State.

2. The grievance of the Desiya Murpokku Dravida Kazhagam is that it had been refused recognition as a State party by the Election Commission of India, although, it secured 8.33% of the valid votes in the Assembly elections. It is the further grievance of the Petitioners that in view of the amendment made to Clause 6 of the Election Symbols Order, 1968, it had been denied recognition on account of the cumulative effect of the requirement that a political party would not only have to secure not less than 6% of the total valid votes polled, but it had also to return at least 2 members to the Legislative Assembly of the State. It is the Petitioners' case that despite having secured a larger percentage of the votes than was required, it was denied recognition, since it had failed to return 2 members to the Legislative Assembly.

3. In order to appreciate the case made out by the writ petitioners, it would be apposite at this stage to look into the background in which the Election Symbols Order, 1968, came to be pronounced.

4. After the commencement of the Constitution on 26th January, 1950, the Election Commission was constituted under Article 324 of the Constitution. On 30th July, 1951, the Commission held a conference in New Delhi with 7 established political parties organised on an all-India basis and discussed the possibilities of allotting a distinctive symbol to each one of them all over India. During the deliberations, the participants generally agreed that the same symbols would be used throughout India for all candidates of a party, both for parliamentary and assembly elections. What also fell for discussion was whether where among several constituencies one of the seats was reserved for Scheduled Castes or Scheduled Tribes, the candidates belonging to a party would be allotted the party's symbol. The said discussions led to ad hoc recognition being given by the Election Commission to several parties as national or multi-state parties and allotted to them the symbols as were shown against their names.

5. Drawing inspiration from the first General Elections conducted by the Election Commission in 1951-52, the Election Commission decided to withdraw recognition from such parties whose poll performance was far below the standards to merit further recognition. However, giving due recognition to the fact that some of the parties were new and were not fully organised before the elections, the Commission fixed 3% of the valid votes polled in the elections as the minimum standard for grant of recognition. In the case of national parties, such percentage was calculated with reference to the votes polled in regard to elections to the House of the People, while in the case of State parties, the votes polled in the elections to the State Legislative Assemblies were the factors

to be considered. On account of the standards laid down, only 4 political parties remained eligible for recognition as national parties, namely, (1) Indian National Congress; (2) All India Bharatiya Jan Sangh; (3) Communist Party of India; and (4) Praja Socialist Party, and all other parties lost their recognition. Standards for maintaining such recognition continued to be applied by the Election Commission in the Second and Third General Elections held in 1957 and 1962 respectively, but after the Third General Elections the minimum standard was raised by the Commission from 3 to 4%. The same formula was also used by the Election Commission after the Fourth General Elections in 1967.

6. After the Fourth General Elections were held in 1967, the Election Commission decided to streamline the provisions and procedure so long followed relating to recognition of political parties in the conduct of elections. The Commission was of the view that the provisions relating to recognition of political parties and their functioning, was required to be codified and provision was also required to be made for registration of political parties as a pre-condition for recognition. Accordingly, by virtue of powers conferred on it by Article 324 of the Constitution, read with Section 29A of the Representation of the People Act, 1951 and Rules 5 and 10 of the Conduct of Election Rules, 1961 and other powers vested in it, the Election Commission of India made and promulgated the Elections Symbols (Reservation and Allotment) Order, 1968, which is at the core of the issues being heard in these matters.

7. As the Preamble of the aforesaid Order states, the same was promulgated to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly Constituencies; for the recommendation of the political parties in relation thereto and for matters connected therewith. It was also promulgated in the interest of purity of elections to the House of the People and the Legislative Assembly of every State and in the interest of the conduct of such elections in a fair and effective manner. After the Election Symbols Order was promulgated, some of its provisions were challenged on the ground of their constitutional validity. One of the questions raised was whether under the aforesaid Order, the Election Commission could have vested itself with the powers contained in Clause 15 thereof, reserving to itself powers to settle issues in relation to splinter groups or rival sections of recognized political party, each of whom claimed to be the original party. The decision of the Commission was made binding on all the rival sections and groups. The said question fell for the decision of this Court in the case of Shri Sadiq Ali & Anr. Vs. Election Commission of India, New Delhi & Ors. [(1972) 4 SCC 664] and it was held by a Three-Judge Bench of this Court that Clause 15 was intended to effectuate and subserve the main purposes and objects of the Symbols Order. It was observed that the Clause was designed to ensure that because of a dispute having arisen in a political party between two or more groups, the entire scheme of the Election Symbols Order relating to the allotment of a symbol reserved for the political party, was not frustrated. This Court took note of the fact that the Election Commission had been clothed with plenary powers by Rules 5 and 10 of the Conduct of Election Rules, 1961, in the matter of allotment of Symbols, the validity whereof had not been challenged. This Court, therefore, came to the conclusion that the fact that the power to settle such disputes had been vested in the Commission could not constitute a valid ground for assailing the vires of the said clause. Since the said decision has also been referred to by the learned counsel for the parties in extenso, we will revert back to the same at a later stage in this judgment.

8. The same view was also expressed by this Court in All Party Hill Leaders' Conference, Shillong Vs. Captain W.A. Sangma & Ors.[(1977) 4 SCC 161] and in Roop Lal Sathi Vs. Nachhattar Singh Gill [(1982) 3 SCC 487], wherein while dealing with the provisions of Clause 13 of the Symbols Order, this Court held that the dispute relating to the procedure for setting up of candidates could be the subject matter of an Election Petition under Section 100(1)(d)(iv) of the Representation of the People Act, 1951.

9. The authority of the Election Commission under the Election Symbols Order, 1968, as a whole was also challenged before this Court in Kanhiya Lal Omar Vs. R.K. Trivedi & Ors. [(1985) 4 SCC 628], wherein it was urged on behalf of the Petitioner that the said Order, being legislative in character, could not have been issued by the Election Commission, which was not entrusted by law with power to issue such an Order regarding the specification, reservation, choice and allotment of symbols that might be chosen by the candidates during elections in the Parliamentary and Assembly Constituencies. It was also urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the Legislative Assemblies, in the Commission, could not be construed as conferring power on the Commission to issue the Symbols Order. Rejecting the said contention, this Court held that the expression "election" in Article 324 of the Constitution is used in a wide sense so as to include the entire process of election which consists of several stages, some of which had an important bearing on the result of the process and that every norm which laid down a Code of Conduct could not possibly be elevated to the status of legislation or even delegated legislation. It was emphasized that there are certain authorities or persons who may be the source of rules of conduct and who at the same time could not be equated with authorities or persons who are entitled to make law in the strict sense.

10. As has been indicated hereinbefore, the Petitioner political party, Desiya Murpokku Dravida Kazhagam, hereinafter referred to as "DMDK" was refused recognition as a State Party by the Election Commission of India, despite having secured 8.33% of the valid votes on account of the fact that by virtue of the amendment to the Election Symbols Order in 2000, in order to obtain recognition, DMDK was required to secure not less than 6% of the total valid votes polled in the State and must have returned at least two members to the Legislative Assembly of the State.

11. Appearing for the Writ Petitioners, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the condition for a political party to be recognized as a State Party was originally prescribed in Clause 6 of the Election Symbols Order, 1968, which provides as follows:-

> "6(2). A political party shall be treated as a recognized political party in a State, if and only if either the conditions specified in clause (A) are, or the condition specified in clause (B) is, fulfilled by that party and not otherwise, that is to say – A) that such party -
>
> a) has been engaged in political activity for a continuous period of five years; and
>
> b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning,

returned – either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from the State;

Or (ii) at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number;

(B) that the total number of valid votes polled by all the contesting candidates set up by such party at the general election in the State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning (excluding the valid votes of each such contesting candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total number of valid votes polled by all the contesting candidates in that constituency), is not less than four per cent of the total number of valid votes polled by all the contesting candidates at such general election in the State (including the valid votes of those contesting candidates who have forfeited their deposits)."

12. Mr. Venugopal submitted that the said conditions remained in force from 1968 to 1997 when the conditions stipulated in Clause 6(2)(B) for recognition of a political party as a State Party were amended by the Election Commission of India vide its Notification No.56/97 Jud III dated 15.12.1997, which provided as follows :-

"6(2). A political party shall be treated as a recognized political party in a State, if and only if either the conditions specified in clause (A) are, or the condition specified in clause (B) is, fulfilled by that party and not otherwise, that is to say – A) that such party -

(a) has been engaged in political activity for a continuous period of five years; and

(b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning, returned – either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from the State;

Or (ii) at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number;

(B) that the total number of valid votes polled by all the contesting candidates set up by such party at the general election in the State to the House of the People, or, as the case may be, to the Legislative Assembly, is not less than six per cent of the total number of valid votes polled by all the contesting candidates at such general election in the State.

2(A) Notwithstanding anything contained in clause (B) of the sub- paragraph (2), a political party shall be treated as a recognized political party in a State, if at the general election to the House of the

People or as the case may be, to the Legislative Assembly of the State, in existence and functioning at the commencement of the Election Symbol (Reservation and Allotment) (Amendment) Order, 1997, the total number of valid votes polled by all the contesting candidates setup by such party (but excluding the valid votes of each such candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total valid votes polled by all the contesting candidates in that constituency), is not less than 4% of the total number of valid votes polled by all the contesting candidates at such general election in that State (including the valid votes of those contesting candidates who have forfeited their deposits)."

13. By virtue of the aforesaid Notification, the minimum percentage of votes to be obtained by a political party for recognition as a State Party was increased from 4% to 6%, but the other criteria regarding the number of seats or percentage of votes was maintained. The said conditions relating to the recognition of a political party as a State Party solely on the basis of the percentage of votes held by its candidates, was again amended in 2007 by the Election Commission of India vide its Notification No.56/2000/Jud-III dated 1.12.2000, where the criteria was altered in the manner following :-

> "6B. Conditions for recognition as a State party – a political party, other than a National party, shall be treated as a recognized State party in a State or States, if, and only if, -
>
> Either (A) (i) the candidates set up by it, at the last general election to the House of People, or to the Legislative Assembly of the State concerned, have secured not less than six per cent of the total valid votes polled in that State at that general election; AND
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> (ii) In addition, it has returned at least two members to the Legislative Assembly of the State at the last general election to that Assembly;

or (B) it wins at least three per cent of the total number of seats in the Legislative Assembly of the State, (any fraction exceeding one- half being counted as one), or at least three seats in the Assembly, whichever is more, at the aforesaid general election."

14. It was submitted that the DMDK was constituted as a political party on 14.9.2005 and was registered with the Election Commission of India under Section 29A of the Representation of the People Act, 1951, hereinafter referred to as "the 1951 Act", and contested the General Elections in 2006 for the Tamil Nadu Legislative Assembly in 232 out of 234 constituencies, just after 8 months of its formation. Being an unrecognized party, the candidates were allotted the "Naqara" symbol in 224 constituencies, whereas in six constituencies its candidates were given the "Bell" symbol and the "Ring" symbol in 2 constituencies. Mr. Venugopal submitted that in the said elections all the candidates of the DMDK secured 8.33% of the total number of valid votes in comparison to the first and second political parties, which obtained 31.44% and 30.92% respectively of the votes. Apart from the above, the President of the Party, Mr. Vijayakanth, won the Assembly Election from the Virudhachalam Assembly Constituency, thereby returning one candidate to the Tamil Nadu

Legislative Assembly, in addition to having polled 8.33% of the total valid votes.

15. Mr. Venugopal submitted that the criteria laid down by the Election Commission of India for recognition of a political party as a State Party, whereby a State Party had to secure not less than 6% of the total valid votes polled in the State in the General Elections and in addition it had to return at least two members in the said State election, was an erroneous methodology for granting recognition to a political party as a State Party, since in a given General Election, it was not always the political party which had secured the highest number of votes, that had won the General Elections in the State. That in the 13th Assembly General Elections in 2006, held in Tamil Nadu, the DMK having polled 8,728,716 votes won 96 seats, whereas the AIADMK, having polled 10,768,559 votes, won only 61 seats i.e. despite having polled more than one crore votes over the votes polled by DMK, the AIDMK got only 61 seats as against the DMK's 96 seats. Similarly, in the 9th Lok Sabha General Elections held in 1989 in Tamil Nadu, the DMK having polled 70,38,849 votes did not win a single seat, whereas the AIADMK, having polled almost half of the number of votes, viz. 45,18,649, won all the Lok Sabha seats from Tamil Nadu. Similarly, in the 10th Lok Sabha General Elections held in 1991 and the 14th Lok Sabha General Elections held in 2004, the AIADMK in 1991 and the DMK in 2004 won all the seats for the Lok Sabha, despite having polled lesser number of votes than the rival group. In view of the aforesaid facts and figures, Mr. Venugopal submitted that the criteria adopted by the Election Commission of India for grant of recognition to political parties in a State as a State party was not a correct index for determining grant of such recognition.

16. Mr. Venugopal submitted that the recognition of a political party entitles it to the right of exclusive reservation and use of an electoral symbol, as otherwise there was bound to be confusion in the minds of the voters if different symbols were allotted to different candidates belonging to the same political party. Learned counsel submitted that the classification of parties into recognized and unrecognized parties on the basis of the seats won during an election and the percentage of votes polled, is unreasonable and arbitrary, having no nexus with the purpose sought to be achieved. Mr. Venugopal submitted that yet another disadvantage suffered by unrecognized parties under the Election Symbols Order, 1968, is that in subsequent elections, it does not enjoy any priority with regard to symbols and more often than not, symbols which it had used in the earlier election when given to other candidates, resulted in benefit to such candidate to the disadvantage of the party concerned.

17. Mr. Venugopal also contended that paragraph 6(B) of the Election Symbols Order, 1968, was causing hardship to political parties as it imposes two conditions clubbed with other conditions which were highly anomalous and was, therefore, liable to be struck down.

18. Mr. Manoj Goel, learned Advocate, who appeared for the Petitioners in SLP(C)No. 23494 of 2009 and Writ Petition (C) No.426 of 2009, reiterated the submissions made by Mr. Venugopal and submitted that by denying the unrecognized political parties a common election symbol to its candidates, an attempt was being made by the Election Commission of India, to suppress the growth of such parties. It was submitted that parties that did not have a common electoral symbol have a disadvantage in relation to other unrecognized political parties, since party candidates and even the political parties were known by common citizens by their symbols. It was urged that a political party

like the Bhartiya Janata Party was known by its "Lotus" symbol, while the Bahujan Samaj Party was known by its "Elephant" symbol. Similarly, other parties were also entitled to be recognized by their electoral symbols, which otherwise resulted in hostile discrimination. It was urged that in order to provide a level playing field for all candidates, it was necessary to associate each party with a common electoral symbol, which would eliminate any confusion in the mind of the voter as to who or which party he or she was voting for.

19. Mr. Goel submitted that in Union of India Vs. Association for Democratic Reforms & Anr. [(2002) 5 SCC 294], it was laid down without any ambiguity that the voter has a right to know the antecedents of the candidates based on interpretation of Article 19(1)(a) of the Constitution, which provides that freedom of speech and expression includes the fundamental right to know the relevant antecedents of the candidates contesting the elections. It was also submitted that the said decision was reiterated in the decision rendered by this Court in People's Union for Civil Liberties (PUCL) & Anr. Vs. Union of India & Anr. [(2003) 4 SCC 399].

20. Mr. Goel then urged that questions similar to those, which have arisen in this case, also arose for consideration before a Constitution Bench in Kuldip Nayar & Ors. Vs. Union of India & Ors. [(2006) 7 SCC 1], wherein, while considering various aspects of election laws, the Constitution Bench reiterated the submissions made in People's Union for Civil Liberties (supra), wherein it was stated that it was required to be understood that democracy based on adult franchise, is part of the basic structure of the Constitution. There could, therefore, be no doubt that democracy is a basic feature of the Constitution of India and democratic form of Government depends on a free and fair election system. The Constitution Bench also recorded the contention of the writ petitioners that free and fair election is a constitutional right of the voter, which includes the right that a voter shall be able to cast his vote according to his choice, free will and without fear.

21. Reference was also made to a decision of a Bench of six Judges of this Court in Kharak Singh Vs. State of U.P. & Ors. [AIR 1963 SC 1295], in which the freedom of movement and life and personal liberty, as provided under Article 19(1)(d) and Article 21, ensuring a citizen's free right to move and travel while protecting his life and liberty, fell for consideration. It was held that any restriction on such activity would result in denying a citizen the fundamental rights guaranteed to him under Part III of the Constitution.

22. Learned counsel submitted that the Election Symbols Order, 1968, did not have any statutory force and was in the nature of general directions issued by the Election Commission to regulate the mode of allotment of symbols to contesting candidates. He urged that the said Order was only a compilation of general directions, and not being law, is violative of Articles 19(1)(a) and 19(2) of the Constitution and was, therefore, unconstitutional and void.

23. Mr. Goel also referred to the decisions of this Court in Kanhiya Lal Omar Vs. R.K. Trivedi & Ors. [(1985) 4 SCC 628] and Sakal Paper (P) Ltd. & Ors. Vs. Union of India [(1962) 3 SCR 842, wherein the provisions of the Election Symbols Order, 1968, were under consideration. In the first case, this Court held that the power of superintendence, direction and control vested in the Election Commission under Article 324(1) of the Constitution, include all powers necessary for the smooth

conduct of elections. Reliance was placed on the earlier decision of this Court in Shri Sadiq Ali & Anr. Vs. Election Commission of India, New Delhi & Ors. [(1972) 4 SCC 664] in holding that recommendation of political parties by virtue of Election Symbols Order, 1968, was not unconstitutional and the powers under the said Order were derived not only from the Conduct of Election Rules, 1961, but also from Article 324 of the Constitution. In the latter case, this Court was considering the right to freedom of speech as guaranteed under Article 19(1)(g) of the Constitution and the question which fell for consideration was whether an order which violated Article 19(1)(a) included the freedom of the Press and for propagating his ideas a citizen has the right to publish them, to manage them and to circulate them, either by word of mouth or by writing. It was also held that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom. Mr. Goel urged that by denying to a political party a common symbol, the right to propagate its ideas would amount to interference with the fundamental right of freedom of speech as guaranteed under the aforesaid Article. Mr. Goel urged that since a large chunk of the eligible voters of the country were illiterate, they needed some form of communication which would help them to connect with the political party and the ideas which it propagated.

24. Mr. Goel also referred to two judgments of the U.S. Courts, namely,

(a) James L. Buckley Vs. Francis R. Valeo [424 US 1 (1976); and

(b) Texas Vs. Gregory Lee Johnson [491 US 397 (1989)];

which were decisions relating to the protection of a citizen under the First Amendment. Mr. Goel submitted that democracy is not just about political expression of the majority, but also the right of political minorities, however small, to express themselves. It was urged that the voices of the political minorities could not be stifled under the weight of hugely imbalanced provisions relating to freedom of speech and expression. Mr. Goel submitted that the quantity, width and spread, effectiveness and efficacy and mobilization of people and resources could not be made dependent on the percentage of votes polled and the number of seats won during an election, but the right to freedom of political speech and expression and its communication and propagation must be held to be available to all, irrespective of whether they could get even a single vote or a single seat.

25. Mr. Sanjay Hedge, appearing for the Writ Petitioner in Writ Petition No.125 of 2011, India Jana Nayaka Katchi, formed in April, 2010, urged that the criterion sought to be introduced by the amendment of paragraphs 6(A) and 6(B) of the Election Symbols Order, 1968, was wholly arbitrary, as it sought to discriminate between parties which had a long existence as against those which have been formed only in recent times. Mr. Hegde submitted that it was highly arbitrary and unreasonable to pit candidates from a newly formed party without a common symbol against parties which were recognized by their Symbols by the common electorate. Mr. Hegde submitted that the rationale behind the decision not to allot any common symbol to the candidates of the parties which had recently come into existence gave an unfair advantage to parties which were already established and would prevent a newly-formed party from making any impact on the voters. Mr. Hegde submitted that the Writ Petitioner Party had been formed by an educationist and had in its very first

election, secured 1% of the valid votes polled, which only went to show that given the proper opportunities, parties, such as the Writ Petitioner party, would be able to make a larger impact on the electorate if it could set up candidates who could be identified with the party by means of a common symbol. Mr. Hegde submitted that the symbol in the context of an illiterate electorate is absolutely necessary for a free and fair election and equating established parties with newly-formed parties is a disadvantage to the newly formed party, was contrary to Article 14 and was, therefore, liable to be struck down.

26. Col. Edwin Jesudass, appearing for the Writ Petitioner, All India NR Congress in Writ Petition No.124 of 2011, urged that having fulfilled the criteria, the party has been duly recognized and was, therefore, entitled to the allotment of a permanent election symbol. Echoing the submissions made by Mr. Venugopal, Mr. Goel and Mr. Hegde, Col. Jesudass, who appeared in person, urged that the conditions under the notification issued by the Election Commission on 16.9.2011 were unreasonable and there was no justification for increasing the percentage of votes for qualifying as a State Party from 4% to 6%.

27. In reply to the submissions made on behalf of the Writ Petitioners, Ms. Meenakshi Arora, learned Advocate, appearing for the Election Commission of India, submitted that Section 29-A contained in Part 4A of the Representation of the People Act, 1951, provided a complete procedure as to the manner in which political parties were to be registered. Part V of the Act deals with conduct of elections, which includes nomination of candidates, their Election Agents and the general procedure to be followed during the elections. The remaining Chapters of Part V deal with the conduct of elections while Part VA deals with free supply of certain material to candidates of recognized political parties. Ms. Arora urged that similar provisions regarding recognized political parties and registered political parties are also to be found under the Conduct of Election Rules framed under Section 169 of the 1951 Act. Referring to the Conduct of Election Rules, 1961, Ms. Arora referred to Rule 5 which makes provision for allotment of symbols for elections in Parliamentary and Assembly Constituencies. Learned counsel urged that the said Rules empowered the Election Commission to specify the symbols that may be chosen by candidates at elections in Parliamentary or Assembly Constituencies. Learned counsel referred to Rule 10 which relates to the preparation of list of contesting candidates. It was submitted that under the aforesaid Rules, the Election Commission was fully competent in law not only to allot symbols, but also to determine the right of a recognized political party to an election symbol, as was initially held in Sadiq Ali's case (supra) and also in the case of Kanhiya Lal Omar (supra). Ms. Arora submitted that, in fact, in the case of Kanhiya Lal Omar (supra), this Court observed that the Commission has been clothed with plenary powers by the Conduct of Election Rules and the Commission could not be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbols and for issuing directions in connection therewith. It was also held that it was plainly essential that the Commission should have the power to settle a dispute, in case claim for the allotment of the symbol of a political party was made by two rival claimants. In such a case, the machinery for resolving such disputes was contained in paragraphs 13 and 15 of the Elections Symbols Order, 1968. It was re-emphasised that the Commission is an authority created by the Constitution and according to Article 324, the superintendence, direction and control of the electoral rolls for and the conduct of elections to Parliament and to the Legislature of every State and of elections to the offices of

President and Vice-President was vested in the Commission. Ms. Arora submitted that it was no longer available to the Petitioners to contend that the Election Commission was not competent to decide questions relating to the allotment of symbols to political parties and candidates at the time of elections, since its powers had been vested in it under Article 324 of the Constitution itself.

28. In this regard, Ms. Arora also referred to the recent decision of this Court in Subramanian Swamy Vs. Election Commission of India [(2008) 14 SCC 318], in which the validity of the Election Symbols Order, 1968, was upheld and it was also held that though the matter of symbol is extremely sensitive for a political party, it should be or remain to be firstly a political party since Section 29-A of the Representation of People Act, 1951, clearly shows that a political party must have a certain amount of following as one could not imagine a political party without substantial following.

29. Ms. Arora urged that in Rama Kant Pandey Vs. Union of India [(1993) 2 SCC 438], while holding that creation of distinction between candidates of recognized parties and other candidates, though alleged to be artificial, inconsistent with the spirit of election law, discriminatory, giving important and special treatment to party system in democracy, was quite proper and that political parties constitute a class from other candidates and hence Articles 14, 19 and 21 were not violated in the facts of the case. It was also observed that the right to vote or to stand as a candidate and contest an election is not a fundamental right or even civil right, but a purely statutory right, as is the right to be elected. It was also urged that even the right to dispute an application was a statutory right emerging from the Representation of the People Act, 1951. According to Ms. Arora, outside the Statute, there is no right to elect, no right to be elected and no right to dispute an election. It was submitted that these rights were the creation of a Statute and were, therefore, subject to statutory limitations, as no fundamental right was involved.

30. Ms. Arora submitted that the Election Symbols Order, 1968, concerns registered parties, recognised and non-recognised parties and independent candidates. Learned counsel urged that paragraph 2(h) of the Election Symbols Order, 1968, defines “political party” to be an association of a body of individual citizens of India, registered with the Commission as a political party under Section 29-A of the Representation of the People Act, 1951, which as mentioned herein earlier, deals with registration of association of bodies as political parties with the Election Commission. Ms. Arora submitted that since the provisions of paragraph 6A, 6B and 6C of the Election Symbols Order, 1968, have been held to be valid, they could not be departed from and the political party would, therefore, be bound by whatever amendments that may have been brought to the Election Symbols Order, 1968. Ms. Arora urged that although freedom of expression was a fundamental right within the meaning of Article 19(1)(a) of the Constitution, the right to vote was a statutory right which could not be questioned by way of a Writ Petition so long as said right remained in the statute book.

31. The submissions made on behalf of the writ petitioners regarding the constitutional validity of the Election Symbols Order, 1968, and the power of the Election Commission to settle issues relating to claims of splinter groups to be the original party, had fallen for the decision of this Court about forty years ago in Sadiq Ali’s case, when this Court had occasion to observe that the Election Commission had been clothed with plenary power by Rules 5 and 10 of the Conduct of Election

Rules, 1961, in the matter of conducting of elections, which included the power to allot symbols to candidates during elections. The challenge to the vires of the Symbols Order, 1968, was, accordingly, repelled.

32. The view in Sadiq Ali's case has since been followed in the All Party Hill Leaders' Conference case (supra), Roop Lal Sathi's case (supra), Kanhiya Lal Omar's case (supra) and as recently as in Subramanian Swamy's case (supra), to which reference has been made in the earlier part of this judgment, where the provisions of Article 324 of the Constitution vesting the superintendence, direction and control of elections, were considered in detail and it was, inter alia, held that in addition to Rules 5 and 10 of the Conduct of Election Rules, 1961, the powers vested in the Election Commission could be traced to Article 324 of the Constitution.

33. The evolution of the law relating to the criteria for a political party to be recognized as a State Party clearly indicates that the Election Commission, in its wisdom, was of the view that in order to be recognized as a political party, such party should have achieved a certain bench-mark in State politics. Nothing new has been brought out in the submissions made on behalf of the writ petitioners which could make us take a different view from what has been decided earlier. Mr. Venugopal's submissions regarding political parties winning a larger number of seats while polling a lesser percentage of the votes, sounds attractive, but has to be discarded. Mr. Venugopal's submissions are in relation to the poll performance of the larger parties within a State where even a vote swing of 2 to 5 per cent could cause a huge difference in the seats won by a political party. A three or four-cornered contest could lead to a splitting of the majority of the votes so that a candidate with a minority share of the votes polled could emerge victorious. The Election Commission has set down a bench-mark which is not unreasonable. In order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State. Once it succeeds in doing so, it will become entitled to all the benefits of recognition, including the allotment of a common symbol.

34. There cannot be any difference of opinion that, as was laid down in Union of India Vs. Association for Democratic Reforms (supra), a voter has the right to know the antecedents of the candidates, a view which was later reiterated by this Court in People's Union for Civil Liberties (supra), but such right has to be balanced with the ground realities of conducting a State-wide poll. The Election Commission has kept the said balance in mind while setting the bench-marks to be achieved by a political party in order to be recognized as a State Party and become eligible to be given a common election symbol. We do not see any variance between the views expressed by the Constitution Bench in the PUCL case and the amendments effected by the Election Commission to the Election Symbols Order, 1968, by its Notification dated 1st December, 2000.

35. The writ petitions and the Special Leave Petitions must, therefore, fail and are dismissed.

36. There will be no order as to costs.

... ... J. (ALTAMAS KABIR)

.....J. (SURINDER SINGH NIJJAR) New Delhi Dated:

18.04.2012 REPORTABLE IN THE SUPREME COUR OF INDIA EXTRAORDINARY ORIGINAL JURISDICTION WRIT PETITION (C) NO.532 OF 2008 DESIYA MURPOKKU DRAVIDA KAZHAGAM & ANR. ....PETITIONERS Vs. THE ELECTION COMMISSION OF INDIA. ....RESPONDENTS WITH WRIT PETITION (C) NOS.315 OF 2009, 422 OF 2009, 426 OF 2009, 444 OF 2009, 454 OF 2009, 463 OF 2009, 447 OF 2009 & 132 OF 2009, SPECIAL LEAVE PETITION (C) NOS.23494 OF 2009 & 7379-7380 OF 2009 AND WRIT PETITION (C) NOS.111 OF 2011, 117 OF 2011, 125 OF 2011, 124 OF 2011 & 128 OF 2011 J U D G M E N T Chelameswar, J.

I have had the advantage of the opinion of my learned brother Altamas Kabir, J. I regret my inability to agree with the same.

2. All these petitions filed either under Article 32 or under Article 136 raise certain common and substantial questions of law as to the interpretation of the Constitution. The lis, essentially, is between the Election Commission of India, a creature of the Constitution under Article 324, on the one hand and various bodies claiming to be political parties and some of their functionaries, on the other hand. The essence of the dispute is whether a political party is entitled for the allotment of an election symbol on a permanent basis irrespective of its participation and performance judged by the vote share it commanded at any election. Some of the petitioner parties had contested some election, either General or By- Election, by the time they filed these petitions and had been in existence for some time, while the others came into existence just before the commencement of this litigation. All of them are political parties registered under Section 29A1 of the Representation of the People Act, 1951(for short 'the R.P. Act'), but none of them is a "recognised political party", under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968, (henceforth referred to as 'the Symbols Order').

3. To examine the issues arising out of this batch of petitions, the facts pertaining to W.P.No.532 of 2008 and S.L.P.No.7379 – 7380 of 2009 arising out of an interim order passed by the Andhra Pradesh High Court in W.P.No.3212 of 2009, shall be taken as representative facts. The first of the abovementioned two cases represents the case of a political party, which was registered with the Election Commission on 24-01-2006 and contested 232 assembly constituencies out of a total of 234 in the general elections to the Legislative Assembly of Tamil Nadu held in the year 2006. It secured 8.337 total number of valid votes and returned one Member to the Legislative Assembly, whereas the political party in the second of the abovementioned cases, was registered with the Election Commission on 22-12- 2006 and contested a couple of by-elections to the Legislative Assembly of Andhra Pradesh. Both the abovementioned political parties restricted, for the time being, their political activity to one State each, i.e., Tamil Nadu and Andhra Pradesh, respectively.

4. Section 29A of the R.P. Act, 1951, provides for the registration of the political parties with the Election Commission. It was inserted in the R.P. Act, 1951 in the year 1989. From the language of Section 29A it appears that registration with the Election Commission is not mandatory for a political party, but optional for those political parties, which intend to avail the benefits of Part IV of the said Act of which Section 29A is also a part. The expression "political party" is defined under Section 2(f) of the R.P. Act, to mean "an association or a body of individual citizens of India registered under Section 29A". The definition, was inserted by an amendment to the R.P.Act, in the

year 1989.

5. Until 1985, the Constitution of India made no reference to political parties. It was by the Fifty Second Amendment to the Constitution, Tenth Schedule was added to the Constitution, where the expression "political party" occurs. Judicial note can be taken of the fact that as a matter of practice, most of the political parties are registered under some law dealing with the registration of Societies. They are not bodies corporate, they are only associations consisting of shifting masses of people.

6. Even as on the date of the coming into force of the Constitution, there were numerous political parties claiming to be either National Parties or State Parties. Neither the Constitution nor the R.P. Act, or any other Statute obligates a political party to seek recognition either by the Election Commission or any other body. However, the Election Commission, from its very inception, duly took note of the existence of the political parties in this country for the purpose of discharging its constitutional obligation of the conduct of elections to Parliament and the Legislatures of various States apart from the elections to the Office of the President and the Vice President.

7. On 30-07-1957, the Election Commission held a Conference, where 7 well established political parties, then organised on All India basis, participated. Whether a system of pictorial symbols is to be adopted to make the task of the voters easy for identifying the party / candidate they choose to vote and a distinctive symbol should be allotted to each of the political parties, was one of the items discussed in the said Conference, having regard to the large scale illiteracy of the voters. A consensus was arrived at in the abovementioned Conference to adopt such a system. "Symbolism is a primitive but effective way of communicating ideas. The use of emblem or flag to symbolise some system, idea, institution or personalisation is a short cut from mind to mind".

8. The first general elections ever held in the Republic of India were in the year 1952. It may not be out of place to mention that in the said election the symbol allotted to a contesting political party's candidate was marked on a separate box in each of the polling station. Goes without saying that there were as many ballot boxes in each of the polling stations as there were contesting candidates with reference to each of the constituencies. The system of maintaining separate ballot boxes for each of the names of contesting candidates disappeared in due course of time. A system of a 'ballot paper' with multiple names of the contesting candidates with the candidate's election symbol indicated against each of the contesting candidates came to be adopted. With the advancement of technology, even the abovementioned system was discarded in favour of Electronic Voting Machine (EVM), but the practice of using the pictorial symbol still continues.

9. The purpose behind the adoption of the system of pictorial symbol was considered by this Court in Shri Sadiq Ali and anr. v The Election Commission Of India, New Delhi and Ors. (1972) 4 SCC 664, as under:

> "……. It may be pertinent to find out the reasons which led to the introduction of symbols. It is well known that overwhelming majority of the electorate are illiterate. It was realised that in view of the handicap of illiteracy, it might not be possible for the illiterate voters to cast their votes in favour of the candidate of their choice unless

there was some pictorial representation on the ballot paper itself whereby such voters might identify the candidate of their choice. Symbols were accordingly brought into use. Symbols or emblems are not a peculiar feature of the election law of India. In some countries, details in the form of letters of alphabet or numbers are added against the name of each candidate while in others, resort is made to symbols or emblems. The object is to ensure that the process of election is a genuine and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice." And also, at para 9 in Kanhiya Lal Omar v R.K.Trivedi and Ors (1985) 4 SCC 628, it is held as under:

"..... India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a larger percentage of them are still illiterate. Hence there is need for using symbols to denote the candidates who contest elections so that the illiterate voter may cast his vote in secrecy in favour of the candidate of his choice by identifying him with the help of the symbol printed on the ballot paper against his name."

10. In the Conference dated 30-07-1957, referred to earlier, there was a general agreement among all the participants on various items; relevant in the context is that; "the same symbol would be used throughout India for all candidates of a party, both for parliamentary and assembly elections"2. As a consequence of the consensus arrived at the said Conference, the Election Commission gave "recognition" to fourteen political parties as National / Multi State parties and allotted to each of them a specific symbol. Such a recognition was accorded in exercise of the general power of superintendence conferred on the Election Commission under Article 3243 r/w 5(1)4 of the Conduct of Election Rules, 1961.

11. After the first General Elections, the Election Commission decided to withdraw recognition of those political parties whose poll performance was poor. Parties, which polled a minimum of 3 per cent of the votes at the first General Elections, were allowed to retain their recognition and the recognition accorded earlier to the other parties was withdrawn. The said percentage was raised to 4 after the third General Elections in 1962. The situation continued the same till 1967. What happened thereafter can be conveniently explained by extracting a passage from the 'How India Votes Election Laws, Practice and Procedure', by V.S. Ramadevi and S.K. Mendiratta:

" After the fourth general elections in 1967, the Election Commission considered it more desirable to codify the provisions relating to recognition of political parties and all matters connected therewith at one place, so that all concerned and interested may be fully aware of the prescribed requirements and may regulate their functioning accordingly. Further, the Commission considered it appropriate and desirable that there should also be provision for registration of political parties and that such registration should be made a condition precedent for recognition of any party for the purposes of the election law.

> Accordingly, the Commission promulgated on 31 August 1968, an Order called the Election Symbols (Reservation and Allotment) Order 1968, which is still in force. The Order made detailed provisions for registration of parties, their recognition and all matters connected therewith, together with the provisions for specification, reservation, choice and allotment of symbols at elections. Paragraph 18 of that Order vests in the Election Commission all residuary powers to remove any difficulty arising in the implementation of that Order or to deal with a situation for which no provision or insufficient provision is made in that Order."

12. The Symbols Order, 1968, was made by the Election Commission, purportedly, in exercise of the power conferred on it by Article 324 of the Constitution r/w Rules 5 and 10 of the Conduct of Elections Rules, 1961, initially. Pursuant to the introduction of Section 29A in the R.P. Act, 1951, the Election Commission purports to draw authority from the said Section also. Para 4 of the said Order postulates the allotment of a symbol to each contesting candidate at every contested election of a given constituency. Under para 5, symbols are classified into two groups; reserved and free. Para 5 reads as follows:

> "5. Classification of symbols – (1) For the purpose of this Order symbols are either reserved or free.
>
> (2) Save as otherwise provided in this Order, a reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that party.
>
> (3) A free symbol is a symbol other than a reserved symbol." Emphasis supplied It can be seen from the above that certain symbols are reserved exclusively for the allotment to the candidates set up by a recognised political party.

Para 65 of the said Order empowers the Election Commission to classify the political parties as either recognised political parties or unrecognised political parties. It further stipulates that a recognised political party can either be a National Party or a State Party.

13. Paras 6A and 6B of the said Order stipulate the conditions, which are required to be fulfilled by any political party, if it is to be classified as a recognised political party. In the case of a State Party, para 6A stipulates the conditions, which are required to be fulfilled / satisfied, while para 6B stipulates the conditions for a National Party. Broadly speaking, in either case (National Party and State Party), the requirement is, participation in one general election either to the Parliament or to the corresponding State Legislature, before seeking recognition, and procuring there at a certain minimum percentage of validly polled votes and also securing a minimum number of seats, specified therein. Such conditions stipulated under paras 6A and 6B varied from time to time.

14. All the petitioners are aggrieved by the Symbols Order, 1968 as it stood amended up to May 2005. Since, these parties are, admittedly, unrecognised political parties, they did not have a reserved symbol for exclusive allotment to the candidates setup by those parties at elections. It is

also not out of place to mention that during the pendency of these petitions, the said Order came to be amended again by Notification date 16- 09-2011.

15. The conditions, which are required to be satisfied for a political party to be classified as a recognised political party (State), thereby entitling it for the exclusive allotment of a common symbol to all its candidates at any election (under the Symbol Order, 1968, as it stood amended up to 2005), are contained in para 6A of the said Order, which came to be substituted for the original para6A by a Notification dated 14-05- 2005.

"6A. Conditions for recognition as a State Party – A political party shall be eligible for recognition as a State party in a State, if and only if any of the following conditions is fulfilled:

(i)At the last general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least two members to the Legislative Assembly of that State at such general election; or

(ii)At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or

(iii)At the last general election to the Legislative Assembly of the State, the party has won at least three percent of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or

(iv)At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State." From the above it can be seen that to secure recognition, a political party must satisfy the following conditions:

(1)that it must have contested one general election to the Legislative Assembly of the concerned State and the candidates setup by the party must have secured cumulatively not less than 6 % of the total valid votes polled in the State and also must have returned, at least, two Members to the Legislative Assembly at such an election;

(2)in the alternative, the party must have contested the election to the Lok Sabha from that State and the candidates setup by the party must have cumulatively secured not less than 6% of the total valid votes polled in the State, apart from returning, at least, one Member to the Lok Sabha;

(3)a third alternative condition, which if fulfilled would entitle the party for recognition, is that the party must have contested the general election to the Legislative Assembly and won, at least, 3% of the total number of seats or 3 seats, whichever is higher;

(4)in the alternative, the party must have contested the election to the Lok Sabha and returned, at least, one Member to the House of the People for every 25 Members allotted to that State.

16. Since, none of the political parties before us satisfied any one of the abovementioned conditions, they were not classified as recognised political parties, thereby, they were unable to secure a common symbol for all their candidates at any election. Hence, the present batch of petitions.

17. The advantages that accrue to any political party by virtue of it being classified as a recognised political party are:

1. reservation of a symbol for the exclusive allotment to all the candidates setup by such party at any election;

2. the candidates set up by such party are entitled to the supply of such number of copies of the “electoral roll” and ”such other material” as may be prescribed, free of cost (see Sections 78A and 78B of the R.P. Act); and

3. allocation of equitable sharing of time on the cable television network and other electronic media, by the Election Commission (Section 39A of the R.P. Act.)

18. Para 6C of the Symbols Order, stipulates that a recognised political party shall continue to enjoy that status for every succeeding general election and in the interregnum between two general elections only if it fulfils the conditions specified under para 6A or 6B, (depending upon whether it is a National party or a State Party) in every successive general election. After each succeeding general election, obviously, an assessment is made by the Election Commission whether such status of each of the political parties should continue or not. On such assessment, if it is found that a recognised political party failed to satisfy the conditions requisite for the continued recognition, such party would be derecognised. Though by virtue of para 10A, the effect of de-recognition, insofar it pertains to the exclusive use and allotment of the election symbol, which had been originally allotted to such party, stands postponed by certain period, but the other advantages, which are incidental to the status of a recognised political party, would be denied immediately on de-recognition.

19. The substance of the abovementioned provisions of the allotment of Symbols Order is that, no political party is entitled for allotment or use of an election symbol permanently. The allotment of an exclusive election symbol is available to a political party only so long as it is recognised by the Election Commission. Securing the recognition and its continuance depends upon the performance of the political party at every succeeding general election. Therefore, newly formed political parties are not entitled, as a matter of right, for the exclusive allotment of a common election symbol for the

benefit of all the candidates set up by them at any election. Such candidates are required to choose one of the free symbols notified by the Election Commission. Allotment of a free symbol to the candidate depends upon the various factors, such as, the existence of a prior claim, etc., the details of which are not necessary for the purpose of this case. Therefore, all the candidates set up by a political party need not get the same symbol at a general election.

20. Even in the case of an existing political party, which was recognised at some anterior point of time, but lost the recognition in view of its inadequate performance at any general election or in the case of a political party, which contested a general election, but failed to satisfy the requisite standards of performance stipulated in the Symbols Order, a common symbol would not be available for the exclusive use of such party's candidates at any subsequent election beyond a period specified in para 10A.

21. It is the abovementioned non-availability of a common symbol for the exclusive use of the candidates of political parties, which have not gained or continue to enjoy the status of a recognised political party, is the bone of contention in these petitions.

22. It is submitted that the Symbols Order, insofar as it provides for the recognition and de-recognition of a registered political party, is;

(i) arbitrary and violative of the Article 14 of the Constitution of India; it creates an artificial classification between recognised and unrecognised political parties without any rational nexus to the object sought to be achieved; and (ii) violative of the fundamental rights guaranteed under Article 19(1)(a) & (c); to the members of the political party; and (iii) violative of the constitutional right of the members of the political party to participate in the electoral process by virtue of their being voters.

23. Elaborating the abovementioned grounds of attack, various submissions are made by the learned counsel appearing for the petitioners and the same are extensively incorporated in the Judgment of my learned brother Altamas Kabir, J. I, therefore, see no reason to repeat the same except to briefly note the submissions made by the learned counsel for the Election Commission.

24. It is the stand of the Election Commission that the rules of de- recognition or non-recognition of the political parties by the Election Commission are designed to prevent "insignificant political parties from gaining recognition". A political party, which failed to secure a minimum stipulated percentage of validly polled votes at a general election and return a minimum stipulated number of members to the Legislature, has no right to claim either recognition or a permanent symbol. It is also submitted by Ms. Meenakshi Arora, that recognition of a political party by the Election Commission under the provisions of the Symbols Order not only enables the political party for the reservation and exclusive use of an electoral symbol in favour of its candidates at any election, but also confers certain other advantages contemplated under Section 78A and 78B of the R.P. Act (which has been taken note of, earlier). Therefore, unrestricted and unregulated recognition of political parties would be an additional burden on the exchequer. The learned counsel, relying on N.P.Ponnuswamy v Returning Officer, Namakkal Constituency, 1952 SCR 218 and Jyothi Basu v.

Debi Gosal (1982) 1 SCC 691, argued that all the electoral rights are creation of statutes and there is no common law right or a fundamental right vested in a political party or a candidate set up by a political party to contest an election. Equally, there is no fundamental right either in favour of the political party or its members to seek the allotment of a permanent electoral symbol in favour of a political party irrespective of its following, which is to be judged, according to the learned counsel, solely based on its performance in a general election. The Election Commission being charged with the responsibility, by the Constitution, of conducting the elections in this country, is constitutionally authorised7 to take all measures for appropriately regulating each step of the electoral process in ensuring a free and fair electoral process, which is essential for preserving the democratic structure established under the Constitution of the Republic of India.

25. The learned counsel for the Election Commission further submitted that the question whether a political party once recognised should retain its reserved symbol permanently fell for the consideration of this Court earlier in Subramanian Swamy v. Election Commission of India, (2008) 14 SCC 318, and the submission was refuted by this Court and, therefore, the same is no more res integra and cannot be reopened again.

26. I am of the opinion that this batch of petitions raise basic issues of far-reaching consequences in the functioning of the democracy – which we the people of India have "solemnly resolved to constitute":

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." – 376 US 1 Wesberry v. Sandors.
>
> 'Electoral rights' subsume such distinct concerns as the citizen's right, the territorial constituencies' ability to choose a representative in the legislature - a political party's opportunity to gain access to power and a candidate's chance of securing a place in the legislature to voice the desires and aspirations of the community. They spring from a common root – the electoral process, which is source and product of the constitutional scheme of establishing a democratic republic.

27. Before I examine the various submissions and the larger question involved in the petitions, one preliminary issue is required to be settled, i.e., in view of the earlier decision of this Court in Subramanian Swamy (supra), whether is it permissible for the petitioners to raise these various questions, which they are seeking to raise in this batch of petitions and right for this Court to examine the same ?

28. It is held by this Court in Golaknath v. State of Punjab (1967) 2 SCR 762, relying upon Superintendent & Legal Remembrancer State of West Bengal v. Corporation of Calcutta (1967) 2 SCR 170 and Bengal Immunity Company Limited v. State of Bihar (1955) 2 SCR 603, that there is "nothing in the constitution that prevented the Supreme Court from departing from the previous decisions of its own if it was satisfied of its error and of its harmful effect on the general interest of

the public". If a principle laid down by this Court is demonstrably inconsistent with the scheme of the Constitution, it becomes the duty of this Court to correct the wrong principle laid down. It is also the duty of this Court to correct itself as early as possible in the matters of the interpretation of the Constitution, "as perpetuation of a mistake will be harmful to public interest". Therefore, in my opinion, the various legal issues raised by the petitioners are required to be examined.

29. In Mohinder Singh Gill and anr. v The Chief Election Commissioner, New Delhi and ors. (1978) 1 SCC 405, speaking for the Court, Justice Iyer opined:

> "23. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular Government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. "The right of election is the very essence of the constitution" (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

30. Though this Court held that adult franchise and general elections are constitutional compulsions, it did not elaborate and explain the basis of such statement. The statement is less rhetoric and more legal than what it might sound for the following reasons. Article 326, declares that the elections to the House of the People and the Legislative Assembly of every State shall be on the basis of adult suffrage. Articles 81(1)(a) and 83, cumulatively command that, 530 members of the House of the People (Lok Sabha) are required to be "chosen by direct election from the territorial constituencies in the State". Article 81(2)(b) mandates that each State shall be divided into territorial constituencies in the manner specified therein, whereas Article 83(2) mandates that the duration of the House of the People shall be no longer than 5 years. The expiry of the period of 5 years reckoned from the date of the first meeting shall operate for dissolution of the House. These provisions cumulatively command a periodical election to the House of the People based on adult suffrage. Similarly, Articles 168, 170 and 172 cumulatively command a periodical election based on adult suffrage to the Legislative Assembly of a State.

31. To ensure the conduct of periodic elections to these various legislative bodies, the Election Commission is established by the Constitution. It is endowed with such powers necessary to enable the same to function as an independent constitutional entity to discharge the constitutional obligations entrusted to it untrammelled by the authority of the Executive12. This entire scheme of a representative democracy enshrined in the Constitution is for the purpose of achieving the constitutional goal of establishing a "Democratic Republic" adumbrated in the preamble to the Constitution. It is in this background, this Court held in Mohinder Singh Gill and anr. (supra), "that the heart of the Parliamentary system is free and fair elections periodically held based on adult franchise".

32. It was held in Mohinder Singh Gill and anr. (supra):

> "The most valuable right in a democratic polity is the 'little man's' little pencil-marking, accenting and dissenting, called his vote. ..... Likewise, the little man's right, in a representative system of Government to rise to Prime Ministership or Presidentship by use of the right to be candidate cannot be wished away by calling it of no civil moment. If civics mean anything to self-governing citizenry, if participatory democracy is not to be scuttled by law. ..... The straightaway conclusion is that every Indian has a right to elect and be elected and this is constitutional as distinguished from a common law right and is entitled to cognizance by Courts, subject to statutory regulations." The little man's right in this country to become a member of any one of the Houses created by the Constitution metaphorically described by Justice Iyer as a right to 'rise to Prime Ministership or Presidentship', emanates out of a necessary implication from the express language and scheme of the Constitution. It is already noticed that predominant majority of the seats in the House of the People and in Legislative Assembly of a State are required to be filled up by 'direct election' from the 'territorial constituencies'. Such members are required to be "chosen" in such manner as Parliament may by law provide13. Such Process of choosing, by direct election - the members of the House of the People or the Legislative Assembly - is described by this Court in Mohinder Singh Gill and anr. (supra), as the citizens right to elect or get elected.

33. The right to elect flows from the language of Articles 81 and 170 r/w Articles 325 and 326. Article 326 mandates that the election to the Lok Sabha and legislative Assemblies shall be on the basis of ADULT SUFFRAGE, i.e., every citizen, who is of 18 years of age and is not otherwise disqualified either under the Constitution or Law on the ground specified in the Article SHALL BE entitled to be registered as a voter. Article 32514 mandates that there shall be one general electoral roll for every territorial constituency. It further declares that no person shall be ineligible for inclusion in such electoral roll on the grounds only of religion, race, caste, sex, etc. Articles 8115 and 17016 mandate that the members of the Lok Sabha and Legislative Assembly are required to be CHOSEN BY DIRECT ELECTION from the territorial constituencies in the States. The Sates are mandated to be divided into territorial constituencies under Articles 81(2)(b) and 170(2)17. The cumulative effect of all the abovementioned provisions is that the Lok Sabha and the Legislative Assemblies are to consist of members, who are to be elected by all the citizens, who are of 18 years of age and are not otherwise disqualified, by a valid law, to be voters. Thus, a Constitutional right is created in all citizens, who are 18 years of age to choose (participate in the electoral process) the members of the Lok Sabha or the Legislative Assemblies. Such a right can be restricted by the appropriate Legislature only on four grounds specified under Article 326.

34. Coming to the question of the right to get elected / being CHOSEN either to the Lok Sabha or to the Legislative Assembly of a State, Articles 8418 and 17319 stipulate the requisite qualifications for a person to be either a member of the Lok Sabha or the Legislature of a State. These two Articles are couched in negative language stipulating, essentially, that, to be chosen as a member of any of the Legislative Bodies envisaged under the Constitution, a person must be a citizen of India and must be

of the qualifying age i.e., 25 years in the case of Lok Sabha or the Legislative Assembly and 30 years in the case of Rajya Sabha or the Legislative Council, as the case may be. Apart from that, these Articles also prescribe that any person aspiring to be a member of any one of the Legislative Bodies, created by the Constitution, is required to make and subscribe an Oath set out in the Third Schedule in the Constitution. Articles 10220 and 19121 prescribe the various contingencies in which a person would become disqualified to be a member of any one of the Legislative Bodies, such as, holding of a public office or owing allegiance or adherence to a foreign State, etc.

35. It may be noted that the Constitution confers a right on every citizen, who is of the age of 18 years, to be a voter. But, every voter is not entitled to be a member of the Legislature. A higher age requirement is prescribed to be a member of the Legislature, as explained above.

36. In my opinion, therefore, subject to the fulfilment of the various conditions stipulated in the Constitution or by an appropriate law made in that behalf, every citizen of this country has a Constitutional right both to elect and also be elected to any one of the Legislative Bodies created by the Constitution – the "straight conclusion" of the Mohinder Singh Gill's case (supra), "that every Indian has a right to elect and be elected – subject to statutory regulations", which rights can be curtailed only by a law made by the appropriate legislation that too on grounds specified under Article 326 only.

37. At this stage, it is necessary to deal with the submission made by Ms. Meenakshi Arora, that in view of the decisions of this Court in N.P.Ponnuswamy and Jyothi Basu (supra), both the right to vote and the right to contest an election for the Constitutionally crated Legislative Bodies, is purely statutory. Relevant paras of the said two Judgments, insofar as they are relied upon by the learned counsel, read as follows:

> N.P.Ponnuswamy (supra) "28. The points which emerge from this decision may be stated as follows :--
>
> (1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. ....." Jyothi Basu (supra) "The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the Constitutional and statutory provisions in relation to these rights have been explained by the Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency & Ors.,(1) and Jagan Nath v. Jaswant Singh.(2) We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation." The limited question before this Court in those two cases revolved around the nature of the legal right to raise an election dispute. In the first of the abovementioned

cases, the question was whether a challenge, under Article 226 of the Constitution, to the rejection of the nomination of Ponnuswami at an election to the Legislative Assembly is permissible in view of the specific prohibition contained under Article 329(b)22 of the Constitution. In the second of the abovementioned cases, the question was, who are the persons, who could be arrayed as parties to an election petition. In both the cases, this Court was dealing with the nature of the election disputes, the forum before which such dispute could be raised and the procedure that is required to be followed in such disputes. The question as to the nature and scope of the right to vote or contest at any election to the Legislative Bodies created by the Constitution did not arise in these cases. With due respect to their Lordships, I am of the opinion that both the statements (extracted above) are overbroad statements made without a complete analysis of the scheme of the Constitution regarding the process of election to the Legislative Bodies adopted in subsequent decisions as a complete movement of law. A classical example of the half truth of one generation becoming the whole truth of the next generation. My conclusion is fully supported by People's Union for Civil Liberties (PUCL) and anr. v. Union of India and anr. (2003) 4 SCC 399:

> " However, case after case starting from Ponnuswami case characterized it as a statutory. ..... With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple." (Para 96 of P.V. Reddi, J)

38. The next question is what is the role of a political party in the electoral process of a representative democracy. Whether the formation, existence and continuance of a political party are - activities, which are not prohibited by law and permitted as a matter of legislative grace or is there any constitutional or fundamental right in these activities.

39. "Political parties are indispensable to any democratic system and play the most crucial role in the electoral process in setting up candidates and conducting election campaigns"23. The legal and constitutional position of political parties varies from country to country. In most countries, the political parties do not have any express constitutional or statutory recognition, except Germany, whose Constitution guarantees the legitimacy of the political parties and their right to exist, subject to the condition that they accept the principles of the democratic governance. Coming to the United Kingdom, the existence of political parties is a long established constitutional fact and their contribution to the growth of a healthy parliamentary democracy is a matter of the British constitutional history though political parties are not part of the Constitution of England24. In the United States, the "right of individuals to associate for the advancement of political beliefs and the right of the qualified voters .... to cast their votes effectively"25 are considered as the most precious freedoms and protected by the First and the Fourteenth Amendments. The Indian Constitution made no reference to political parties prior to the 52nd Amendment made in 1985 by which the Tenth Schedule was inserted in the Constitution. The Tenth Schedule recognises the existence of

political parties in this country and the practice of political parties setting up candidates for election to either of the Houses of Parliament or State Legislature. However, the Election Commission recognised, from the inception, the existence of political parties and the practice of political parties setting up candidates at elections to any one of the Houses created by the Constitution.

40. A political party is nothing but an association of individuals pursuing certain shared beliefs. Article 19(1)(c) confers a fundamental right on all citizens to form associations or associate with organisations of their choice. Article 19(1)(a) confers a fundamental right on the citizens of the freedom of speech and expression. The amplitude of the right takes within its sweep, the right to believe and propagate ideas whether they are cultural, political or personal. Discussion and debate of ideas is a part of free speech. This Court in Romesh Thapper v. State of Madras, AIR 1950 SC 124 as under:

> ".....without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible." Therefore, all the citizens have a fundamental right to associate for the advancement of political beliefs and opinions held by them and can either form or join a political party of their choice. Political parties are, no doubt, not citizens, but their members are generally citizens. Therefore, any restriction imposed on political parties would directly affect the fundamental rights of its members.

41. It is argued that political parties, which do not qualify for recognition by the Election Commission by virtue of the stipulations in the Symbols Order suffer a disadvantage in the electoral process. The Symbols order cripples the ability of the unrecognised political parties and the candidates set up by such parties from effectively communicating with the electorate in order to garner their votes. Therefore, the Symbols Order imposes restriction on the citizens fundamental rights under Article 19(1)(c) and (a) to associate with a political party and propagate the political ideas subscribed to by the party on par with the recognised political parties, which are able to secure the allotment of a reserved symbol. The disadvantage imposed by the Symbols Order on political parties with limited following, at a given point of time, certainly is a law falling within the description of 'class legislation' and violative of Article 14 of the Constitution of India.

42. If the purpose of adopting the system of pictorial symbols is to enable the voter to identify "the candidate of his choice"26, and "the symbol of each political party, with passage of time, acquired a great value because of the bulk of the electorate associated the political party at the time of elections with its symbols"27. It does not require any further logic or authority to say that denying the reservation of a common symbol for the use of a political party on the ground that the Election Commission is not willing to 'recognise' such a political party, for whatever reasons, certainly renders the party disadvantaged. The Symbols Order, insofar as it provides for the allotment of a symbol for the exclusive use only of a recognised political party's candidates, in my opinion, certainly creates a disadvantage to the political parties, which have not been able to secure recognition from the Election Commission apart from creating two classes of political parties. The citizens right to form or join a political party for the advancement of political goals mean little if such a party is subjected to a disadvantage, in the matter of contesting elections. Therefore, the two

questions raised;

(i) whether the Symbols Order satisfies the test of being a reasonable restriction designed to achieve any of the purposes specified under Article 19(2) and (4); and

(ii) the question whether such a classification satisfies the twin tests of being a reasonable classification, which has a nexus to the object sought to be achieved by such classification, are required to be examined to decide the constitutionality of the Symbols Order.

43. I do not propose to examine the 1st question though I am of the opinion that the said question requires an exhaustive examination in an appropriate case, as, in my opinion, the Symbols Order certainly violates the prohibition contained under Article 14, in view of the settled principle of law that this Court would not normally embark upon the examination of issues in the field of Constitutional Law unless it is absolutely necessary.

44. To establish the disadvantages imposed by the Symbols Order on the unrecognised political parties, it is necessary to analyse the nature of authority of the Election Commission either to recognise or not to recognise a political party. It is also necessary to examine whether, either the Constitution or any Law compels the Election Commission to recognise or not to recognise or derecognise a political party and what are the benefits or burdens, which flow from the recognition or non-recognition of a political party.

45. As already noticed, except for the Tenth Schedule, which is a relatively recent addition to the Constitution, no other provision of the Constitution, expressly refers to the political parties either recognised or unrecognised. The R.P. Act, as it was originally enacted, also did not make any reference to a political party. The expression "political party" was first introduced in the R.P. Act in the year 1989 by the amending Act No.1 of 1989. Section 2 (f) was inserted, which provides for the definition of the expression "political party". Simultaneously, by the same amending Act, Part – IV A was introduced into the Act, which dealt with the registration of political parties with the Election Commission and the advantages flowing from such registration. The expression "recognised political party" was first introduced in the Act by Act No.21 of 1996, in the proviso to Section 33 and Sub-Section (2) of Section 38. Later, such an expression was employed in Section 39A and in the second explanation to Sub-Section (1) of Section 77, Section 78A and Section 78B, which occur under Part–VA of the Act by the amending Act No.46 of 2003. The explanation to Section 78B(2), defines the expression "unrecognised political party" for the limited purposes mentioned therein and it reads as follows:

> "Explanation—For the purposes of section 39A, this Chapter and clause (hh) of sub-section (2) of section 169, the expression "recognised political party", has the meaning assigned to it in the Election Symbols (Reservation and Allotment) Order, 1968]." None of the provisions referred to in the explanation deal with the allotment of a reserved symbol. Thus, there is a statutory compulsion (post 1996) on the part of the Election Commission to recognise or not to recognise a political party as it is only on the basis of the recognition by the Election Commission, the rights or obligations

> created under the abovementioned provisions come into play. There is still no constitutional compulsion in that regard.

46. Though, post-1996, the R.P. Act, 1951, obligates the Election Commission to confer recognition on some political parties for certain purposes, the Act does not stipulate the criteria on the basis of which such recognition is to be accorded. It simply borrowed the definition of the expression 'recognised political party' from the Symbols Order, thereby leaving it to the discretion of the Election Commission to recognise or not to recognise a political party on such terms and conditions, which the Election Commission deems fit. But, there is nothing either in R.P. Act, or any other law, which obligates the Election Commission to accord recognition to a political party on the basis of its performance at an election. In other words, it is not legally obligatory for the Election Commission to choose the criteria of performance at an election for the purpose of according or refusing to accord recognition to a political party. It so happened that such a criterion was chosen by the Election Commission well before the R.P. Act obliged the Election Commission to undertake the exercise and the Parliament while amending the R.P. Act simply took note of the existing practice of the Election Commission. Even today, there is nothing in the law, which prevents the Election Commission from changing the criteria for conferring recognition on a political party.

47. It would be profitable to understand the genesis and evolution of the criterion of – poll performance – for evaluating its constitutionality in the context of the allotment of symbols. Pursuant to the 30th July 1957 Conference (referred to earlier) held by the Election Commission, "the Election Commission gave adhoc recognition on various dates between 2nd August 1951 to 7th September 1951", to fourteen parties as National or Multi-State parties and allotted symbols to them. "In addition to the above parties....., 59 other parties were recognised as State parties and allotted various symbols, as far as possible, inconformity with their choice. The recognition of these State parties was left ..... to the Chief Electoral Officer of the States concerned". In this context, it is stated in "How India Votes Election Laws, Practice and Procedure, by V.S. Ramadevi (supra), as follows:

> "It may be significant to note here that there was no provision either in any Act or the rules for the recognition of political parties. All the orders granting recognition to the aforementioned parties either as national or state parties were issued by the Election Commission in exercise of its powers under art 324 and r 5 of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951. The said r 5 merely provided that the Election Commission shall publish a list of symbols and may add to or vary that list as it may like, but there was no mention about the political parties in this rule."

48. Essentially, the entire exercise was undertaken by the Election Commission to collect the data regarding the number of organisations claiming to be the political parties, who were likely to contest the elections either to the State Legislature or to the Parliament, in order to enable the Election Commission to discharge its constitutional obligations, under Article 324, of conducting elections to the various Legislative Bodies created under the Constitution. As it is recorded by the former Chief Election Commissioner in 'How India Votes Election Laws, Practice and Procedure' (supra); "all

those parties were allotted various symbols as far as possible inconformity with their choice." To start with, the exercise was never meant to regulate the right of various political parties to set up candidates at elections or choose a common electoral symbol for the benefit of the candidates set up by such parties. The purpose was only to eliminate the possibility of more than one political party claiming or using the same symbol resulting in friction between the parties and confusion in the minds of the voters. Such an arrangement became necessary because of the consensus of the Conference to have pictorial symbols for the meaningful exercise of the voting rights of the electors.

49. It was in the year 1968, eventually, the Election Commission thought of formalising the existing practice by creating a formal legal instrument of the entire exercise of the recognition of a political party. It is at that juncture, the exercise, which initially commenced as a facilitator of the constitutional obligation of the Election Commission to conduct the election, metamorphosised into an authority / power of the Election Commission to accord recognition or to refuse recognition with the attendant consequence of allotment and reservation of symbols in favour of the political parties, which are electorally more fortunate and denial of the same to the less fortunate political parties at a given point of time.

50. The result is the creation of the Symbols Order, 1968, where, for the first time, the Election Commission conferred on itself the authority to recognise or refuse to recognise or derecognise political parties, which did not demonstrate that they have some minimum political following and legislative presence.

51. Till 1996, gaining recognition from the Election Commission did not confer any advantage on a political party other than securing the reservation of a symbol commonly for all the candidates set up by such a party at any election. Political parties could still set up, then and now also, candidates at any election irrespective of the fact whether they are recognised by the Election Commission or not. It is only much later (1996), certain legal rights and obligations came to emanate from the factum of recognition or lack of it, such as, the requirement of subscription of a larger number of proposers for a candidate set up by an unrecognised political party (See Section 33 of the R.P. Act.) and the requirement of postponing the poll only on the death of a candidate set up by a recognised political party (Section 52). It may be mentioned herein that Section 52, prior to its amendment in 1996, did not draw any distinction between a candidate set up by a recognised political party or otherwise. Death of a candidate, duly nominated at an election even as an independent, entailed countermanding of the poll.

52. Notwithstanding all these changes, the constitutional right of a qualified citizen to contest an election to any one of the Legislative Bodies created by the Constitution, whether supported by a political party or not, be it a recognised or unrecognised political party, has never been curtailed by the Legislature so far. All that a qualified voter requires to contest an election under the scheme of the R.P. Act, 1951, is to secure the support of, at least, one more elector to propose his name as a candidate if a recognised political party is willing to sponsor such a candidate, failing which, the requirement (post 1996 amendment) is, to secure the support of ten qualified voters to sign the nomination paper. The only other requirement is to make a deposit of certain amount specified under Section 34 of the Act, which amount varies depending upon whether the candidate is

contesting the election of Lok Sabha or the Legislative Assembly.

53. Once a qualified voter decides to contest an election under the provisions of the R.P. Act, 1951, whether such a voter is sponsored by a political party or not, whether such a political party is recognised by the Election Commission or not, there is no way under the law, as it exists today, to prevent him from contesting. Also the Election Commission is bound to allot a pictorial symbols to each such candidate. It is admitted unanimously by the learned counsel appearing that there have been elections, where hundreds of candidates contested an election from certain constituencies and the Election Commission did allot some symbol or the other to each of those candidates.

54. All political parties form one class. All of them have the same goal of propagating their respective political ideas though the ideas themselves may differ. The endeavour of all the political parties is to capture the State power in order to implement their respective policies, professedly, for the benefit of the society in general. In the process of such a political activity, some party, at a given point of time, successfully convinces a majority of the voters that the entrustment of the State power to that political party would be more beneficial to the society at large. It becomes victorious, while the other parties, which fail to successfully convince the majority of the voters about the wholesomeness of their ideas, loose the elections, sometimes even miserably. But, that does not mean that such parties, which fail to convince the voters about the wholesomeness of their political ideology, would be condemned forever by the electorate. Examples in our country and elsewhere are not lacking that political parties, which failed miserably both in terms of percentage of the votes secured by them, as well as the number of seats secured in the Legislature, at a given election, dramatically improving their performance in some subsequent election and capture power with thundering majority. It is said that “democracy envisages rule by successive temporary majorities”. Such transient success or failure cannot be the basis to determine the constitutional rights of the candidates or members of such political parties. The enjoyment of the fundamental rights guaranteed by the Constitution cannot be made dependent upon the popularity of a person or an idea held by the person. If it were to be otherwise, it would be the very antithesis of liberty and freedom. The constitutional guarantees are meant to protect the unpopular, the minorities and their rights. Denying the benefit of a symbol to the candidates of a political party, whose performance does not meet the standards set up by the Election Commission, would disable such political party from effectively contesting the election, thereby, negating the right of an association to effectively pursue its political briefs.

55. Coming to the question, whether the classification created in the Symbols Order can satisfy the requirements of the mandate of Article 14, the argument of the learned counsel for the Election Commission is that, political parties, which do not command even a minimum vote-share and fail to secure a minimum prescribed legislative presence prescribed by the Election Commission, at a given election, form a distinct class in contradistinction to political parties, which satisfy the prescriptions of the Election Commission, regarding the eligibility for being classified as recognised political parties. The learned counsel further submitted that such classification is made for the purpose of avoiding insignificant political parties from permanently securing a symbol for the use of its candidates at elections. An interesting submission is made that a large number of political parties without the minimal voter support are in the electoral field and granting recognition to such parties and reserving a symbol in favour of such parties would create unnecessary confusion in the minds of

the voters. Therefore, avoidance of such a confusion in the minds of the voters, is the purpose sought to be achieved by the classification in question.

56. Before I examine the tenability of the submission made by the Election Commission, I think it necessary to recapitulate the foundation of the doctrine of reasonable classification. In Budhan Choudhry v. State of Bihar, (1955) 1 SCR 1045, a Constitution Bench of 7 Judges of this Court, after a thorough analysis of 7 earlier judgments of this Court, explained the doctrine of reasonable classification under Article 14 and held as under:

> "..... It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely,
>
> (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.....".

Therefore, it can be seen from the above that it is not sufficient for a law to survive the challenge under Article 14 to demonstrate that the law makes a classification based on intelligible differentia between two groups of persons or things. It must also be established that such differentia have a rational relation to the object sought to be achieved by such classification.

57. Examined in the light of the above test, the object sought to be achieved by the Election Commission by the Symbols Order is to avoid the confusion in the minds of the voters at the time of voting. Such a result is said to be achieved by the Election Commission by denying recognition to the political party with insignificant following, thereby, denying them the benefit of the reservation of an exclusive symbol to its candidates.

58. I have no option, but to reject the submission made by the Election Commission for the reason that by simply denying the recognition to a political party with insignificant voter-support, I do not understand, how the perceived voter confusion could be avoided. There is nothing either in the Constitution or in the R.P. Act, 1951 or any other law, which prohibits an unrecognised political party from setting up candidates at an election. The legal position is the same with regard to even independent candidates. Therefore, notwithstanding the refusal of recognition by the Election Commission, unrecognised or derecognised political parties or independent candidates without any party support can still contest the election. Candidates set up by an unregistered political party can also contest an election as registration under Section 29A of the R.P. Act is not mandatory for a political party, except that registration begets certain advantages specified in the R.P. Act, 1951 to a political party. The Election Commission is bound to allot a symbol to any of the candidates

belonging to any one of the abovementioned categories. I am, therefore, of the opinion that there is no rational nexus between the classification of recognised and unrecognised political parties and the professed purpose sought to be achieved by such classification. On the other hand, it is likely to preserve the political status quo.

59. Coming to the decision of this Court in Subramanian Swamy (supra), the challenge in the case was only to para 10A of the Symbols Order, which was introduced by an amendment of 2000 in the Symbols Order on the ground that it was violative of Article 14 of the Constitution. It was argued on behalf of the Election Commission "that the symbol was integrally and inextricably connected with the concept of recognition of the party and since the appellant had never challenged and indeed could not so challenge the de-recognition of Janata Party, there was no question of it being allowed to insist on a reserved symbol which was the prerogative only of the recognised political party". Though this Court took note of the fact that, "for good long 17 years there was no concept of recognised political party as till then there was no Symbols Order", came to the conclusion that the submission of the Election Commission is acceptable. It was held at para 15:

> "…….. the respondent is undoubtedly correct in arguing that concept of recognition is inextricably connected with the concept of symbol of that party. It is but natural that a party must have a following and it is only a political party having substantial following in terms of Clauses 6A, 6B and 6C would have a right for a reserved symbol. Thus, in our opinion, it is perfectly in consonance with the democratic principles. A party which remains only in the records can never be equated and given the status of a recognised political party in the democratic set up. We have, therefore, no hesitation in rejecting the argument of Dr. Swamy that in providing the symbols and reserving them for the recognised political parties alone amounted to an undemocratic act." In my opinion, this Court, failed to appreciate that in a "democratic set up", while the majorities rule, minorities are entitled to protection. Otherwise, the mandate of Article 14 would be meaningless. If democracies are all about only numbers, Hitler was a great democrat. The status of majority or minority, even an insignificant minority, could only be transient. Further, the question as to what is the legitimate purpose sought to be achieved by the classification under the Symbols Order, was not considered.

60. For all the abovementioned reasons, I would hold that the Symbols Order, insofar as it denies the reservation of a symbol for the exclusive allotment of the candidates set up by a political party with "insignificant poll performance", is violative of Article 14 of the Constitution of India.

.....J. (J. CHELAMESWAR) New Delhi;

April 18, 2012.