IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 104 OF 2015

Anoop Baranwal ..Petitioner

Versus

Union of India ..Respondent

COUNTER AFFIDAVIT ON BEHALF OF THE RESPONDENT

I, Shri B.M. Sharma aged about 56 years presently working as Deputy Secretary to the Govt. of India, Ministry of Law and justice, Legislative Department, Shastri Bhawan, New Delhi, do hereby solemnly affirm and state as under:-

1. That I am working as Deputy Secretary to the Govt. of India, Ministry of Law and justice, Legislative Department, Shastri Bhawan and in my official capacity, I am fully conversant with the facts and circumstances of the case. I am competent to swear this affidavit on behalf of the answering respondent.

2. That I have gone through the contents of the present Writ Petition filed by the Petitioner and have understood the same. I have also perused the records pertaining to the case, and I am filling this affidavit in reply on the basis of the knowledge derived by me after perusing the records.

3. That, save and except those, which are matter of record, all the averments, statements and submissions made by Petitioner in the abovementioned Writ Petition are, until and unless specifically admitted, are denied by the answering respondent. The answering respondent craves leave of this Hon'ble Court to file a further detailed affidavit or affidavits if the situation so warrants or this Hon'ble Court so requires.

4. That the present Writ Petition has been filed by the Petitioner praying inter alia to:-

(i) issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondents to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/section

committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India;

(ii) issue a writ of mandamus or an appropriate writ, order or direction constituting an interim neutral and independent collegiums/section committee to recommend the name for the appointment on the vacant post of the member to the Election Commission;

(iii) issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondents to decide the petition of the petitioner dated 03.12.2014 for making a law for ensuring a fair, just and transparent selection process by constituting a neutral and independent collegiums /section committee to recommend the name for recommending the names for member to the Election Commission;

(iv) pass any other or further orders as may be deemed fit and proper in the circumstances of the case; and /

(v) awards cost of this petition.

5. Mr. Prashant Bhushan, Advocate vide Interlocutory Application dated 08.07.2015 has requested this Hon'ble Court that prayer clause in the above said petition may be substituted by the following:

"In the light of the facts advanced and authorities cited, this Hon'ble Court may be pleased:

1. To issue an appropriate writ, direction or order to the Respondent to implement an independent and transparent system for appointment of members of the Election Commission on the lines recommended by the Report of the Committee on Electoral Reforms of May, 1990, formulated by the Ministry of Law and Justice, Government of India, the Report of the Second Administrative Reforms Commission, Government of India and the Report of the Law Commission of India on Electoral Reforms of March, 2015; and /or

2. To pass any other order deemed fit in the circumstances of the case."

6. I submit that at present there is no vacant post of Chief Election Commissioner/Election Commissioner. I further submit that the Chief Election Commissioner and other Election Commissioners (Condition or Service) Act, 1991 [No.11 of 1991] provide for the matters connected to the Chief Election Commissioner and Election Commissioners. Article 324 of the Constitution of India contemplates the provisions of appointment of the Chief Election Commissioner and Election Commissioners. The process and the procedure for appointment of the Chief Election Commissioner and Election Commissioner is as per the constitutional and statutory provisions.

7. I further submit that presently the appointment of Chief Election Commissioner and Election Commissioners in Election Commission is made as per the provisions of Article 324(2) of the Constitution of India and Government of India (Transaction of

Business) Rules 1961 made under clause(3) of article 77 of Constitution of India and nature of cases mentioned against Sl.No.22 of the 3rd schedule to the said Rules and Rule 8 thereof. I further submit that according to these Rules, appointment of Chief Election Commissioner and Election Commissioners requires the approval of Hon'ble Prime Minister and the President of India. Therefore the process and procedure for appointment of the Chief Election Commissioner and Election Commissioners is as per the provisions of the aforesaid constitutional and statutory provisions. This procedure of appointment is in existence for long period.

8. I further submit that regarding recommendations of the Committee/Commission relating to change in the present system of appointment to the post of Chief Election Commissioner and other Election Commissioners, it is prerogative of the Government to accept such recommendations or otherwise. Further making legislation on any subject is the prerogative of Legislature only based on the overall requirement.

Existing system for appointment to the post of Chief Election Commissioner and other Election Commissioners is working smoothly. Further Election Commission since its establishment is working in a free and fair manner. I further submit that the subject matter agitated through this Writ Petition is purely policy matter and the same is in exclusive domain of the legislature and is not a justiciable matter.

9. I further submit that in the year 2012 a reply on similar subject was given to Shri L.K.Advani, Member of Parliament and Shri Gurudas Das Gupta, Member of Parliament by the then Hon'ble Prime Minister Dr.Manmohan Singh and the department was of the view that any change in the procedure for appointment, resignation and removal of the Chief Election Commissioner and other Election Commissioners as suggested would require discussion with other political parties and can be taken up with the other agenda for Electoral Reforms.

I, therefore, submit that in view of the facts stated and submissions made herein above, the present Special Leave Petition is liable to be dismissed.

DEPONENT

VERIFICATION:

I, the above mentioned deponent, do hereby verify that the facts stated in paragraphs 1 to 3 of the Counter Affidavit are true to my personal knowledge and the facts stated in paragraphs 4 to 9 of the Counter Affidavit are true to record maintained in my office and the submissions made therein are based on legal advice which I received and believed to be true.

Verified at New Delhi on this day __ day of October, 2015.

DEPONENT

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IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

I.A. NO. ____ OF 2015

IN

WRIT PETITION (CIVIL) NO. 104 OF 2015

IN THE MATTER OF:
ANOOP BARANWAL

.....PETITIONER

VERSUS

UNION OF INDIA

.....RESPONDENT

APPLICATION FOR PERMISSION TO AMEND THE PRAYER OF THE WRIT PETITION

To
HON'BLE THE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

The Humble application of the Petitioner above named

MOST RESPECTFULLY SHOWETH:

1. That the present writ petition is being filed seeking transparency in the appointment of the members of the Election Commission of India formulated under Article 324 of the Constitution thereby ensuring its independence from the Executive.

2. That all the facts leading to filing of the present application has been set out in detail in the accompanying Writ Petition and the same are not being repeated herein for the sake of brevity. The petitioner craves permission to rely upon

the contents of the writ petition.

3. That the Petitioner seeks to amend the prayer clause of the Writ Petition to the effect that it may be substituted by the following:

"In light of the facts advanced and authorities cited, this Hon'ble Court may be pleased:

1. To issue an appropriate writ, direction or order to the Respondent to implement an independent and transparent system for appointment of members of the Election Commission on the lines recommended by the Report of the Committee on Electoral Reforms of May 1990, formulated by the Ministry of Law and Justice, Government of India, the Report of the Second Administrative Reforms Commission, Government of India, of January 2007 and the Report of the Law Commission of India on Electoral Reforms of March 2015; and/or

2. To pass any other order deemed fit in the circumstances of the case."

PRAYER

In the above circumstances, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:

a) Allow the Petitioner to amend the prayer of the writ petition to the effect mentioned above;

(b) Pass such other or further order (s) as this Hon'ble Court may deem and fit in the peculiar facts and circumstances of the case in favour of the Petitioner.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY:

Prashant Bhushan

Drawn On: 8/7/2015
Filed On: 8/7/2015

PRASHANT BHUSHAN
ADVOCATE FOR THE PETITIONER

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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A.No. _____ OF 2015

IN

WRIT PETITION (CIVIL) NO. 104 OF 2015

IN THE MATTER OF:

ANOOP BARANWAL

... PETITIONER

Versus

UNION OF INDIA

... RESPONDENT

AFFIDAVIT

I, Anoop Baranwal , S/o Shri Madan Mohan, R/o B 34, Badri Awas, Teliyaganj, Allahabad-211004, Uttar Pradesh, presently at New Delhi do hereby solemnly affirm and state on oath as under:

1. That I am the petitioner in the instant writ petition and being conversant with the facts and circumstances of the case, am competent to swear this Affidavit.
2. That I have read and understood the contents of the accompanying application for amendment to the prayer of the main writ petition, and I state that the contents of the same are true and correct to the best of my knowledge.
3. I further confirm that I have not concealed in the present application, any data/material /information which may enable this court to form an opinion whether to entertain this application or not and/or whether to grant any relief or not.

DEPONENT

VERIFICATION:

I, the above named Deponent, do hereby verify that the contents of the above affidavit are true and correct to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 8th day of July 2015.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 104 OF 2015

Anoop Baranwal ..Petitioner

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3. That, save and except those, which are matter of record, all the averments, statements and submissions made by Petitioner in the abovementioned Writ Petition are, until and unless specifically admitted, are denied by the answering respondent. The answering respondent craves leave of this Hon'ble Court to file a further detailed affidavit or affidavits if the situation so warrants or this Hon'ble Court so requires.

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I, therefore, submit that in view of the facts stated and submissions made herein above, the present Special Leave Petition is liable to be dismissed.

DEPONENT

(बृज मोहन शर्मा/B. M. SHARMA)
उप सचिव (प्रशासन)
Deputy Secretary (Admn.)
भारत सरकार/Govt. of India
विधि और न्याय मंत्रालय
Ministry of Law & Justice
(विधायी विभाग/Legislative Deptt.)

VERIFICATION:

I, the above mentioned deponent, do hereby verify that the facts stated in paragraphs 1 to 3 of the Counter Affidavit are true to my personal knowledge and the facts stated in paragraphs 4 to 9 of the Counter Affidavit are true to record maintained in my office and the submissions made therein are based on legal advice which I received and believed to be true.

Verified at New Delhi on this day __ day of October, 2015.

DEPONENT

(बृज मोहन शर्मा/B. M. SHARMA)
उप सचिव (प्रशासन)
Deputy Secretary (Admn.)
भारत सरकार/Govt. of India
विधि और न्याय मंत्रालय
Ministry of Law & Justice
(विधायी विभाग/Legislative Deptt.)

Petition No.17959 of 2012. The petition before the High Court sought direction for exercise of power under Section 21 of the Chartered Accountants Act, 1949 ('CA Act') to initiate investigation against Multi-National Accounting Firms (MAFs) and Indian Chartered Accountancy Firms (ICAFs) having arrangement with such MAFs for breach of Code of Professional Conduct under the CA Act and also to take penal action by way of cancellation of permission granted to them by the Institute of Chartered Accountants of India (ICAI). Since the issue raised in Writ Petition (Civil) No.991 of 2013 is identical, both the matters have been heard together. In the Writ Petition, some other connected issues have also been raised to which reference will be made in due course.

The Issue

2. The issue raised in the appeal arising out of Karnataka High Court Judgment and the Writ Petition filed directly in this Court is: Whether the MAFs are operating in India in violation of law in force in a clandestine manner, and no effective steps are being taken to enforce the said law. If so, what orders are required to be passed to enforce the said law.

The Pleadings

3. Briefly, the averments in the High Court writ petition are: The MAFs are illegally operating in India and providing Accounting, Auditing, Book Keeping and Taxation Services. They are operating with the help of ICAFs illegally. Operations of such entities are, *inter alia,* in violation of Section 224 of the Companies Act, 1956, Sections 25 and 29 of the CA Act, the Code of Conduct laid down by the ICAI. Reference has been made to the Report dated 15th September, 2003 of Study Group of the ICAI on the subject (hereinafter referred to as 'Study Group Report'). The Study Group was constituted by the Council of the ICAI in July, 1994 to examine attempts of MAFs to operate in India without formal registration with the ICAI and without being subject to any discipline and control. This was in the wake of liberalization policy and signing of GATT by India. It was noted that the bodies corporate formed for management consultancy services were being used as a vehicle for procuring professional work for sister firms of Chartered Accountants (CAs). Members of ICAI were associating with such bodies as Directors, Managers etc. to provide escape route to MAFs. CA functions must be discharged by animate persons and not in anim bodies.

4. The concerns of various segments of CAs noted by the Study Group are :

"(a) *Sharing fees with non-members;*

(b) *Networking and consolidation of Indian firms;*

(c) *Need to review the advertisement aspect;*

(d) *Multi disciplinary firms with other professionals;*

(e) *Commercial presence of multi-national accounting firms;*

(f) *Impact of similarity of names between accountancy firms and MAFs/Corporates engaged in MSC-Scope for reform and regulation;*

(g) *Strengthening knowledge base and skills;*

(h) *Facilitating growth of Indian CA firms & Indian CAs internationality;*

(i) *Perspective of the Government, corporate world and regulatory bodies and role of ICAI in shaping the view;*

(j) *Introduction of joint audit system;*

(k) *Recognition of qualifications under Clause (4) of Part I of the First Schedule to the Chartered Accountants Act, 1949 for the purpose of promoting partnership with any persons other than the CA in practice within India or abroad;*

(l) *Review the concept of exclusive areas for the keeping in view the larger public interest involved so as to include internal audit within it;*

(m) *Conditionalities prescribed by certain financial institutions/Governmental agencies insisting appointment of select few firms as auditors/concurrent auditors/consultants for their borrowers."*

5. The Study Group considered whether goal should be to focus on ethics or growth of the profession with Code of Ethics being guiding points and not barriers. Further issues were what should be the regulatory regime; whether networking could be allowed to benefit Indian CAs; whether MAFs may be required to furnish particulars about their ownership, persons responsible and other financial particulars. It was noted that the Code of Ethics under First Schedule to the CA Act prohibits sharing of fee with persons other than members of the ICAI. Only cost for obtaining assistance/advice to international affiliates could be given. Indian Firms with International Affiliates (IFIA) may be required to adhere to bench mark in regard to audit procedures, quality standards etc. Decision making and real control should be with Indian firms. Number of audits qua each partner should be fixed. Mentioning of affiliation with any person not member of ICAI may amount to advertising which was not permissible. It could be permitted if entities were registered with ICAI. It was also suggested that concept of Multi disciplinary firms was required to be explored for rendering integrated service with suitable safeguards. Steps to upgrade knowledge were also suggested. However, it was suggested that commercial presence of MAFs should not be

allowed *de facto* or *de jure*. Reference was made to Surbanes Oxley Act, 2002 in USA making a foreign public accounting firm preparing audit report to be accountable to the Public Company Accounting Oversight Board and the Securities and Exchange Commission. Thus, MAFs could not be allowed without registration with ICAI. Non Indian CAs should not authenticate any financial statement of any Indian entity. MAFs' claim to provide audit services through affiliates amounts to indirect entry in India without requisite reciprocity for Indian accountancy firms. It was suggested that even where MAFs affiliate with Indian CA, same brand should not be allowed as in other services. Use of name identical to MAFs was brand building exercise which gave impression that Indian CA firm was not independent. Separation of identity was a must. Use of statutory visiting cards etc. must display separation of identity. Under collective label of management consultancy services, CA services should not be allowed as Code of Ethics for auditors cannot be enforced in this manner. Audit cannot be done in non professional way. Advertisement and publicity was harmful to the cause of the profession so that user relies only on real worth of services. It is further noted that though the CAs are not allowed to share fees or

profits with anyone other than a member of the institute, some of the members were lending their names to the MAFs who are non-members and enabling them to illegally operate in the field of Chartered Accountancy and sharing fees and profits with them. Indian CAs have not been provided reciprocity in the countries to which the MAFs belong as per Section 29 of the CA Act.

6. Reference has also been made to a report on operations of MAFs in India dated 29th July, 2011 submitted by Expert Group of the ICAI (for short Expert Group Report) in the wake of the 'Satyam Scam', and decisions of the ICAI laying down the Code of Conduct. The Expert Group Report noted that the MAFs are rendering services which are rendered by the CAs in terms of Section 2(2) of the CA Act such as accountancy, auditing, professional services about matters of accounting procedure, presentation or certification of financial facts or data. The MAFs are corporates/juridical persons. They solicit professional work in international brand name. They have registered Indian CA firms with ICAI with the same brand names which are their integral part. There is no regulatory regime for their accountability. Thus, the principle of reciprocity under Section 29 of the CA Act, Section 25 prohibiting corporates from chartered accountancy practice and

Code of Ethics prohibiting advertisement and fee sharing are flouted. The MAFs also violate FDI policy in the field of accounting, auditing, book keeping, taxation and legal services. Detailed reference to the said report will be made in the later part of the judgment.

7. The stand of the ICAI in the form of a status report filed before the High Court is that 161 out of 171 firms were examined by the High Powered Committee in pursuance of report of the Expert Group dated 29th July, 2011 with regard to alleged violations and some of the cases were referred to the Director (Discipline) for further action. Remaining 10 firms were in the process of being examined. Thus, the ICAI has already taken action on its part.

8. The High Court observed that in view of the stand of the ICAI, no further action was necessary and disposed of the writ petition.

9. In the writ petition filed directly in this Court, apart from the averments noted above, it has been stated that PricewaterhouseCoopers Private Limited (PwCPL) and their network audit firms operating in India, apart from other violations, have indulged in violation of Foreign Direct Investment (FDI) policy, Reserve Bank of India Act (RBI)/Foreign Exchange Management Act FEMA

(FEMA) which requires investigation. Firms operating under the brand name of PwCPL received huge sums from abroad in violation of law and applicable policies but the concerned authorities have failed to take appropriate action. M/s. Pricewater House, Bangalore was the Auditor of the erstwhile Satyam Computer Services Limited (Satyam) for more than eight years but failed to discover the biggest accounting scandal which came to light only on confession of its Chairman in January, 2009. The said scandal attracted penalty of US Dollars 7.5 Million (approx. Rs.38 crores) from the US Regulators apart from other sanctions. Since certification by Auditors is of great importance in the matter of payment of subsidies, export incentives, grants, share of government revenue and taxes, sharing of costs and profits in PPP (Public Private Partnership) contracts etc., oversight of professionals engaged in such certification has to be as per law of the land. Accordingly, even though investigation was sought by the petitioner vide letter dated 1st July, 2013, no satisfactory investigation has been done.

10. PwCPL is the brand under which member firms of PricewaterhouseCoopers International Limited, U.K. (PwCIL), an

English private company provides professional services in respect of audit, tax and advisory services. 'PwC India' firms are network member firms of the PwCIL. There are 10 Audit Firms namely Price Waterhouse (PW), Lovelock and Lewes (LL), Price Waterhouse Bangalore, Price Waterhouse & Co. Bangalore, Price Waterhouse & Co. Kolkata, Price Waterhouse Delhi, Price Waterhouse & Co. Delhi, Price Waterhouse & Co. Chennai, Dalal & Shah Mumbai and Dalal & Shah Ahmedabad, besides a private limited company, namely PwCPL, who are collectively referred to as "PwC India" firms and who operate from various metros including Delhi. Their clients include Government departments, Public Sector organizations, ministries for which huge payments are made to them. They are engaged in auditing/certifying statutory compliances. They have violated Foreign Direct Investment (FDI) Policy, RBI master circulars, FEMA Act and Rules. According to Notification dated May 3, 2000, under Section 47(2)(h) of FEMA Act, no person resident outside India can make investment by way of contribution to the capital of a firm or a proprietary concern or any association of persons in India without permission of the RBI. In violation of the said provision, PwC India entities received Rs.240 crores in Financial Year 2010-2011. The Chairman of PwC India confirmed

the receipt of funds from Global Network. Receipt of Rs.22.90 crores in the Financial Year ended March, 2010 is reflected in the balance sheet and profit and loss account of the PwCPL. Receipt of Rs.7.97 crores is reflected in the balance sheet and profit and loss account of Dalal & Shah, Mumbai. This apart, approximately Rs.210 crores was received by PwCPL, Price Waterhouse (PW) and Lovelock and Lewes (LL). However, no action was taken for receipt of these sums in violation of law. A sum of Rs.41 crores was received by Price Waterhouse & Company, Kolkata to acquire another audit firm, Dalal & Shah, Mumbai through a circuitous route by giving interest free loans to its four partners to enable them to invest the said amount in Dalal & Shah, Mumbai in violations of the RBI Guidelines, FEMA policy and ICAI Regulations.

11. There is also violation of Companies Act. Insurance premium has been paid by three firms of PwC for benefit of other member firms which is illegal. Lovelock and Lewes (LL), a member firm of PwC India failed to point out the high level of NPAs, in its audit report, resulting in Global Trust Bank (GTB) being forced to merge with Oriental Bank of Commerce in 2004. This happened due to accumulated losses of GTB. LL was also found guilty of

manipulating share prices and falsification of accounts by Serious Fraud Investigation Office (SFIO). PwC has been found guilty of accounting scandals outside India.

12. After making the above averments, the petition suggests that falsification of accounts should be made a non-bailable offence to ensure effective governance and to avoid potential loss of revenue to the public exchequer. An independent regulator should be appointed for the auditors. Prayer has been made for investigation into the above allegations against the PwCPL and their network Audit Firms operating in India sharing the brand name of PwC.

13. To sum up, the case of the petitioners is:

(i) The MAFs violate provisions of Sections 25 and 29 of the CA Act, the Code of Conduct laid down by the ICAI, Companies Act, the FDI Policy as highlighted in report of the Study Group of the ICAI dated 15th September, 2003 and the report of the Expert Group of the ICAI dated 29th July, 2011. Regulatory framework was required

to be re-visited to cover the gap in the existing regulatory framework and challenge on account of operations of MAFs as noted in the said reports. Audit functions were required to be separated with a separate oversight body.

(ii) PwC Services BV, Netherlands in violation of law, made investment of Rs.41.42 crores through PwC, Kolkata to acquire Dalal & Shah, Mumbai which is an audit firm through a circuitous route by giving interest free loans to its partners allowing them to invest the said amount with Dalal & Shah, Mumbai. This is clear offence under the Benami Transactions (Prohibition) Act. It is also an offence under the FEMA, the Chartered Accountants Act, and RBI Master Circulars.

(iii) The PwC Services, BV Netherlands remitted Rs.240 crores to various PwC entities in India for 'enhancement of skills'. Payment of Income Tax on the said amounts does not

legalise the remittance. The remittance shows that the foreign company has control over Indian Firms and is thus indirectly running chartered accountancy business in India and also getting its return on the said amount.

(iv) There is falsification of accounts with regard to insurance premium for a 280 crore policy by PwC firms in India in violation of Companies Act, 1956.

(v) PwC is responsible for the violations by Satyam scam, failure of the Global Trust Bank (GTB) and UB Group (Kingfisher Airlines) for which action ought to be taken.

(vi) SFIO and CBI have found PwC guilty. Still, the PwC firms have not been prosecuted and have been awarded Government contracts such as GST Suvidha Provider for GST Network, consultancy contract by the Kerala Government for preparing master

plan to connect Kochi with industrial corridor of south India.

14. The prayers of the petitioners on above basis are:

(a) ICAI must take immediate action for deregistration of these firms in terms of their own report of 2011 which they had themselves accepted.

(b) These audit firms ought to be prosecuted for offences under the Chartered Accountants Act, 1949.

(c) PwC firms ought to be prosecuted under FEMA, 1999 regarding the payment of Rs.240 crores and Rs.42 crores by the ED.

(d) PwC Kolkata firm and partners need to be prosecuted under the Benami Transactions (Prohibition) Act.

(e) Investigation and action on part of ICAI and Ministry of Corporate Affairs with regard to the falsification of accounts and wrong accounting of the insurance policy of Rs.280 crores that was utilized by PwC Bangalore without paying any premium.

(f) A CBI investigation into the receipt of Rs.240 crores so that the real purpose of such receipts is known and necessary action may be taken.

High Powered Committee Expert Group Report dated 29th July, 2011

15. In its report dated 29th July, 2011 on Operation of Multinational Network Accounting Firms (MAFs) in India, the expert group constituted by the ICAI examined the issues concerning operation of MAFs in India. The group was constituted in the context of corporate fraud of high magnitude revealed by the statement of Chairman of Satyam. The ICAI sought curbing of undesirable activities/operations of MAFs. The Ministry held a meeting with the representatives of the ICAI to identify the issues. Thereafter, the following issues were referred to the Expert Group by the High Powered Committee of the ICAI:

> *"(a) Manner in which certain Indian CA firms, hold out to public that they are actually MAFs in India, the manner in which assignments are allotted, determination of nexus/linkage. The representatives of certain Indian CA firms carry two visiting cards one of Indian CA firm and another of a multinational entity. They represent the multinational entity and seek work for Indian CA firm.*
>
> *(b) Name used by auditor in/his report – The basic question was whether the auditors of M/s. Satyam had correctly mentioned the name of their firm in the audit report.*
>
> *(c) Terms and conditions and cost payable for use of international brand name – No*

international firm will allow its name to be used by all and sundry. The question is what is the consideration whether it is determined as a percentage of fee or profits and whether it is within the framework of Chartered Accountants Act, 1949, Regulations framed, thereunder Code of Conduct and Ethics.

(d) *Nature of extra benefits accrued to the Indian CA firms having foreign affiliation.*

(e) *How the MAFs placed their foot in India – Long back in a meeting with RBI it was informed that the MAFs entered in India to set up representative offices. No documents are available as regards the terms and conditions set out while granting them permission to operate in India. However, the RBI vide its letter No.Ref.DBS.ARS.No.744/08:91:008 (ICAI)/ 2003-2004 dated 23rd March, 2004 inter alia, mentioned that "RBI has not permitted any foreign audit firm to set up office or to carry out any activity in India under the current exchange control regulations."*

(f) *Contravention of permission originally granted by Government – What was the original permission given for these firms to enter into India and subsequently whether they are adhering to the terms and conditions of that permission? If contravention was found to take up with Government/FIPB – for approaching Government or FIPB, ICAI must have information as to the nature of permission given. As already mentioned, no documents are available indicating the nature of permission granted. What is the current position of international trade in accounting and related services? The opening up of accounting and related services, can be linked to reciprocal opening up by developed countries.*

(g) Additional powers required by ICAI to curb the malpractices - If under the existing legislation, ICAI does not have enough powers to curb this practice, whether they would need more powers. A separate proposal for amendment of Chartered Accountants Act, 1949 has been sent by the Council to the Government seeking additional powers."

16. It was noted that some of the MAFs are active in India and are rendering services which are provided by CAs without registration with the Institute. Certain MAFs are corporate or juridical persons with significant commercial presence in India and are rendering assurance services. They solicit professional work including audit work by including international brand name in their name. With the same brand names certain Indian CA firms were registered with the ICAI. They hold out to public that they are actually MAFs in India, whereas to the ICAI they hold out that they are purely Indian CA firms having no relationship with foreign entities. The government, regulators and the ICAI must ensure that such wrong impression is not permitted. Entities other than CAs in practice should be prohibited from providing auditing and assurance services in absence of their regulation under a law. Indian CAs are not getting mutual treatment in other countries, while the MAFs continue to operate in India through the Indian CA firms. Entities having similar

name as that of MAFs, which entered through automatic/FIPB route, are rendering Chartered Accountancy services contrary to the policy of not permitting Foreign Direct Investment (FDI) in the field of accounting, auditing and book keeping services, taxation services and legal services. The Institute requested the Department of Company Affairs to take the following action:

> *"(i) for reviewing the existing situation for ensuring reciprocal advantage in favour of the Indian accounting profession;*
>
> *(ii) to take appropriate action against MAFs if found to be in violation including cancellation/revoking/ withdrawal the permission already granted to such foreign entities;*
>
> *(iii) to ensure that the non-compliance of the terms & conditions of the permission granted by the Government to such MAFs is dealt with effectively;*
>
> *(iv) to prohibit the MAFs/consultancy firms which have set up commercial presence either as a corporate entity or otherwise from defying the restrictions in terms of the Government policy both in letter & spirit; and*
>
> *(v) to ensure that the names of the companies which are same or similar to the names of MAFs should not be allowed to continue to operate in India."*

17. The Institute called for information from the Indian CA firms perceived to be having international affiliations to examine whether

they are functioning within the framework of CA profession. The exercise resulted in finding out 171 names of firms but the said firms were reluctant to submit copies of agreements with foreign entities and their tax returns. Certain CA firms submitted the documents by masking certain portions contained in their agreements, partnership deeds and assessment orders/income tax returns claiming confidentiality and commercially sensitive nature of the documents. Some of the firms did not give the details.

18. The group considered network groups as 'A' to 'D'. With regard to 'A', it was observed that the multinational entity had permitted the participating firms in the network to use the brand name. The relationship between members and firms and how these are governed from the same offices under common management and control was not disclosed. The linkage was clear from the data disclosed on the website. Firms received financial grants from non-CA firms contrary to the prohibition for the members of the Institute to receive any part of profits from non-member of the Institute. The networking firms have made remittances to a multinational entity, sharing their revenue purportedly towards subscription fees, technology cost and administration cost etc. However, the break-ups of costs were not furnished. The cost

excluded marketing, publicity and advertising which was not allowed as per the CA Act. The data was not furnished to support the claim that remittances are only in respect of such matters and not related to the volume of business generated through the efforts of the multinational entities. A total and full disclosure was not made in spite of repeated directions. The domain name used by all the firms in the network was identical to the name of the multinational entity which supports the view that they hold out that these firms were part of international network. Some of the firms operate from the same premises from where their international affiliate also operates. They share the same telephone and fax numbers. They share human resources with other firms. Articled Assistants are also shared without following the restrictions imposed by the ICAI.

19. With regard to group 'B', the multinational entity had executed sub-licence agreements with the Indian firms. They stated that they are not sharing their fees or profits with any multinational entity but reimbursement of costs relating to certain central facilities and levies are made annually. The CA firms used name of the international entity in their E-mail IDs. The E-mail ID and the domain name resembled the name of the multinational entity. Thus,

in the same manner, as in respect of network 'A' the CA firms in network 'B' hold out that they are part of the international network. They share same premises, same telephone and fax number. They made remittances annually to the multinational entity sharing their revenue with multinational entity which they have claimed to be towards reimbursement of cost towards central facilities and levies. They do not provide break-up which may show that the cost included marketing, publicity and advertising.

20. The firms in the Network 'C' are also using the MAF's name as part of domain name in their E-mail IDs, which is displayed in the visiting cards of the partners of the firms.

21. Similar was the position with regard to Network 'D'. The firms in Network 'D' also used the name of multinational entity as domain name.

22. The Council has prescribed maximum limit for statutory audit and tax audit which a member in practice can undertake in a year. But, by sub-contracting the work to other firms, the firms are undertaking more than the prescribed work leading to deterioration of quality of performance.

23. The member firms are required to refer the work among themselves. In respect of some firms, referral fee is payable and receivable. Agreements also provided for use of name and logo. Payment/receipt of referral fee is prohibited as per code of conduct applicable to CAs.

24. The group noted that firms have names identical to the names of MAFs operating in India but in absence of complete data, a conclusive finding could not be recorded as to violation of the CA Act with regard to sharing of fees or profits with non-members, securing business through solicitation/publicity. International affiliations with entities which do not follow the same Code of Ethics as applicable to Indian CA firms vitiate the level playing field with other Indian CA firms. Control of the Indian CA firm is effectively placed in the hands of non-members/companies and foreign entities.

25. Some of the observations in the report are:

> "4.2 The Council of ICAI has deliberated that some of the MAFs are active in India and are rendering services such as assurance services, taxation services, etc. normally provided by Chartered Accountants, without registration with the Institute and, without being subject to any disciplinary and regulatory control on the ethical and independent issues. Certain MAFs either as corporate and other juridical persons with the Institute brand name were

given permission by the other regulators/Government for doing consultancy business in India. These entities have established significant commercial presence in India and are rendering assurance services. These private limited companies in certain cases solicit professional work including audits by using the international brand name and projecting large experience, infrastructure and international database including turnover, manpower size, technical expertise and experience in other countries. These private limited companies work under the name and style/trade name/brand name of well known MAFs and in certain cases also co-brand multinational name with certain Indian CA including by making presentations and organizing mega public programmes. In fact these firms and individuals employ with them as Directors or partners or in other capacity and hold out to the public that they are MAFs. In view of their well known brand and presence internationally the corporate sector, the Government and the society at large and sometimes even the regulators carry a wrong impression as if these private limited companies are in fact MAFs and the services being provided by these private limited companies are actually services being provided by such MAFs.

4.3 Certain Indian CA firms and private limited companies associated with them hold out to public that they are actually MAFs in India whereas to the ICAI/regulators, they hold out that they are purely Indian CA firms having no relationship with foreign entities.

4.4 It is important for the Government, regulators and the ICAI to ensure that such wrong impression is not permitted and all entities other than Chartered Accountants in practice and CA firms should be actually prohibited directly or indirectly from providing auditing and assurance services, as these are required to be regulated in the public interest. The very objective of having the profession relating to

accountancy under specific Act of Parliament, incorporating therein a strict disciplinary and ethical code was to ensure that there is no dilution of the professional standards and services are provided in a regulated manner.

4.5 In certain cases, joint venture agreements, MOUs, foreign collaboration agreements, shareholders agreements, private equity participations and side letters are exchanged between parties mandating appointment auditors as prescribed by international parent. In certain cases public sector undertakings, Government departments/Central and State Governments advertise for various professional services wherein the basic eligibility requirement tends to favour Multinational Network Accounting firms or other corporate entities. It has also been observed that auditors have been replaced by Indian CA firms networked with Multinational Network Accounting firms apparently for no professional reasons.

4.6 The ICAI has been pursuing with the accounting bodies in different countries for recognition of its qualification and relaxation for its members for entry level requirements like appearance in certain papers such as accounting, auditing as well as training requirements giving due credit to the ICAI's educational and training curriculum. In addition, the Indian Chartered Accountants face various invisible/non-professional barriers like visa, citizenship and residency requirements, procedural impediments to provide services in such countries. While the Institute has been pursuing vigorously for recognition of its qualification-for ensuring level playing field for Indian Chartered Accountants whereas the countries concerned are not showing a sense of seriousness and urgency which these matters deserve. Indian Chartered Accountants are not getting a fair, reasonable and mutual treatment which they deserve. Since MAFs, in corporate or other form, are already commercially present and operating in India on the

basis of holding out as MAFs/the Indian CA Firms and private limited companies may be *de jure* owned and managed to Indian Chartered Accountants, whereas *de facto* these are fully governed MAFs having headquarters in developed countries, who are denying a level playing field to Indian Chartered Accountants in their country by the restrictions as explained herein. As a result the negotiating capacity of India accounting services favouring the Indian accountants has been significantly reduced. In fact, this has also adversely affected the bargaining capacity of the Government of India for Indian accounting profession under the ongoing negotiations under the WTO/General Agreement of Trade in Services (GATS).

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4.8 However, it has been noticed that the entities having similar name as that of MAFs, which entered through automatic/FIPB route for rendering management consultancy services (as defined in CPC 865), are transgressing the permission so granted and are rendering taxation services (CPC 863), auditing, accounting and book keeping services (CPC 862) and legal services (CPC 861). Instances brought to the notice of the Study Team constituted by the Council in April, 1995 and the Study Group constituted by the Council in February, 2002 are placed at Annexure-III. Extracts taken from the website pages of some of the MAFs are given at Annexure-IV.

4.9 It is noted that as per the policy of the Government of India, Foreign Direct Investment (FDI) is not permitted in the field of accounting, auditing and book keeping services, taxation services and legal services and no commitment had been made by India for opening of such services under the WTO/GATS. However, some entities were not only providing services through their own establishment (signifying their commercial presence i.e., Mode-3) in India but also through service providers in India

particularly for those services like auditing which cannot be rendered by them under the relevant laws of the country.

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4.16 The 171 firms from whom documents/details were called for by and large furnished the documents that were called for. However, certain CA firms have submitted the documents by masking certain portions contained in their agreements, partnership deeds and assessment orders/income tax returns claiming confidentiality and commercially sensitive nature of the documents. The financial details were asked with a view to confirm compliance of these firms with the code of ethics in regard to sharing of fees, inward and outward remittances, nature of expenses, financial dealing with non-members, nature of payment, nature of revenue sharing of fees belonging to non-members and to identify activities not permitted within the framework of the Chartered Accountants Act, 1949, other laws including Foreign Exchange Management Act, 1999 and Foreign Contribution (Regulation) Act, 1976; Code of Ethics and Conduct. Masking/omission of certain portions was construed as non-compliance with the directions of the Institute, and such firms which had masked certain portions were asked to additionally submit copies of their financial statements i.e. Income & Expenditure Account and Balance Sheets or Statement of Affairs including tax audit reports for the last 3 years. However, these firms, instead of submitting unmasked and complete information, had been questioning the logic/reasoning behind asking such data, which according to the firms are commercially sensitive/confidential. Despite reminders, some of the firms had not submitted unmasked/complete details.

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5A.8 Observations :

(i) The multinational entity has granted permission to the participating firms in the network to use the brand name. This is notwithstanding the fact whether the firms have signed the License Agreement with the entity or not. The relationship between members and firms how these are governed from same offices under common management and control is not disclosed. The data disclosed on the website, however, clearly brings out the linkage.

(ii) Though some of the participating firms in the Network 'A' have not signed, the Verein document of Name License Agreement yet while making remittances to the multinational entity, the revenue of the entire network is taken into account.

(iii) The Verein document makes a mention of Supplemental Regulation but while submitting documents to the Institute the firms in Network 'A' have not submitted a copy thereof.

(iv) The networking firms in Network 'A' have received financial grants from a non-CA firm. A member of the Institute is prohibited from receiving any part of profits from a non-member of the Institute. Such an act on the part of a member/firm seems to be in violation of Item (3) of Part I of the First Schedule to the Chartered Accountants Act 1949.

(v) The networking firms in Network 'A' have made remittances to the multinational entity, sharing their revenue with multinational entity, which they have claimed to be towards subscription fees, technology cost including cost of licenses – obtained for software, budgeted expenses, cost of administration etc. However, the firms have not provided break-up/computation and whether the cost includes cost towards marketing, publicity and advertising the products and services in India as well as abroad and any other cost which is not allowed as per the Chartered Accountants Act, 1949, Regulations framed thereunder and Code of Ethics. The firms in

Network 'A' have also not furnished any data in support of their claim that the money remitted by them to the multinational entity is in respect of above matters only and that the same in no way relates to the volume of business generated through the efforts of the multinational entity and through use of brand name. A total and full disclosure in this regard has not been made in spite of repeated directions by the High Powered Committee/Group on the basis of directions of the Council.

(vi) The Verein document lay an obligation on the member firms in Network A "to make every reasonable effort to refer clients to other member firms". A member of the Institute is prohibited from securing any professional business by means which are not open to a Chartered Accountant. However, they are required to follow the networking guidelines of the Institute. Such an act on the part of a member/firm seems to be in violation of Item (S) 1 of Part I of the First Schedule to the Chartered Accountants Act, 1949.

(vii) The networking firms in Network A and all their personnel are using the domain name identical to the name of the multinational entity in their email IDs and the same is displayed in their visiting cards. This clearly supports holding out by these firms in Network A that they are part of the international Network A of MAFs. Some of these firms operate from the same premises from where their international affiliate also operates. They share the same telephone and fax nos. thus establishing that they are one and the same. The Indian firms in Network A and MAFs are *de facto* the same entities providing assurance, management and related services and as such their operations seem to circumvent the provisions of the Chartered Accountants Act, 1949 and Regulations framed thereunder. A member of the Institute is prohibited from disclosing the affiliation with any international entity. In this regard, the Council, at its 172nd meeting held in January, 1995,

while agreeing with the recommendation of the then Committee on Ethical Standards and Unjustified Removal of Auditors that the use of expression/words, "In Association with ....", Associates of .....", Correspondents of ....." etc. on the stationery, letter-heads, visiting cards and professional documents of the firm of CAs was not permissible in view of the provisions of Item (7) of Part I of the First Schedule to the Chartered Accountants Act,1949, decided that it should not be permitted irrespective of whether the name sought to be used is the name of an Indian firm or a foreign firm.

(viii) The networking firms in Network A are sharing their human resources with other firms in the network. However, it has been possible to ascertain whether the articled assistances are also being rotated among the firms. It may be mentioned that articled assistants are assigned to a member, whose obligation is to train them. As such, the articled assistances cannot be allowed to be utilized by any other member. However, to address this issue, there exists a provision under Regulation 54 of the Chartered Accountants, Regulations, 1988 enabling secondment of articled assistances with a view to provide the articled assistants the opportunity of gaining practical experience in areas where the principal may not be in a position to provide the same. Such secondment is allowed under the Regulations with certain restrictions and conditionalities and the same is required to be sent to the Institute for records within thirty days from the date of commencement of training on secondment.

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5B.7 Observations :

(i) The CA firms in Network B and all their personnel are using the domain name identical to the name of the multinational entity in their email IDs, and the same is displayed in the visiting cards. This clearly supports holding out by these firms in Network C that

they are part of the international Network C of MAFs. Some of these firms operate from the same premises from where their international affiliate also operate. They share the same telephone and fax nos. thus establishing that they are one and the same. The Indian firms in Network B and MAFs are *de facto* the same entities providing assurance, management and related services and as such their operations seem to circumvent the provisions of the Chartered Accountants Act, 1949 and Regulations framed thereunder. A member of the Institute is prohibited from disclosing his affiliation with any international entity. In this regard, the Council, at its 172nd meeting held in January, 1995, while agreeing with the recommendation of the then Committee on Ethical Standards and Unjustified Removal of Auditors that the use of expression/words, "In Association with .....", "Associates of .....", Correspondents of ....." etc. on the stationery, letter-heads, visiting cards and professional documents of the firm of CAs., was not permissible in view of the provisions of Item (7) of Part I of the First Schedule to the Chartered Accountants Act, 1949, decided that it should not be permitted irrespective of whether the name ought to be used is the name of an Indian firm or a foreign firm.

(ii) The CA firms in Network B have made remittances annually to the multinational entity sharing their revenue with multinational entity which they have claimed to be towards reimbursement of cost towards central facilities and levies. However, the firms have not provided break-up/computation and whether the cost includes cost towards marketing/publicity and advertising the products and services in India as well as abroad and any other cost which is not allowed as per the Chartered Accountants Act, 1949, Regulations framed thereunder and the Code of Ethics. The firms in Network B have also not furnished any data in support of their claim that the money remitted by them to the multinational is in respect of above

matters only and that the same in no way relates to the vote of business generated through the efforts of the multinational entity and through use of brand name. A total and full disclosure in this regard has not been made in spite of repeated directions by the High Powered Committee/Group on the basis of directions of the Council.

(iii) The networking firms in Network A are sharing their human resources with other firms in the network. However, it has not been possible to ascertain whether the articled assistants are also being rotated among the firms. It may be mentioned that articled assistants are assigned to a member, whose obligation is to train them. As such, the articled assistants cannot be allowed to be utilized by any other member. However, to address this issue, there exists a provision under Regulation, 1988 enabling secondment of articled assistants with a view to provide the articled assistants the opportunity of gaining practical experience in areas where the principal may not be in a position to provide the same. Such secondment is allowed under the Regulations with certain restrictions and conditionalities and the same is required to be sent to the Institute for records within thirty days from the date of commencement of training on secondment.

(iv) The obligations set out in respect of the CA firms in Network B as per the sub-licensee agreement give a clear indication that the CA firms are under the management and supervision of a non-CA firm for matters such as admission of partners, merger, purchase of assets, etc.

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5C.4 Observations :

(i) The CA firms in Network C have amounts to the multinational entity, which they claim to be on account of actual and allocable cost for activities and services provided, however, the firms have not

provided break up/computation and whether the cost includes cost towards marketing, publicity and advertising of the products and services in India as well as abroad and any other cost which is not allowed as per the Chartered Accountants Act, 1949, Regulations framed thereunder and Code of Ethics. The firms in Network C have also not furnished any data in support of their claim that the money remitted by them to the multinational entity is in respect of above matters only and that the same in no way relates to the volume of business generated through the efforts of the multinational entity and through use of brand name. A total and full disclosure in this regard has not been made in spite of repeated directions by the High Powered Committee/Group on the basis of directions of the Council.

(ii) The firms in Network C have admitted that the global network identifies broad market opportunities, develops strategies, strengthens network's internal products and promotes international brand. The member firms in India also gain access to brand and marketing materials developed by their overseas affiliate. This amounts to indirectly soliciting professional work and securing professional business by means which are not open to a Chartered Accountant.

(iii) The firms in Network C have mentioned that they have joined the network and formed different firms in different cities to overcome the limitation on number of partners.

(iv) The network C firms have entered into an agreement for sharing of resources. Sharing of human resources includes articled assistants also, as confirmed by one of their then partners, in a statement given by him to the members of the Committee. It may be mentioned that articled assistants are assigned to a member, whose obligation is to train them. As such the articled assistants cannot be allowed to be utilized by any

other member. However, to address this issue, there exists a provision under Regulation 54 of the Chartered Accountants Regulations, 1988 enabling secondment of articled assistants with a view to provide the articled assistants the opportunity of gaining practical experience in areas where the principal may not be in a position to provide the same. Such secondment is allowed under the Regulations with certain restrictions and conditionalities and the same is required to be sent to the Institute for records within thirty days from the date of commencement of training on secondment.

(v) The firms in the Network C and all its personnel are using the MAFs name as part of domain name in their email IDs, which is displayed in the visiting cards of the partners of these firms as well as the CA employees. This clearly supports holding out by these firms in Network C that they are part of the International Network C of MAFs. Some of these firms operate from the same premises from where their international affiliate also operates. They share the same telephone and fax nos. thus establishing that they are one and the same. The Indian firms and MAFs are *de facto* the same entities providing assurance/management and related services and as such their operations seem to circumvent the provisions of the Chartered Accountant Act, 1949 and Regulations framed thereunder. A member of the Institute is prohibited from disclosing his affiliation with any International entity. In this regard, the Council, at its 172nd meeting held in January, 1995, while agreeing with the recommendation of then Committee on Ethical Standards and Unjustified Removal of Auditors that the use of expression/words, "In Association with .....", "Associates of .....", Correspondents of ....." etc. on the stationery, letter-heads, visiting cards and professional documents of the firm of CAs, was not permissible in view of the provisions of Item (7) of Part I of the First Schedule to the Chartered Accountants Act, 1949, decided that it should not be

permitted irrespective of whether the name sought to be used is the name of an Indian firm or a foreign firm.

(vi) As per the Name License Agreement, the CA firm in Network C shall be liable for and will indemnify the Business Trust against any and availability, loss, damage, cost, legal cost and other expenses of any nature suffered, or incurred by the Business Trust arising out of any dispute against the Business Trust by a third party.

(vii) The service as defined in the agreement with the Trust granting license for use of name, prescribes the services which will be covered by the said Trust and rendered by the CA firm. This includes audit, assurance as well as tax advisory services.

(viii) The letterheads and the visiting cards furnished by the firm in Network C do not mention anywhere that it is a firm of Chartered Accountants.

5D.6 Observations :

(i) The firms in Network D have a management services agreement, technical services agreements, regulations and name license agreements with other entities, copies of which have not been furnished by the firms.

(ii) The firms in Network D and all their personnel have been using the name of multinational entity as domain name in their email IDs, which is displayed in the visiting cards used by the partners of these firms as well as their CA employees. This clearly supports holding out by these firms that they are part of the international Network D of MAFs. Some of these firms operate from the same premises from where their international affiliate also operates. They share the same telephone and fax nos. thus indicating that they are one and the same. The Indian firms and MAFs are *de facto* the same entities providing assurance, management and related services and as such their

operations seem to circumvent the provisions of the Chartered Accountants Act, 1949 and Regulations framed thereunder. A member of the Institute is prohibited from disclosing his affiliation with any international entity. In this regard, the Council at its 172nd meeting held in January, 1995, while agreeing with the recommendation of the then Committee on Ethical Standards and Unjustified Removal of Auditors that the use of expression/words, "In Association with .....", "Associates of .....", Correspondents of ....." etc. on the stationery, letter-heads, visiting cards and professional documents of the firm of CAs, was not permissible in view of the provisions of Item (7) of Part I of the First Schedule to the Chartered Accountants Act, 1949, decided that it should not be permitted irrespective of whether the name sought to be used is the name of an Indian firm or a foreign firm.

(iii) The firms in the Network D have signed an agreement for sharing of human resources; however, it has not been possible to ascertain whether the articled assistants are assigned to a member, whose obligation is to train them. As such, the articled assistants cannot be allowed to be utilized by any other member. However, to address this issue/there exists a provision under Regulation 54 of the Chartered Accountants Regulations, 1988 enabling secondment assistants with a view to provide the articled assistants the opportunity of gaining practical experience in areas where the principal may not be in a position to provide the same. Such secondment is allowed under the Regulations with certain restrictions and conditionalities and the same is required to be sent to the Institute for records within thirty days from the date of commencement of training on secondment.

(iv) One of the network firms in Network D, though is yet to sign the agreement with the multinational entity, but has already been operating

as part of the multinational entity's network and complies with the obligations.

(v) The amount of remittance made by firms in Network D to the multinational entity (exceeding Rs.XXXX million in a year) has been disclosed. However, the firms in Network D have not provided break up computation and whether the cost includes cost towards marketing, publicity and advertising the products and services in India as well as abroad and any other cost which is not allowed as per the Chartered Accountants Act, 1949, Regulations framed thereunder and Code of Ethics. The firms have also not furnished any data in support of their claim that the money remitted by them to the multinational entity is in respect of above matters only and the same in no way relates to the volume of business generated through the efforts of the multinational entity and through use of brand name. A total and full disclosure in this regard has not been made in spite of repeated directions by the High Powered Committee/Group on the basis of directions of the Council.

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6. Findings

6.1 The Committee/Group with a view to ascertain compliance with the various aspects of Code of Ethics had received documents/details listed in para 4.13 hereinabove, from 171 firms. Based on information received, it was found absence of affiliation etc. to 135. Of these, nearly firms submitted data in entirety. Other firms submitted most of the data, such as financial that for various reasons the number of firms actually 73% of the firms submitted the data masking of withholding most of the important data, such as financial figures, profit sharing, capital contribution etc. primarily on the grounds of commercial sensitiveness/confidentiality of the data.

6.2 In the absence of complete set of documents such as complete copy of agreements between some of the Indian CA firms and their international affiliates/network along with annexures referred thereto, networking agreement, internal regulations, service agreements, statute of international affiliate etc. it was not possible to draw conclusive inference as to violation of the Chartered Accountants Act, 1949 with reference to sharing of fees or profits with non-members, sharing profits of non-members, securing business through means not open to Chartered Accountants, solicitation, direct or indirect publicity etc. This shall require proper examination under the relevant provisions of Sections 21, 22 and Schedules framed thereunder.

6.3 Most of these networks are created/established outside India and are functioning under different set of ethical and regulatory guidelines. The India CA firms having international affiliations are subject to regulatory jurisdiction of ICAI and are required to follow the Code of Ethics applicable to Chartered Accountants in India. However, due to the dichotomy of other entities operating in close association with the Indian CA firms, often permitting common brand name/using of logos, coupled with leveraging on international resources etc., is vitiating the level playing field with other Indian CA firms.

6.4 Most of these firms have a name license agreement to use International brand name. One of the terms of such agreement is that apart from common professional standards etc., the Indian affiliates shall harmonize their policies etc. with the global policies of the network. In this manner, matters such as selection and appointment of partners, acquisition of assets, investment in capital etc. are regulated through the means of such agreements and at time even the representative voting is held by an aligned private limited company rather than the CA firms themselves. As a

consequence of this, the control of the Indian CA firms is effectively placed in the hands of non-members/companies foreign entities. The desirability of such a practice from the point of view of independence needs to be examined in the light of Code of Ethics and Schedules to the Chartered Accountants Act, 1949 and Sections 21 and 22 thereof.

6.5 In respect of some firms with names approved by Institute e.g. "XYZ & Co., Patna", the partnership deeds sent by the said firm revealed that the name of the firm is given as "XYZ & Co." and not as "XYZ & Co. Patna" which is the name registered by the Institute. This means that the firm has submitted to the Institute the partnership deed of a firm by the name "XYZ & Co.", whereas the partnership deed supposed to have been submitted should be that of "XYZ & Co., Patna". Letters were written to such firms requesting them to submit the appropriate partnership deed. The first have replied that it was an inadvertent mistake on their part and on the part of the Institute which had approved a trade/firm name with city name as the suffix.

6.6 The firms, M/s WZ, Patna and M/s XYZ & Co. Patna, vide form No.117 sought approval of the Council of the Institute for the firm name, 'XYZ, Patna' and 'XYZ & Co., Patna' respectively. The subsequent forms 18 filed by the firm, for change in the constitution, also mention the firm name as such. However, the partners of the firm, while affixing their signatures on the audit reports, mention the name of the firm as 'XYZ' and 'XYZ & Co.' respectively. The audit reports of companies, which were audited by them, have been signed on behalf of 'M/s XYZ' and not 'M/s XYZ Patna' and by 'M/s. XYZ & Co.' and not 'M/s. XYZ & Co. Patna'. It is an accepted fact that M/s XYZ, Patna and M/s XYZ & Co. Patna have carried out audits of certain companies whose shareholders have appointed M/s XYZ as the auditors. M/s XYZ and M/s XYZ & Co., by allowing the partners of M/s XYZ, Patna

and M/s XYZ & Co. Patna respectively to audit the accounts of clients have rendered the audited accounts invalid ab-initio.

6.7 It is noted that Item (1) of Part I of the Second Schedule to the Chartered Accountants Act, 1949, which deals with professional misconduct in relation to Chartered Accountants in practice, mentions that a chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he discloses information acquired in the course of his professional engagement to any person other than his client so engaging him, without the consent of his client or otherwise than as required by any law for the time being in force. The auditors, by allowing the audit to be conducted by an unauthorized firm, without the consent of the client, which was not appointed as the statutory auditors, may have allowed all information relating to the audit being passed on to the said firm, thus breaching the aforesaid Item, for which both the firms which were appointed and the one which carried out the audit, may be in violation of the Code of Ethics.

6.8 In response to Institute's letter, some firms have furnished details/documents after masking or eliminating certain portion such as financial figures, profit sharing ratio, capital contribution etc. The Institute has sent numerous letters to these CA firms for providing the information particularly, copies of agreements/contracts they have with their international affiliates/networks with complete annexures, partnership deed with complete annexures and schedules mentioned therein, assessment orders and/or tax returns, financial statements i.e. income and expenditure statement, balance sheet or statement of affairs including tax audit reports. As stated earlier, most of the firms have submitted copies of agreements/contracts, partnership deeds, assessment orders or income-tax returns but around 27% of firms have not furnished the information and have masked/blackened/not

provided the important information. It may be further stated that some of the firms instead of complying with the directions of the Institute, have questioned the logic/reasoning behind seeking copies of income-tax returns, which according to them are commercially sensitive/confidential. One group of firms belonging to one network has cited two legal opinions that they have obtained in this regard and have declined to submit unmasked details.

However, they have sought personal hearing. As mentioned earlier, the Group considered this matter and noted that documents have been called in pursuance of the directions given by the Council and that detailed reasoning for calling of documents has also been given to the firms. Hence, the Group felt that it would not be within its powers to override directions of the Council and grant any concession to certain firms.

6.9 Section 2(2) of the Chartered Accountants Act, 1949 defines the term 'to be in practice'. Pursuant to Section 2(2) above, the Council of the Institute has passed a resolution permitting Chartered Accountants in practice to render entire range of management consultancy and other services. The members of the Institute are governed by a Code of Ethics which is mandatory for every member of the Institute. The services rendered by the multinational entities in India are also to the nature of management consultancy (including financial services, valuation, audit and assurance services etc.) and other related services which are carried on through the medium of private limited companies which are carried using the internationally known accounting firm's name. Since these entities employ Chartered Accountants as well as non-Chartered Accountants for discharging various responsibilities, a misleading Impression is created that the services rendered by the private limited companies are in fact rendered by a Multinational Accounting Firm. In fact, this is not so as the company rendering such services is neither registered

with ICAI nor is governed by any ethical code or regulatory framework."

26. Accordingly, the recommendations were made to the effect that the Council should consider action against the firms which had not given the full information; consider action against the firms who are sharing revenue with multinational entity/consulting entity in India which may include cost of marketing, publicity and advertising as against the ethics of CAs; action should be considered against the firms who had received financial grant from the multinational entities in spite of prohibition against the CA firms. A member is not allowed to accept any share, commission or brokerage from a non-member unless such non-member is a member of a professional body with prescribed qualifications. Further recommendation is that action be taken against the audit firms distributing its work to other firms and allowing them access to all confidential information without the consent of the client; require the CA firms to maintain necessary data about the remittances made and received on account of networking arrangement or sharing of fee; consider action against firms being paid or offered referral fee; it should be made mandatory for all firms who enter into any kind of affiliation/arrangement with any foreign entity to disclose their international affiliation/arrangement every year to the Institute;

Council should consider action against the firms using name and logo of international networks; action should also be considered for securing professional business by means which are not open to CAs in India. The Council should also issue public statement that without specific approval of the Council, by a notification under Section 29(2) of the CA Act, no MAF can directly or indirectly operate in India through any agreement or arrangement with any Indian entity/firm of CAs. No international firm or entity should be permitted to hold out to public that they are operating in India as a MAF as part of their network. No Indian CA firm should be permitted to pay any part of their profit or fee or other receipts to any person other than a member of ICAI or a firm owned by them by way of cost or percentage except payment for specific professional fee. The Council may request the Ministry of Corporate Affairs, Reserve Bank of India and other relevant Ministries/Departments to take appropriate action so that the recommendations can be implemented to engage the services of accounting firms registered with ICAI. Only CAs and CA firms registered with ICAI should be permitted to provide audit and assurance services. Wherever MAFs are operating in India, directly or indirectly, they should not engage in any audit and assurance services without 'No Objection' and

permission from ICAI and RBI. Instructions may be issued that any joint venture agreement, MOU, foreign collaboration agreement, stakeholders agreement, private equity fund condition, venture capital fund condition or side letters prescribing for appointment of a specific Chartered Accountant or a CA Firm or any other entity are illegal and against public interest.

Stand of the ICAI

27. ICAI in its response submitted that the function of the institute was to regulate the profession of chartered accountancy and to take action against misconduct of its members under The Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The accounting professionals had significant role in the economy of the country. The economy of India had witnessed two major securities scams in 1992 and 2001. The CA Act was amended on the recommendation of the Joint Parliamentary Committee which enquired into the stock market scams including the high level committee on the 'Corporate Audit and Governance', under the chairmanship of Shri Naresh Chandra which examined the Auditor-Company relationship and disciplinary mechanism for the

Auditors. Amendment was proposed by the Council of the Institute to establish a Disciplinary Directorate headed by Director (Discipline).

28. In response to the grievance that no action was taken against PwCPL and their network audit firms in India, the ICAI submitted that its Disciplinary Directorate had already taken cognizance of the information in the Article dated 17th January, 2012 in the Times of India "Sundry Income cushions PwC India". Letter dated 9th March, 2012 was written to PwC, New Delhi, Chennai, Bangalore, PwC, Kolkata, LL, Kolkata. A letter was also written to RBI. The stand of the PwC firms, was that news item did not make any reference to their firms and no clarification was necessary. PwC, Kolkata submitted that it was member of PwC network of firms around the world ('PwC Network'). To maintain the quality standards of all members, a grant of Rs.65 crores was given to them by the PricewaterhouseCoopers Services BV during the financial year ended 31st March, 2011 as an outright, non refundable grant. The same was included in the "Sundry Income" in their annual accounts. The stand of LL, Kolkata, was that it was a member of PwC Network of Firms around the world. It received grant of Rs.28.97 crores for maintaining quality standards from

PwC Services BV during the financial year ended 31st March, 2011 as an outright, non-refundable grant. The Disciplinary Directorate sent a reminder to the RBI and sent a letter to the Commissioner of Income Tax, Kolkata and Joint Secretary (Revenue), Ministry of Finance. The Deputy Commissioner of Income Tax, Kolkata stated that scrutiny proceedings on issue of transfer pricing were pending for the assessment year 2010-2011 and 2011-2012 in respect of PwCPL. With regard to the failure of PwC, Bangalore to discover the scandal of 'Satyam', it was stated that the US Regulators, i.e., Securities and Exchange Commission (SEC) and PCAOB had taken action but in India the proceedings were getting prolonged. As regards failure of LL to point out high level of NPAs of GTB, it was submitted that no formal complaint was filed against PwCPL. The same is not registered and the Institute could not take any action against them under the CA Act as amended in 2006 and 2007 Rules. Action was taken against the members of LL, Shri S. Gopalakrishnan, Shri P. Rama Krishna and Shri Manish Agarwal. Action was also taken against Shri Kersi H. Vachha and Shri Amal Ganguli. In 2002-2003 action was taken against Shri Partha Ghosh and Shri D.V.P. Rao of M/s. PwC. PwC Bangalore were the auditors of 'Satyam' for which action was taken against CA S.

Gopalakrishnan (For the period 1.4.2000 to 31.3.2007), CA S. Talluri (For the period 1.4.2007 to 30.9.2008), CA Pulavarthi Siva Prasad (for the period 1.4.2001 to 31.3.2005), CA Chintapatla Ravindernath (for the period 1.4.2005 to 30.9.2008). Action was also taken against V. Srinivasu, the then CFO of the Satyam, V.S. Prabhakara Gupta, the then head of Internal Audit Cell of Satyam. The Joint Director, SFIO filed a complaint dated 3rd March, 2009 in respect of DSQ Softwares Limited against CA Naresh Kumar Tharad of M/s. N.K. Tharad & Co., Chartered Accountants, Kolkata. It was revealed that company had made preferential allotment of shares to various entities in a fraudulent manner.

Stand of the Respondent-Firms

29. In its written submissions, Respondent No.5 M/s. Deloitte Haskins & Sells submitted that there is no allegation against it in the SLP. All the partners of Respondent No.5 were Indians and the firm was also registered with the ICAI. An expert group was constituted by the Ministry of Corporate Affairs which gave its report dated January 31, 2017 to the effect that Big six firms (MAFs) were not operating directly. Their network partners were rendering audit services. Indian network firms pay global network charges to their parent organization towards sharing common global costs of human

resources and other infrastructure, technology cost. This is a standard practice across jurisdictions. It does not make MAFs subject to the control by the global parent. MAFs cannot be considered as multinational entities as there is no foreign control through ownership or management. Network partners are run, controlled and managed by Indian nationals. It was submitted the writ petition was not maintainable.

30. Reference has also been made to letter dated 3rd July, 2017 addressed to the Secretary, Ministry of Corporate Affairs from the PMO, with reference to the said expert group incorporating the conclusions of the expert group as follows:

> *"a) The accounting and auditing standards and practices followed in India should be aligned to international standards and practices with customization to the extent necessary.*
>
> *b) The small size of majority of India audit firms being a constraint in facing global competition, consolidation through merger and networking of India audit firms should be encouraged through policy measures.*
>
> *c) With audit becoming a multi disciplinary function, formation of multi disciplinary audit firms with participation by professionals from other relevant professions should be promoted.*
>
> *d) It should be ensured that the recommendations of Quality Review Board*

conducting technical evaluations of India audit firms are implemented.

e) *If and when audit and assurance are opened to global competition, the principle of reciprocity should be followed and the interests of India audit firms should be given due consideration."*

31. The stand of the PwC Network (Respondents 6 to 11) is that PwC or PW is the brand owned by PwCIL registered under the laws of England limited by guarantee. PwCIL acts as a coordinating company within the PwC network and does not provide any business or audit services. Respondent Nos.6 to 11 are member entities of the PwC Network which consists of companies and firms around the world all of which are separate legal entities. PwCIL allows desirous entities to become members of the PwC network if they follow global standards to provide quality services for clients in respect of audit/non audit services. Uniform and consistent delivery is important. PwC network is not a global partnership. The network activities are to develop and implement policies and initiatives for a common and coordinated approach to maintain quality and standards of service. PwC brand name is based on name licence agreement to exercise cooperation amongst member firms. All the members (in 177 countries) have to pay a licence fees. PwC

Services BV (Services BV) is incorporated in Netherlands to operationalize global standards of services. Services BV coordinates efforts of various firms across the globe to develop superior global common standard. Services BV does not do any client related work but develop standards. It pools money by charging the network entities a percentage of their revenue which is used to meet the expenses to develop standards. Firm Service Agreements are signed by network entities. Services BV works on no profit no loss basis. Network charges are paid by all member entities including the Indian member entities. The network felt the need of enhancing the standards and capacity of Indian network entities for which non refundable grants were provided. The grants are not in the nature of investment. These are current account transactions and not capital account transactions. For FY 2009-10, the grants were taxed but network charges paid to Services BV were disallowed as deduction. For FY 2010-11 assessment order has been passed on 29th September, 2016 against which appeal was pending.

32. The Enforcement Directorate (ED) sought information in respect of funds received from outside India. In March and August, 2016, ED issued summons. In July, 2017, ED again issued summons under Section 37 of FEMA seeking details of inward/outward

remittances. In August, 2017, the Chief Financial Officer (CFO) was issued summons by the ED to provide information about the remittances.

33. The Registrar of Companies issued notices to show cause why prosecution should not be launched against the Directors and Company Secretary of the PwCPL in January, 2013. Company Law Board allowed compounding of the offences on payment of composition amount of Rs.8,31,000/-.

34. Auditing services are being carried by firms belonging to PwC Group as follows :

i) Price Waterhouse [FRN-310002E] - 66 Indian Partners (Respondent No.7)

ii) Lovelock & Lewes [FRN-301056E] - 66 Indian Partners (Respondent No.8)

iii) Price Waterhouse & Co. [FRN-050032S] - 19 Indian Partners (Respondent No.9)

iv) Price Waterhouse, Bangalore [FRN-007568S] - 18 Indian Partners (Respondent No.10)

v) Dalal & Shah LLP [FRN-102021W/W100110] - 16 Indian Partners (Respondent NO.11)

35. There are other LLPs which are members of PwC Network in India. All the partners are Indian by nationality and registered with

ICAI. Directors are not partners. Indian Chartered Accountant member firms of PwC Network operate as independent entities.

36. Guidelines of the ICAI dated 27th September, 2011 apply to a network if the network has common ownership, control or management, common quality control policies and procedures, common business strategy, use of a common brand name or a significant part of professional resources.

37. The Expert Group Report of the ICAI recommended the following:

> *"No person or entity and specially Chartered Accountants can hold out to public that they are operating in India as or on behalf or in their trade name and in any other manner so as to represent them being part of or authorized by MAFs to operate on their behalf in India or they are actually representing MAFs or they are MAFs office/representatives in India, except those registered with ICAI in terms of Clause (Hi) as a network, in accordance with network guidelines as notified by the ICAI from time to time."*
>
> *[(Clause 7.12 (v) of the Report at pg.152 of SLP No.1808 of 2016]."*

38. The guidelines allow registration of a network and the PwC firms have filed their declaration in accordance with the above

guidelines and are registered in India as per Regulations of the ICAI. Merely because the PwC audit firms are part of global PwC Network does not by itself violate any applicable law. As regards the grants received in Financial Years 2008-09, 2009-10 and 2010-11, amounting to Rs.142.9, tax has been paid as per assessment and proceedings are pending. The Network has furnished all the information to the ICAI.

39. Since all the partners are Indians and are registered with ICAI, they are personally accountable to the ICAI for any professional misconduct. Services BV does not have any stake in the partnership or profits of the firms. Thus, there is no violation of Section 25 of the CA Act.

Stand of Central Board of Direct Taxes (CBDT)/ED

40. Stand taken by the CBDT is that on receipt of letter dated 1st July, 2013 from the Advocate for the petitioner, investigation was conducted by the Director General of Income Tax (Investigation) (DGIT) with regard to the income tax implications. It was found that 11 entities belonging to the PwC Group are operating in India. Four entities have received grants of Rs.477.64 crores from PwC Services

BV during the period 2009 to 2013. The grants are of two types – professional capacity building and business expansion. Rs.416.39 crores are offered for tax which were taxed for professional capacity building as "sundry income". The balance was claimed as capital receipt for expansion of business. The Assessing Officer made assessment of tax and proceedings were pending. According to ED, investigation in the matter is pending, though number of witnesses have been examined.

Stand of the Registrar of Companies (ROC)

41. The stand of the ROC, Kolkata is that prosecution was initiated against the auditors of the Company, who compounded the offences. Certain proceedings are still pending against the auditors of the Company.

Stand of the RBI

42. The stand of the RBI is that it only issues circulars and frames Regulations under the FEMA but does not conduct any investigation for compliance thereof. Regulation 3 of the Foreign Exchange Management (Investment in Firm or Proprietary concern in India) Regulations, 2000 is that a person resident outside India cannot invest in a firm or proprietary concern without permission of the RBI.

As per para 3.3.2 of the FDI Policy, investment without prior approval of the RBI is not permitted.

The statutory provisions

43. **Sections 2(2), 25 and 29 of the CA Act are reproduced below :**

> "2 (2) A member of the Institute shall be deemed "to be in practice", when individually or in partnership with chartered accountants [in practice], he, in consideration of remuneration received or to be received— (i) engages himself in the practice of accountancy; or (ii) offers to perform or performs services involving the auditing or verification of financial transactions, books, accounts or records, or the preparation, verification or certification of financial accounting and related statements or holds himself out to the public as an accountant; or (iii) renders professional services or assistance in or about matters of principle or detail relating to accounting procedure or the recording, presentation or certification of financial facts or data; or] (iv) renders such other services as, in the opinion of the Council, are or may be rendered by a chartered accountant [in practice]; and the words "to be in practice" with their grammatical variations and cognate expressions shall be construed accordingly. 3 Explanation:— An associate or a fellow of the Institute who is a salaried employee of a chartered accountant [in practice] or [a firm, of such chartered accountants] shall, notwithstanding such employment, be deemed to be in practice for the limited purpose of the [training of articled [assistants]].
>
> 25. Companies not to engage in accountancy. (1) No company, whether incorporated in India or elsewhere, shall practise as chartered accountants. (2) If any company contravenes the provisions of sub-section (1), then, without prejudice to any other proceedings which may be taken against the company, every director, manager, secretary and any other officer thereof who is knowingly a party to such contravention shall be punishable with fine which may

extend on first conviction to one thousand rupees, and on any subsequent conviction to five thousand rupees.

29. Reciprocity. (1) Where any country, specified by the Central Government in this behalf by notification in the official Gazette, prevents persons of Indian domicile from becoming members of any institution similar to the Institute of Chartered Accountants of India or from practising the profession of accountancy or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to become a member of the Institute or practise the profession of accountancy in India. (2) Subject to the provisions of sub-section (1), the Council may prescribe the conditions, if any, subject to which foreign qualifications relating to accountancy shall be recognised for the purposes of entry in the Register. [29A. Power of Central Government to make rules. (1) The Central Government may, by notification, make rules to carry out the provisions of this Act. (2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:- (a) the manner of election and nomination in respect of members to the Council under sub-section (2) of section 9; (b) the terms and conditions of service of the Presiding Officer and Members of the tribunal, place of meetings and allowances to be paid to them under sub-section (3) of section 10B; (c) the procedure of investigation under sub-section (4) of section 21; (d) the procedure while considering the cases by the Disciplinary Committee under sub-section (2), and the fixation of allowances of the nominated members under sub-section (4) of section 21B; (e) the allowances and terms and conditions of service of the Chairperson and members of the Authority and the manner of meeting expenditure by the Council under section 22C; (f) the procedure to be followed by the Board in its meetings under section 28C; and (g) the terms and conditions of service of the Chairperson and members of the Board under sub-section (1) of section 28D.]"

First and Second Schedule of the CA Act :

[THE FIRST SCHEDULE]
[See Sections 21(3), 21A(3) and 22]

PART I

Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he —

(1) allows any person to practice in his name as a chartered accountant unless such person is also a chartered accountant in practice and is in partnership with or employed by him;

(2) pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business, to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner, or a member of any other professional body or with such other persons having such qualifications as may be prescribed, for the purpose of rendering such professional services from time to time in or outside India.

Explanation. - In this item, "partner" includes a person residing outside India with whom a chartered accountant in practice has entered into partnership which is not in contravention of item (4) of this Part;

(3) accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute:

Provided that nothing herein contained shall be construed as prohibiting a member from entering into profit sharing or other similar arrangements, including receiving any share commission or brokerage in the fees, with a member of such professional body or other person having qualifications, as is referred to in item (2) of this Part;

(4) enters into partnership, in or outside India, with any person other than a chartered accountant in practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause (v) of sub-section (1) of section 4 or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships;

(5) secures, either through the services of a person who is not an employee of such chartered accountant or who is not his partner or by means which are not open to a chartered accountant, any professional business:

Provided that nothing herein contained shall be construed as prohibiting any arrangement permitted in terms of items (2), (3) and (4) of this Part;

(6) solicits clients or professional work either directly or indirectly by circular, advertisement, personal communication or interview or by any other means:

Provided that nothing herein contained shall be construed as preventing or prohibiting –

(i) any chartered accountant from applying or requesting for or inviting or securing professional work from another chartered accountant in practice ; or

(ii) a member from responding to tenders or enquiries issued by various users of professional services or organisations from time to time and securing professional work as a consequence;

(7) advertises his professional attainments or services, or uses any designation or expressions other than chartered accountant on professional documents, visiting cards, letter heads or sign boards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Chartered Accountants of India or of any other institution that has

been recognised by the Central Government or may be recognised by the Council:

Provided that a member in practice may advertise through a write up setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council;

(8) accepts a position as auditor previously held by another chartered accountant or a certified auditor who has been issued certificate under the Restricted Certificate Rules, 1932 without first communicating with him in writing;

(9) accepts an appointment as auditor of a company without first ascertaining from it whether the requirements of section 225 of the Companies Act, 1956 9 1 of 1956] in respect of such appointment have been duly complied with;

(10) charges or offers to charge, accepts or offers to accept in respect of any professional employment, fees which are based on a percentage of profits or which are contingent upon the findings, or results of such employment, except as permitted under any regulation made under this Act;

(11) engages in any business or occupation other than the profession of chartered accountant unless permitted by the Council so to engage:

Provided that nothing contained herein shall disentitle a chartered accountant from being a director of a company (not being a managing director or a whole time director) unless he or any of his partners is interested in such company as an auditor;

(12) allows a person not being a member of the Institute in practice, or a member not being his partner to sign on his behalf or on behalf of his firm, any balance-sheet, profit and loss account, report or financial statements.

PART II

Professional misconduct in relation to members of the Institute in service

A member of the Institute (other than a member in practice) shall be deemed to be guilty of professional misconduct, if he being an employee of any company, firm or person –

(1) pays or allows or agrees to pay directly or indirectly to any person any share in the emoluments of the employment undertaken by him;

(2) accepts or agrees to accept any part of fees, profits or gains from a lawyer, a chartered accountant or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification.

PART III

Professional misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he –

(1) not being a fellow of the Institute, acts as a fellow of the Institute;

(2) does not supply the information called for, or does not comply with the requirements asked for, by the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority;

(3) while inviting professional work from another chartered accountant or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false.

PART IV

Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he —

(1) is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months;

(2) in the opinion of the Council, brings disrepute to the profession or the Institute as a result of his action whether or not related to his professional work.]

THE SECOND SCHEDULE

[See sections 21(3), 21B(3) and 22]

PART I

Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he –

(1) discloses information acquired in the course of his professional engagement to any person other than his client so engaging him, without the consent of his client or otherwise than as required by any law for the time being in force;

(2) certifies or submits in his name, or in the name of his firm, a report of an examination of financial statements unless the examination of such statements and the related records has been made by him or by a partner or an employee in his firm or by another chartered accountant in practice;

(3) permits his name or the name of his firm to be used in connection with an estimate of earnings contingent upon future transactions in a manner which may lead

to the belief that he vouches for the accuracy of the forecast;

(4) expresses his opinion on financial statements of any business or enterprise in which he, his firm, or a partner in his firm has a substantial interest;

(5) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary in making such financial statement where he is concerned with that financial statement in a professional capacity;

(6) fails to report a material misstatement known to him to appear in a financial statement with which he is concerned in a professional capacity;

(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;

(8) fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion;

(9) fails to invite attention to any material departure from the generally accepted procedure of audit applicable to the circumstances;

(10) fails to keep moneys of his client other than fees or remuneration or money meant to be expended in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time.

PART II

Professional misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

(1) contravenes any of the provisions of this Act or the regulations made thereunder or any guidelines issued by the Council;

(2) being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment except as and when required by any law for the time being in force or except as permitted by the employer;

(3) includes in any information, statement, return or form to be submitted to the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority any particulars knowing them to be false;

(4) defalcates or embezzles moneys received in his professional capacity.

PART III

Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months.

Regulation 3 of the Foreign Exchange Management (Investment in Firm or Proprietory concern in India) Regulations, 2000

"3. Restrictions on investment in a firm or a proprietary concern in India by a person resident outside India

Save as otherwise provided in the Act or rules or regulations made or directions or orders issued thereunder, no person resident outside India shall make any investment by way of contribution to the capital of a firm or a proprietary concern or any association of persons in india;

Provided that the Reserve Bank may, on an application made to it, permit a person resident outside India subject to such terms and conditions as may be considered necessary to make an investment by way of contribution to the capital of a firm or a proprietary concern or any association of persons in India."

Clause 3.3.2 (III) of the Circular 2 of 2010 of the Consolidated FDI (CFDI) Policy :

"3.3.2 FDI in Partnership Firm / Proprietary Concern:

(iii)Investment by non-residents other than NRIs/PIO: A person resident outside India other than NRIs/PIO may make an application and seek prior approval of Reserve Bank for making investment by way of contribution to the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India. "

Consideration of the Issue

44. The above resume of facts and pleadings shows the following:

i) There is a bar under CA Act to practice as CAs for a company which includes a limited liability common partnership which has company as its partners.

ii) Code of Conduct for the CAs prohibits fee sharing, advertisements but the MAFs by using international brands and mixing other services with the services to be

provided as part of practice of chartered accountancy violate the said Code of Conduct for which there is no regulatory regime as the MAFs do not register themselves with ICAI. Indian firms using similar brand names are registered with the ICAI but the real entities being MAFs, ICAI is unable to take requisite action for violation of Code of Ethics by the MAFs. Thus, revisit of existing legal framework may become necessary so as to have an oversight mechanism to regulate MAFs on the touchstone of Code of Ethics.

iii) Need for amendment of law to separate regulatory regime for auditing services on the pattern of Sarbanse Oxley Act enacted in US making a foreign public accounting firm preparing audit reports to be accountable to the Public Company Accounting. Similar oversight body may need to be considered in India.

iv) Section 29 of the CA Act provides that if a specified country, prohibits persons of Indian domicile from becoming members of any institution similar to ICAI or practicing the profession of accountancy or subjects them to unfair discrimination in that country, no subject

of any such country shall be entitled to become a member of the Institute or practice the profession of accountancy in India.

v) FDI Policy and the RBI Guidelines framed under the FEMA prohibit the investment by a person outside India to make investment by way of contribution to the capital of a firm or a proprietary concern without permission of the RBI

vi) PwC Services BV Netherlands has made investments in Indian firms. According to the petitioners, the investment is also intended to acquire an audit firm through a circuitous route of giving interest free loans and further investments are in the form of grants for enhancement of skills. Profit sharing is in the form of licence fees/network charges. According to the network, the partners are all Indian partners and use of common brand name is only for uniform standard and giving of grants is for maintaining the said standard. There was no investment by an entity outside India. Nor it amounts to profit sharing by the Indian accountancy firms with an entity outside India.

45. It is an undisputed fact that there are remittances from outside India. The same could be termed as investment even though the remittances are claimed to be interest free loans to partners. The amount could also be for taking over an Indian chartered accountancy firm. Relationship of partnership firms, though having Indian partners, operating under a common brand name from same infrastructure, with foreign entity is not ruled out. It is not possible to rule out violation of FDI policies, FEMA Regulations and the CA Act. Thus, appropriate action may have to be taken in pending proceedings or initiated at appropriate forum.

46. The investigation so far carried out cannot be held to be complete in all respects. The investigation by income tax authorities is only for assessment of income tax. Action by the ROC also does not cover the issue raised herein. The investigation by the ED is said to be still pending, though several persons are said to have been examined and documents collected, which are under scrutiny. The said investigation relates to FEMA violations. The ICAI has initiated action with regard to foreign remittances and is said to have written a letter dated 19th March, 2012 to the RBI to enquire whether investigation was conducted by the RBI. However, according to ICAI, its investigation can only be in respect of

members, registered with it, for the misconduct conducted by them. The ICAI does not claim to have conducted complete investigation for want of complete information into the issue whether the chartered accountancy firms by receiving remittances from outside India or remitting licence fee/network charges outside India have allowed participation of a company or a foreign entity in the accountancy business in violation of Section 25 of the CA Act and whether use of common brand name by the network firms is in violation of reciprocity stipulated under Section 29 of the CA Act. The ICAI should have taken the matter to logical end, by drawing adverse inference, if information was withheld by the concerned groups.

47. No doubt, the report of the committee of experts of ICAI dated 29th July, 2011 does not specifically name the MAFs involved, groups A,B,C,D are mentioned. The ICAI ought to constitute an expert panel to update its enquiry. Being an expert body, it should examine the matter further to uphold the law and give a report to concerned authorities for appropriate action. Though the Committee analysed available facts and found that MAFs were involved in violating ethics and law, it took hyper technical view that non availability of complete information and the groups as such were not

amenable to its disciplinary jurisdiction in absence of registration. A premier professionals body cannot limit its oversight functions on technicalities and is expected to play proactive role for upholding ethics and values of the profession by going into all connected and incidental issues.

48. Thus, a case is made out for examination not only by ED and further examination by the ICAI but also by the Central Government having regard to the issues of violation of RBI/FDI policies and the CA Act by secret arrangements.

49. It can hardly be disputed that profession of auditing is of great importance for the economy. Financial statements audited by qualified auditors are acted upon and failures of the auditors have resulted into scandals in the past. The auditing profession requires proper oversight. Such oversight mechanism needs to be revisited from time to time. It has been pointed out that post Enron Anderson Scandal, in the year 2000, Sarbanse Oxley Act was enacted in U.S. requiring corporate leaders to personally certify the accuracy of their company's financials. The Act also lays down rules for functioning of audit companies with a view to prevent the corporate analysts from benefitting at the cost of public interest. The audit companies were also prohibited from providing non audit services to companies

whose audits were conducted by such auditors. Needless to say that absence of adequate oversight mechanism has the potential of infringing public interest and rule of law which are part of fundamental rights under Articles 14 and 21. It appears necessary to realise that auditing business is required to be separated from the consultancy business to ensure independence of auditors. The accounting firms could not be left to self regulate themselves.

50. While we appreciate that it is for the policy makers to take a call on the issue of extent to which globalization could be allowed in a particular field and conditions subject to which the same can be allowed. Safeguards in the society and economy of the country in the process are of paramount importance. This Court may not involve itself with the policy making but the policy framework can certainly be looked at to find out whether safeguards for enforcement of fundamental rights have been duly maintained. In the present context, having regard to the statutory framework under the CA Act, current FDI Policy and the RBI Circulars, it may *prima facie* appear that there is violation of statutory provisions and policy framework effective enforcement of which has to be ensured. Statutory regulatory provisions intended to advance the object of law have to be enforced meaningfully. No vested interest can flout the

same by manifesting compliance only in form. Compliance has to be in substance. The law enforcing agencies are expected to see the real situation. As found by the Expert Committee in its report, there is a compliance by MAFs only in form and not in substance, by having got registered partnership firms with the Indian partners, the real beneficiaries of transacting the business of chartered accountancy remain the companies of the foreign entities. The partnership firms are merely a face to defy the law. The principle of lifting the corporate veil has to apply when the law is sought to be circumvented. In expanding horizons of modern jurisprudence, it is certainly permissible. Its frontiers are unlimited. The horizon of the doctrine is expanding. While the company is a separate entity, the Court has come to recognize several exceptions to this rule. One exception is where corporate personality is used as a cloak for fraud or improper conduct or for violation of law. Protection of public interest being of paramount importance, if the corporate personality is to be used to evade obligations imposed by law, the real state of affairs needs to be seen[1]. The same principle applies while overseeing the compliance of applicable ethics of not permitting profit sharing or complying with the ceiling limit for the business

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1 State of Rajasthan vs. Gotan Lime Stone Khanji Udyog Pvt. Ltd. (2016) 4 SCC 469, paras 24 to 28; State of Karnataka vs. Selvi J. Jayalalitha (2017) 6 SCC 263, paras 205 to 211

which is violated by using the technique of sub contracts for outsourcing. If the premises are same, phone number/fax number is same, brand name is same, the controlling entity is same, human resources are same, it will be difficult to expect that there is full compliance on mere separate registration of a firm. The prohibition under Section 25 of the CA Act can be held to be defeated. It is perhaps for this reason that the network firms avoided giving the information sought by the Committee. The issue of separate oversight body for auditing work and updating existing legal framework appear to be necessary.

51. The other aspect is of investment in CA firms, in violation of prohibition of FDI policy, by using a circuitous route of interest free loans to partners. The fact that the income tax authorities have taken the grants received as revenue receipts and taxed the same as such is not conclusive to hold that the receipt is not an investment which is impermissible. If investment is not permitted, the policy of law cannot be defeated by terming such investment as grant for quality control specially when the grant has been used to acquire a chartered accountancy firm.

52. Absence of revisiting and restructuring oversight mechanism as discussed above may have adverse effect on the existing

chartered accountancy profession as a whole on the one hand and unchecked auditing bodies can adversely affect the economy of the country on the other. Moreover, companies doing chartered accountancy business will not have personal or individual accountability which is required. Persons who are the face may be insignificant and real owners or beneficiary of prohibited activity may go scot free. As already noted, the Reports of the Study Group and Expert Group show that enforcement mechanism is not adequate and effective. This aspect needs to be looked into by experts in the Government. It may consider whether on the pattern of the Sarbanse Oxley Act corporate leaders be required to personally certify the accuracy of the financial statements. Further, how to prevent corporate analysts from benefitting from the conflict of interests, how to check audit companies from providing non audit services and how to lay down protocol for auditors. It has also been brought to our notice that another law in US *'Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010'* to ensure more transparency and accountability of financial institutions to decrease the risk of investing needs consideration. It sets up an oversight body called the Financial Stability Oversight Council (FSOC).

53. Accordingly, we issue the following directions:

(i) The Union of India may constitute a three member Committee of experts to look into the question whether and to what extent the statutory framework to enforce the letter and spirit of Sections 25 and 29 of the CA Act and the statutory Code of Conduct for the CAs requires revisit so as to appropriately discipline and regulate MAFs. The Committee may also consider the need for an appropriate legislation on the pattern of Sarbanes Oxley Act, 2002 and Dodd Frank Wall Street Reform and Consumer Protection Act, 2010 in US or any other appropriate mechanism for oversight of profession of the auditors. Question whether on account of conflict of interest of auditors with consultants, the auditors' profession may need an exclusive oversight body may be examined. The Committee may examine the Study Group and the Expert Group Reports referred to above, apart from any other material. It may also consider steps for effective enforcement of the provisions of the FDI policy and the FEMA Regulations referred to above.

It may identify the remedial measures which may then be considered by appropriate authorities. The Committee may call for suggestions from all concerned. Such Committee may be constituted within two months. Report of the Committee may be submitted within three months thereafter. The UOI may take further action after due consideration of such report.

(ii) The ED may complete the pending investigation within three months;

(iii) ICAI may further examine all the related issues at appropriate level as far as possible within three months and take such further steps as may be considered necessary.

The matters stand disposed of accordingly.

.....J.
[ADARSH KUMAR GOEL]

.....J.
[UDAY UMESH LALIT]

NEW DELHI;
23rd FEBRUARY, 2018.

CD 11766097IN
25-07-2015

REGISTERED A.D.

MATTER FOR : 17.08.2015

SECTION PIL (WRIT)

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 104 OF 2015
(Under Article 32 of the Constitution of India)
WITH
INTERLOCUTORY APPLICATION NO. 2 OF 2015
(Application for permission to amend the Writ Petition)

Anoop Baranwal ... Petitioners

Versus

Union of India ... Respondents

To,

1. Union of India
Through its Secretary,
Ministry of Law & Justice
Shastri Bhawan, New Delhi - 110 001

WHEREAS the Writ Petition above-mentioned (copy enclosed) was filed in this Registry on 13.01.2015 by Mr. Anoop Baranwal, Petitioner-in-person, now represented by Mr. Prashant Bhushan, Advocate.

AND WHEREAS the said Writ Petition alongwith Interlocutory Applications above-mentioned were listed before this Hon'ble Court on 13.07.2015, when the Court was pleased to pass the following Order:-

"I.A. No. 3 is allowed
Notice, returnable in four weeks' time."

NOW, THEREFORE, TAKE NOTICE that the Writ Petition alongwith application above-mentioned will be posted for hearing before this Court on **Monday, the 17th day of August, 2015** and will be taken up by this Court at 10.30 O'Clock in the forenoon or so soon thereafter as may be convenient to the Court for orders when you may appear before this Court and show cause to the Court why Rule Nisi in terms of the prayer of the Writ Petition should not be issued and Interlocutory Application should not be allowed.

Take further notice that in default of your appearance the matter will be decided and determined in your absence.

Dated this the 22nd day of July, 2015.

Assistant Registrar

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8. Annexure P- 5 53-55

A true copy of the news item published in daily newspaper namely 'The Economic Times' dated 06 June, 2012.

9. Annexure P- 6 56-60

A true copy of the petition of the petitioner dated 03.12.2014 along with the postal receipt.

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A

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LISTING PROFORMA

IN THE SUPREME COURT OF INDIA

1.	Nature of the matter	CIVIL
2.	(a) Name of Petitioner	Anoop Baranwal
	(b) e-mail ID.....	baranwal.anoop@gmail.com
3.	(a) Name of Respondent	Union of India through its Secretary, Ministry of Law and Justice
	(b)e-mail ID.....	
4.	Number of case.....	One
5.	(a)Advocate(s) for Petitioner(s).....	Petitioner IN Person.
	(b) e-mail ID.....	baranwal.anoop@gmail.com.
6.	(a) Advocate(s) for Respondent (s)...	N.A.
	(b) e-mail ID.....	N.A.
7.	Section dealing with the matter.....	
8.	Date of the impugned Order/Judgment.....	N.A.
8A.	Name of Hon'ble Judges.....	N.A.
8B.	In Land Acquisition Matters :	
	i) Notification/Govt. Order No. u/s. 4,6)	N.A.
	dated..... N.A. issued by Centre/State of.....	N.A.
	ii) Exact purpose of acquisition & village involved.....	N.A..
8C.	In Civil Matters :-	N.A.
	i) Suit No., Name of Lower Court.....	N.A.
	Date of Judgment.....	N.A.
8D.	In Writ Petitions:-	N.A.
	"Catchword" of other similar matters.....	N.A.
8E.	In case of Motor Vehicle Accident Matters :	N.A.
	Vehicle No.....	N.A.
8F.	In Service Matters	N.A.
	(i) Relevant service rule, if any.....	N.A.

(ii) G.O./Circular/Notification, if applicable or in question..... N.A.

8G. In Labour Industrial Disputes Matters : N.A.

I.D. Reference/Award No., if applicable ..... N.A.

Nature of urgency..... N.A..

9. In case it is a Tax matter : N.A.

a) Tax amount involved in the matter..... N.A..

b) Whether a reference/statement of the case was called for or rejected... N.A.

c) Whether similar tax matters of same parties filed earlier (may be for earlier/ other Assessment Year)? ..... N.A.

d) Exemption Notification/Circular No..... N.A.

11. Valuation of the matter : N.A.

12. Classification of the matter :

(Please fill up the number & name of relevant category with sub category as per the list circulated)

No. of Subject Category with full name :

No. of sub-category with full name :

13. Title of the Act involved (Centre/State)..... Constitution of India

14. (a) Sub-Classification (indicate Section/Article of the Statute)... Article 324 (2) and 14

(b) Sub-Section involved..... N.A.

(c) Title of the Rules involved (Centre/State)..... N.A.

(d) Sub-classification (indicate Rule/Sub-rule of the Statute)..... N.A.

15. Point of law and question of law raised in the Case: Whether selection process of member to the Election Commission without constitution an independent and neutral collegiums is violative of Article 14 of the Constitution and against the intention of the Constitutional maker expressed in Article 324(2) of the Constitution?

16. Whether matter is not to be listed before any Hon'ble Judge? N.A.

Mention the name of the Hon'ble Judge..... N.A..

17. Particulars of identical/similar cases, if any No

a) Pending cases..... N.A.

b) Decided cases with citation..... N.A.

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17A. Was SLP/Appeal/Writ filed against same impugned Judgment/order earlier? If yes, No

particulars..... N.A.

18. Whether the petition is against interlocutory/final order/decree in the case..... No

19. If it is a fresh matter, please state the name of the High Court and the Coram

in the impugned Judgment/Order..... N.A.

20. If the matter was already listed in this Court : N.A.

a) When was it listed?..... N.A..

b) What was the Coram?..... N.A..

c) What was the direction of the Court.....N.A.

21. Whether a date has already been fixed either by Court or on being mentioned

for the hearing of matter? If so, No

please indicate the date fixed..... N.A.

22. Is there a caveator? If so, whether a notice has been issued to him? No

23. Whether date entered in the Computer?..... N.A.

24. If it is a criminal matter, please state : No

a) Whether accused has surrendered..... N.A.

b) Nature of offence, i.e. convicted under Section with Act..... N.A.

c) Sentence awarded..... N.A.

d) Sentence already undergone by the accused..... N.A.

24 e) (i) FIR/RC/etc..... N.A..

Date of Registration of FIR etc..... N.A.

Name & place of the Police Station..... N.A.

(ii) Name & place of Trial Court..... N.A.

Case No. in Trial Court and Date of Judgment..... N.A.

(iii) Name and place of 1st Appellate Court..... N.A.

Case No. in 1st Appellate Court & date of Judgment..... N.A.

Dated .....

ANOOP BARANWAL
Petitioner in Person

B

SYNOPSIS AND LIST OF DATES

This writ petition is being filed as public interest litigation raising the issue of the constitutional validity of the practice of the Respondents in appointing the member to the Election Commission without following a fair, just and transparent selection process by constituting a neutral and independent collegiums/selection committee, on the ground that such practice is discriminatory and violative of Article 14 of the Constitution and is against the provision of Article 324(2) of the Constitution, which obligate our Executive/ Legislature to make law for ensuring a fair, just and transparent selection process by constituting a neutral and independent collegiums/ selection committee to recommend the name for Election Commission, for which, time to time, the recommendations have been made by the Second Administrative Reform Commission in its Fourth Report in January, 2007; by the Dr. Dinesh Goswami Committee in its Report in May, 1990; and by the Justice Tarkunde Committee in its Report in year 1975.

The present writ petition raise the following question of law of constitutional importance for the kind determination by this Hon'ble Court:

A). Whether the practice of appointing the member to the Election Commission without following a fair, just and transparent process of selection by constituting an

independent and neutral collegiums/selection committee to recommend the name and without making a law for the same as obligated in Article 324(2) of the Constitution, is not discriminatory and violative of Article 14 of the Constitution of India?

B). Whether the provisions of Article 14 of the Constitution does not make it obligatory on the Respondents to follow a fair, just and transparent selection process by constituting a neutral and independent collegiums/selection committee for the appointment of the member of the Election Commission, even in the absence of any law, as intended to be made by the Parliament under Article 324(2) of the Constitution?

C). Whether failing in implementing the recommendations of the Dr. Dinesh Goswami Committee; Second Administrative Reforms Commission and Justice Tarkunde Committee to constitute a neutral and independent committee for the fair, just and transparent mode of selection for the appointment of the members to Election Commission is not violative of Article 14 of the Constitution of India?

D). Whether 'Integrity and Independence of Election Commission' is the basic feature of the Constitution of India in view of the fact that its functioning greatly determines the quality of governance and strength of democracy and whether adopting the process of appointment of the member

to the Election Commission solely on the recommendation of the executive at Centre without evolving fair and transparent selection process, is not undermining the 'Integrity and Independence of Election Commission' in view of the intention expressed by our Constitution makers during Constituent Assembly Debate?

E) Whether the process of appointment of the member to the Election Commission also need not to be insulated from the political and executive pressure by evolving a neutral and independent collegium/committee for fair, just and transparent selection, particularly when for the other High Constitutional and Legal Authorities like Judge of Supreme Court and High Court; Chief Information Commissioner/ Information Commissioner; Chairperson and members of the National Human Right Commission; Chief Vigilance Commissioner; Director of Central Bureau of Investigation; Lokpal and other members; Chairman: Press Council of India, the law to constitute a neutral and independent collegium/selection committee for fair, just and transparent selection to recommend the name, has been adopted and implemented?

F). Whether permitting the Respondent to continue to appoint the members to the Election Commission solely on the advice of the political-executive at centre does not gives

E

ample room for the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation and partisanship and thus causing violation of Article 14 of the Constitution of India?

G). Whether by not making a law for ensuring a fair, transparent and justified process of selection for the appointment of the members to the Election Commission under Article 324(2) of the Constitution of India, the Respondents failed in discharging their constitutional obligation continuously since adoption of the Constitution of India, and as such which is not needed to be interfered by this Hon'ble Court?

LIST OF DATES

26 November, 1949	Under the Constitution of India, the independence and integrity of the Election Commission is of paramount importance for ensuring a free and fair election to strengthen and maintain the life of the democracy. In order to ensure the purity of the election process, it was thought by our Constitution-makers that the responsibility to hold free and fair election in the

F

country should be entrusted to an independent body which would be insulated from political-executive interference.

It is inherent in a democratic set up that the agency which is entrusted the task of holding elections to the legislatures should be fully insulated so that it can function as an independent agency free from external pressures from the party in power or executive of the day. This objective is achieved by setting up of an Election Commission, a permanent body, under Art 324(1) of the constitution.

The functioning of the Election Commission greatly determines the quality of governance and strength of democracy and in view of the great constitutional importance of the Election Commission, the fairness and transparency in the mode of procedure of appointment of the Chief Election Commissioner and it members under Article 324(2) of the Constitution becomes very crucial.

Article 324(2) of the Constitution of India provides for the appointment of the Election Commission, which are as follows:

324(2): "The Election Commission shall consist of

the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."

15 June, 1949

During the adoption of the clause 'subject to the provisions of any law made in that behalf by Parliament' in clause (2) of Article 324 of the Constitution, the views expressed by our Constitutional maker is relevant to quote here. The eminent Constitution maker namely Prof. Shibban Lal Saksena, in the Constituent Assembly Debate, while proposing an amendment that the appointment of the Chief Election Commissioner should be "subject to confirmation by a two-thirds majority in a joint session of both Houses of Parliament." argued that appointment by the President would really mean appointment by the Government under the decision of the Prime Minister.

Agreeing with Prof. Saksena, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, in his reply stated:

"With regard to the question of appointment, I must confess that there is a great deal of force in what my friend, Prof. Saksena, has stated that there is no use of making the tenure of the Election Commissioner a fixed and secure one if there is no provision in the Constitution to prevent either a fool or knave or a person who is likely to be under the thumb of the Executive. My provision - I must admit - does not contain anything to provide against nomination of an unfit person to the post of Chief Election Commissioner or the other Election Commissioners."

Ultimately Dr. B.R. Ambedkar gave an amendment that the appointment of the Chief Election Commissioner and the Election Commissioner shall be made by the President "subject to any law made in that behalf by Parliament" which has also been inserted in the Article 324 (2) of the Constitution with the hope that in due course of time the Government will take an initiative to make the Law for fair, just and transparent mode of the appointment in the Election Commission to ensure its independence and integrity.

1975 Justice Tarkunde Committee (appointed by 'Citizens for Democracy' on the suggestion of Sri Jayaprakash Narayan) recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.

May, 1990 The Committee on Electoral Reforms in the chairmanship of then Law Minister namely, Mr. Dinesh Goswami, appointed by the Central Government, has made several recommendations on the issue of electoral reforms. In para no. 1.2 of its report, Mr. Dinesh Goswami Committee recommended for the affective consultation with neutral authorities like Chief Justice of India and the Leader of the Opposition for the appointment in Election Commission.

January, 2007 The Second Administrative Reforms Commission, in it fourth report made in January, 2007, also recommended for the constitution of neutral and independent collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and

the Deputy Chairman of the Rajya Sabha as members for making recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.

June 02, 2012

The issue of appointment by a neutral committee has also been favoured by the political leaders. Mr. L. K. Advani, then leader of opposition and member of Dr. Dinesh Goswami Committee, in his letter dated 02/06/2012, addressed to the Prime Minister, also urged and suggested to constitute a selection committee consisting of the Prime Minister, the Chief Justice of India, the Law Minister and the Leader of the Opposition in both Houses of Parliament.

June 06, 2012

The aforesaid suggestion of Mr. L.K. Advani was also found support from the Leftist leader namely Mr. Prakash Karat and Mr. Gurudas Das Gupta.

It is regrettable and disappointing that since the adoption of the Constitution, the successive Governments came at centre but none of them take any initiative to make a law, as per Article 324 (2), although several recommendations and suggestions have been made in this regard. The

recommendations and suggestions, so made, have not been given affect by the Respondents for obvious reasons.

It is a practice in vogue since adoption of the Constitution i.e. 26 November, 1949 that the President appoint a member of the Election Commission under Article 324 solely on the advice of the executive at Centre and there is no obligation on the Prime Minister to consult other parties or independent and neutral authorities while selecting and making the recommendation for the appointment of the member of Election Commission. This gives ample room for the ruling party to choose someone whose loyalty to it is assured.

Due to lack of law for the constitution of an independent and neutral committee for fair and just selection, the members to the Election Commission are being appointed by the President solely on the advice of the Prime Minister and thus the whole process of the appointment has been kept centralized with and left to the sweet will and pleasure of the Executive at Centre.

The appointment on the post of the head and

members of many other authorities of constitutional importance like (i) Chief Information Commissioner/ Information Commissioner; (ii) Chairperson and member of the National Human Right Commission; (iii) Chief Vigilance Commissioner & Vigilance Commissioners; (iv) Director of Central Bureau of Investigation; (v) Lokpal and Members; (vi) Chairman: Press Council of India; (vii) Judge of Supreme Court and High Court, is made on the recommendation based on the selection made by an independent and neutral statutory collegiums/ selection committee under the relevant statutes.

15 January, 2015

A post of member to the Election Commission is vacated on the retirement of Chief Election Commission namely Mr. V.S. Sampath and for the appointment on this post, the selection process is to be initiated.

The practice of appointing the members to the Election Commission without making law for adopting fair, just and transparent selection process by constituting an independent and neutral collegium/ committee for recommendation of the name, is violative of Article 14 and 324(2) of the Constitution

M

of India.

03 December 2014

Against the unfair, unjustified and unconstitutional practice of appointing members to the Election Commission, the petitioner made petition on 03.12.2014 before the Prime Minister/Head-Council of Ministers of the Union of India (the Resp. no. 2) with a prayer to take initiative to make law for laying down a fair, just and transparent selection process by constituting an independent and neutral collegiums/committee for recommending the name for the post of the member of the Election Commission.

On the petition of the petitioner dated 03.12.2014 no reply or information in respect of any action or decision taken thereon, has been given by the Respondents till the date and aforesaid petition of the petitioner dated 03.12.2014 is still pending and kept undecided by the Respondents.

Keeping the petition of the petitioner dated 03.12.2014 pending and undecided is illegal, unlawful and unconstitutional and the Respondents are in hurry to recommend the name for the post of members to the Election Commission, which will be

fallen vacant on 15.01.2015, illegally, unlawfully and un-constitutionally without considering and deciding the petition of the petitioner dated 03.12.2014.

08.01.2015 The subject matter involve in the petition are the substantial question of law of the Constitutional importance and violation of the fundamental right guaranteed under Article 14 of the Constitution. Hence present writ Petition as a Public Interest Litigation is being filed.

FILED BY:

ANOOP BARANWAL

(Petitioner-in- person)

R/o B-34, Badri Awas Yojna,
Teliyarganj, Allahabad, U.P.-211004

E mail: baranwal.anoop@gmail.com

Mobile: 09415215383

Drawn on: 05.01.2015

Filed on: .01.2015

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

PUBLIC INTEREST PETITION NO. OF 2015

(Under Article 32 of the Constitution of India)

IN THE MATTER OF

Anoop Baranwal aged about 41 years son of Sri Madan Mohan Baranwal R/o B-34, Badri Awas, C. Lines, Teliarganj, Allahabad, Uttar Pradesh - 211004. ..... Petitioner

Versus

The Union of India through its Secretary, Ministry of Law and Justice, Shastri Bhawan, New Delhi-110001. ... Respondent

PUBLIC INTEREST PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT, ORDER, DIRECTION OR ANY OTHER APPROPRIATE DIRECTION.

To

Hon'ble The Chief Justice of India and His Companion Justices of the Supreme Court of India.

The Humble petition of the Petitioner above named.

MOST RESPECTFULLY SHOWETH:

1. This writ Petition under Article 32 of the Constitution of India, is being filed as Public Interest Litigation by the petitioner, who, being a Citizen of India and practicing advocate at Allahabad High Court, is having deep concern with democracy and is interested in securing the Integrity and Independence of Election Commission and in ensuring the proper implementation of the constitutional provisions. By means of writ petition the substantial question of constitutional validity of the practice of the Respondent in appointing the member to the Election Commission is being raised on the ground that such practice is discriminatory and violative of Article 14 of the Constitution and is against the provision of Article 324(2) of the Constitution, which obligate our Executive/ Legislature to make law for ensuring a

fair, just and transparent selection process by constituting a neutral and independent collegiums/ selection committee to recommend the name for Election Commission, for which, time to time, the recommendations have also been made by the Second Administrative Reform Commission in its Fourth Report in January, 2007; by the Dr. Dinesh Goswami Committee in its Report in May, 1990; and by the Justice Tarkunde Committee in its Report in year 1975.

1.1 This by means of present writ petition as Public Interest Litigation, the petitioner is challenging the selection process of the member to the Election Commission on the ground of violation of Article 14 of the Constitution of India and raising substantial question of law as to the interpretation of Article 324(2) of the Constitution and seeking writ of mandamus or an appropriate writ, order or direction, commanding the Respondent to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India and further seeking writ of mandamus or an appropriate writ, order or direction for constituting an interim neutral and independent collegium/ selection committee to recommend the names for the appointment on the vacant post of the member to the Election Commission.

2. Disclosure in term of Order XXXVIII Rule 12 sub-rule (2) of the Supreme Court Rules, 2013:

2.1 That the petitioner's full name is Anoop Baranwal; his postal address is B-34, Badri Awas, C. Lines, Teliarganj, Allahabad, Uttar Pradesh – 211004 and E-mail address is baranwal.anoop@gmail.com. His Mobile no. is 09415215383 and his PAN no. is AJEPB6629H. The petitioner's annual income is about 20,000/- per month. He is filing the Identity Card issued by High Court Bar Association, Allahabad as a proof regarding personal identification. A photocopy of the Identity Card of the petitioner is annexed herewith and marked as Annexure P-1 (Page no. 31 to —) to this petition.

2.2 That the practice of appointing the member to the Election Commission without making law for a fair, just and transparent process of selection by constituting an independent and neutral collegiums/ selection committee to recommend the name, is in violation of Article 14 and 324(2) of the Constitution of India and is in vogue continuously since adoption of the Constitution. Against the same unconstitutional practice, the petitioner made his petition before the Respondents on 03/12/2014, but to no avail and the Respondent is going to initiate the process of appointment on the post of the member to the Election

Commission, which will be fallen vacant due to retirement of Mr. V.S. Sampath, the Chief Election Commissioner on 15 January, 2015, without deciding the petition of the petitioner dated 03/12/2014. Thus the cause of action for filing the present Public Interest Litigation arises.

2.3 That under the Constitution of India, the independence and integrity of the Election Commission is of paramount importance for ensuring a free and fair election to strengthen and maintain the life of the democracy. By not constituting a neutral and independent Collegium/Selection Committee to recommend the name for the member to the Election Commission and by continuing to adopt the process in appointing the member of Election Commission solely on the recommendation of political-executive at Centre, the independence and the integrity of the Election Commission is being jeopardized and thus public injury is being caused.

2.4 That it is stated that the petitioner has no personal interest in filing the present Public Interest Litigation.

2.5 That it is stated that there is no civil, criminal or revenue litigation, involving the petitioner, which has or could have a legal nexus with the issue(s) involved in the present Public Interest Litigation.

2.6 That it is stated that the petitioner approached the Respondent, the concerned Government Authority and moved the petition dated 03/12/2014 (An. No. 6 to this Petition) for relief{s) sought in the petition. On the petition of the petitioner dated 03/12/2014, no action or decision has been taken by the Respondent.

2.7 That it is further stated that there is no personal gain, private motive and oblique reason of the petitioner in filing the present Public Interest Litigation.

QUESTIONS OF LAW:

3. The present writ petition raise the following question of law of constitutional importance for the kind determination by this Hon'ble Court:

A). Whether the practice of appointing the member to the Election Commission without following a fair, just and transparent process of selection by constituting an independent and neutral collegiums/selection committee to recommend the name and without making a law for the same as obligated in Article 324(2) of the Constitution, is not discriminatory and violative of Article 14 of the Constitution of India?

B). Whether the provisions of Article 14 of the Constitution does not make it obligatory on the Respondents to follow a fair, just and transparent selection process by constituting a neutral and independent collegiums/ selection committee for the appointment of the member of the Election Commission, even in the absence of any law, as intended to be made by the Parliament under Article 324(2) of the Constitution?

C). Whether failing in implementing the recommendations of the Dr. Dinesh Goswami Committee; Second Administrative Reforms Commission and Justice Tarkunde Committee to constitute a neutral and independent committee for the fair, just and transparent mode of selection for the appointment of the members to Election Commission is not violative of Article 14 of the Constitution of India?

D). Whether 'Integrity and Independence of Election Commission' is the basic feature of the Constitution of India in view of the fact that its functioning greatly determines the quality of governance and strength of democracy and whether adopting the process of appointment of the member to the Election Commission

solely on the recommendation of the executive at Centre without evolving fair and transparent selection process, is not undermining the 'Integrity and Independence of Election Commission' in view of the intention expressed by our Constitution makers during Constituent Assembly Debate?

E) Whether the process of appointment of the member to the Election Commission also need not to be insulated from the political and executive pressure by evolving a neutral and independent collegium/ committee for fair, just and transparent selection, particularly when for the other High Constitutional and Legal Authorities like Judge of Supreme Court and High Court; Chief Information Commissioner/ Information Commissioner; Chairperson and members of the National Human Right Commission; Chief Vigilance Commissioner; Director of Central Bureau of Investigation; Lokpal and other members; Chairman: Press Council of India, the law to constitute a neutral and independent collegiums/selection committee for fair, just and transparent selection to recommend the name, has been adopted and implemented?

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fair, just and transparent selection process by constituting a neutral and independent collegiums/ selection committee to recommend the name for Election Commission, for which, time to time, the recommendations have also been made by the Second Administrative Reform Commission in its Fourth Report in January, 2007; by the Dr. Dinesh Goswami Committee in its Report in May, 1990; and by the Justice Tarkunde Committee in its Report in year 1975.

1.1 This by means of present writ petition as Public Interest Litigation, the petitioner is challenging the selection process of the member to the Election Commission on the ground of violation of Article 14 of the Constitution of India and raising substantial question of law as to the interpretation of Article 324(2) of the Constitution and seeking writ of mandamus or an appropriate writ, order or direction, commanding the Respondent to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India and further seeking writ of mandamus or an appropriate writ, order or direction for constituting an interim neutral and independent collegium/ selection committee to recommend the names for the appointment on the vacant post of the member to the Election Commission.

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Commission, which will be fallen vacant due to retirement of Mr. V.S. Sampath, the Chief Election Commissioner on 15 January, 2015, without deciding the petition of the petitioner dated 03/12/2014. Thus the cause of action for filing the present Public Interest Litigation arises.

2.3 That under the Constitution of India, the independence and integrity of the Election Commission is of paramount importance for ensuring a free and fair election to strengthen and maintain the life of the democracy. By not constituting a neutral and independent Collegium/Selection Committee to recommend the name for the member to the Election Commission and by continuing to adopt the process in appointing the member of Election Commission solely on the recommendation of political-executive at Centre, the independence and the integrity of the Election Commission is being jeopardized and thus public injury is being caused.

2.4 That it is stated that the petitioner has no personal interest in filing the present Public Interest Litigation.

2.5 That it is stated that there is no civil, criminal or revenue litigation, involving the petitioner, which has or could have a legal nexus with the issue(s) involved in the present Public Interest Litigation.

2.6 That it is stated that the petitioner approached the Respondent, the concerned Government Authority and moved the petition dated 03/12/2014 (An. No. 6 to this Petition) for relief(s) sought in the petition. On the petition of the petitioner dated 03/12/2014, no action or decision has been taken by the Respondent.

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QUESTIONS OF LAW:

3. The present writ petition raise the following question of law of constitutional importance for the kind determination by this Hon'ble Court:

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B). Whether the provisions of Article 14 of the Constitution does not make it obligatory on the Respondents to follow a fair, just and transparent selection process by constituting a neutral and independent collegiums/ selection committee for the appointment of the member of the Election Commission, even in the absence of any law, as intended to be made by the Parliament under Article 324(2) of the Constitution?

C). Whether failing in implementing the recommendations of the Dr. Dinesh Goswami Committee; Second Administrative Reforms Commission and Justice Tarkunde Committee to constitute a neutral and independent committee for the fair, just and transparent mode of selection for the appointment of the members to Election Commission is not violative of Article 14 of the Constitution of India?

D). Whether 'Integrity and Independence of Election Commission' is the basic feature of the Constitution of India in view of the fact that its functioning greatly determines the quality of governance and strength of democracy and whether adopting the process of appointment of the member to the Election Commission

solely on the recommendation of the executive at Centre without evolving fair and transparent selection process, is not undermining the 'Integrity and Independence of Election Commission' in view of the intention expressed by our Constitution makers during Constituent Assembly Debate?

E) Whether the process of appointment of the member to the Election Commission also need not to be insulated from the political and executive pressure by evolving a neutral and independent collegium/ committee for fair, just and transparent selection, particularly when for the other High Constitutional and Legal Authorities like Judge of Supreme Court and High Court; Chief Information Commissioner/ Information Commissioner; Chairperson and members of the National Human Right Commission; Chief Vigilance Commissioner; Director of Central Bureau of Investigation; Lokpal and other members; Chairman: Press Council of India, the law to constitute a neutral and independent collegiums/selection committee for fair, just and transparent selection to recommend the name, has been adopted and implemented?

F). Whether permitting the Respondent to continue to appoint the members to the Election Commission solely on the advice of the political-executive at centre does not gives ample room for the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation and partisanship and thus causing violation of Article 14 of the Constitution of India?

G). Whether by not making a law for ensuring a fair, transparent and justified process of selection for the appointment of the members to the Election Commission under Article 324(2) of the Constitution of India, the Respondents failed in discharging their constitutional obligation continuously since adoption of the Constitution of India, and as such which is not needed to be interfered by this Hon'ble Court?

FACTS OF THE CASE:

4. Facts of the case briefly stated are as follows:

4.1 The petitioner, being a Citizen of India and practicing advocate, is having deep concern with democracy and is interested in securing the Integrity and Independence of Election

Commission and is also interested in the proper implementation of the constitutional provisions.

4.2 Under the Constitution of India, the independence and integrity of the Election Commission is of paramount importance for ensuring a free and fair election to strengthen and maintain the life of the democracy.

4.3 That in order to ensure the purity of the election process, it was thought by our Constitution-makers that the responsibility to hold free and fair election in the country should be entrusted to an independent body which would be insulated from political-executive interference.

4.4 That it is inherent in a democratic set up that the agency which is entrusted the task of holding elections to the legislatures should be fully insulated so that it can function as an independent agency free from external pressures from the party in power or executive of the day. This objective is achieved by setting up of an Election Commission, a permanent body, under Art 324(1) of the constitution.

4.5 That the functioning of the Election Commission greatly determines the quality of governance and strength of democracy and in view of the great constitutional importance of

the Election Commission, the fairness and transparency in the mode of procedure of appointment of the Chief Election Commissioner and it members becomes very crucial.

4.6 That Article 324(2) of the Constitution of India provides for the appointment of the Election Commission, which are as follows:

> 324(2): "The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."

4.7 That During the adoption of the clause 'subject to the provisions of any law made in that behalf by Parliament' in clause (2) of Article 324 of the Constitution, the views expressed by our Constitutional maker is relevant to quote here. The eminent Constitution maker namely Prof. Shibban Lal Saksena, in the Constituent Assembly Debate, while proposing an amendment that the appointment of the Chief Election Commissioner should be "subject to confirmation by a two-thirds majority in a joint session of both Houses of Parliament." argued that

appointment by the President would really mean appointment by the Government under the decision of the Prime Minister.

4.8 That Agreeing with Prof. Saksena, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, in his reply stated:

> "With regard to the question of appointment, I must confess that there is a great deal of force in what my friend, Prof. Saksena, has stated that there is no use of making the tenure of the Election Commissioner a fixed and secure one if there is no provision in the Constitution to prevent either a fool or knave or a person who is likely to be under the thumb of the Executive. My provision - I must admit - does not contain anything to provide against nomination of an unfit person to the post of Chief Election Commissioner or the other Election Commissioners."

4.9 That ultimately Dr. B.R. Ambedkar gave an amendment that the appointment of the Chief Election Commissioner and the Election Commissioner shall be made by the President "subject to any law made in that behalf by Parliament." with the hope that in due course of time the Government will take an initiative to make the Law for fair, just and transparent mode of the appointment in the Election Commission to ensure its independence and integrity.

4.10 That in the year 1975 Justice Tarkunde Committee (appointed by 'Citizens for Democracy' on the suggestion of Sri Jayaprakash Narayan) recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.

4.11 That the Committee on Electoral Reforms in the chairmanship of then Law Minister namely, Mr. Dinesh Goswami, appointed by the Central Government, has made several recommendations on the issue of electoral reforms. In para no. 1.2 of its report, Mr. Dinesh Goswami Committee recommended for the affective consultation with neutral authorities like Chief Justice of India and the Leader of the Opposition for the appointment in Election Commission. The relevant recommendations in para no. 1.2 of the Report are as follows:

(i) The appointment of the Chief Election Commissioner should be made by the President in consultation with Chief Justice of India and the Leader of the Opposition (and in case no Leader of the opposition is

available, the consultation should be with the leader of the largest opposition group in the Lok Sabha).

(ii) . The consultation process should have a statutory backing.

(iii) The appointment of the other two Election Commissioners should be made in consultation with the Chief Justice of India, Leader of the Opposition (in case the Leader of the opposition is not available, the consultation should be with the leader of the largest opposition group in the Lok Sabha) and the Chief Election Commissioner.

A true copy of the Chapter I and Chapter II of the report of May, 1990 of the Committee on Electoral Reforms is annexed herewith and marked as Annexure P-2 (Page no. 32 to 46) to this petition.

4.12 That the Second Administrative Reforms Commission, in it fourth report made in January, 2007, also recommended for the constitution of neutral and independent body to recommend the name for Election Commission. The recommendation of the Commission is as follows:

"2.1.5.4 Recommendation:

a. A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members should make recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners."

A true copy of the relevant para no. 2.1.5 of the 4th Report of January, 2007 of the Second Administrative Reforms Commission is annexed herewith and marked as Annexure P-3 (Page no. 47 to 49) to this petition.

4.13 That the issue of appointment by a neutral committee has also been favoured by the political leaders. Mr. L. K. Advani, then leader of opposition and member of Dr. Dinesh Goswami Committee, in his letter dated 02/06/2012, addressed to the Prime Minister, also urged and suggested to constitute a selection committee consisting of the Prime Minister, the Chief Justice of India, the Law Minister and the Leader of the Opposition in both Houses of Parliament. While making such suggestion, Mr. L. K. Advani argued:

"The present system whereby members to the Election Commission are appointed by the President,

solely on the advice of the Prime Minister, does not evoke confidence amongst the people."

"There is a rapidly growing opinion in the country which holds that appointments to constitutional bodies such the Election Commission should be done on a bipartisan basis in order to remove any impression of bias, or lack of transparency and fairness. The people of India wish to see that only persons with competence, integrity and an impeccable record of service get appointed to these crucial bodies, whose functioning greatly determines the quality of governance."

"Article 324 of the Constitution, which deals with the Election Commission of India, should be suitably amended. The phrasing of Article 324 (2) shows that this would not need any constitutional amendment and can be done through an ordinary enactment."

To this effect a news item in daily newspaper namely 'The Hindu' dated 04 June, 2012 has been published, the true copy whereof is annexed herewith and marked as Annexure P-4 (Page no. 50 to 52) to this petition.

4.14 That the aforesaid suggestion of Mr. L.K. Advani was also found support from the Leftist leader namely Mr. Prakash Karat and Mr. Gurudas Das Gupta too. To this effect a news item in daily newspaper namely 'The Economic Times' dated 06 June, 2012 has been published, the true copy whereof is annexed herewith and marked as Annexure P-5 (Page no. 53 to 55) to this petition.

4.15 That it is regrettable and disappointing that since the adoption of the Constitution, the successive Governments came at centre but none of them take any initiative to make a law, as per Article 324 (2), although several recommendations and suggestions have been made in this regard. The recommendations and suggestions, so made, have not been given affect by the Respondents for obvious reasons.

4.16 That it is practice in vogue since adoption of the Constitution i.e. 26 November, 1949 that the President appoint a member of the Election Commission under Article 324 solely on the advice of the executive at Centre and there is no obligation on the Prime Minister to consult other parties or independent and neutral authorities while selecting and making the recommendation for the appointment of the member of Election

Commission. This gives ample room for the ruling party to choose someone whose loyalty to it is assured.

4.17 That due to lack of law for the constitution of an independent and neutral committee for selection and making recommendation, the members to the Election Commission are being appointed by the President solely on the advice of the Prime Minister and thus the whole process of the appointment has been kept centralized with and left to the sweet will and pleasure of the Executive at Centre.

4.18 That it is relevant to state that the appointment on the post of the head and members of many other Authorities are being made on the recommendation of an independent and neutral statutory collegium/ selection committee. Illustration of such Authorities may be quoted herewith as follows:

(i) Chief Information Commissioner/ Information Commissioner - are appointed on the recommendation of the Committee consisting of Prime Minister, Leader of the Opposition in the Lok Sabha and one Union Cabinet Minister to be nominated by the Prime Minister u/s 12(3) of the Right to Information Act, 2005.

(ii) Chairperson and member of the National Human Right Commission - are appointed on the recommendation of the Committee consisting of Prime Minister, Speaker, Home Minister, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha and Deputy Chairman of Rajya Sabha u/s 4 of the Protection of Human Right Act, 1993.

(iii) Chief Vigilance Commissioner & Vigilance Commissioners - are appointed on the recommendation of the Committee consisting of Prime Minister, the Minister of Home Affairs and Leader of the Opposition in the Lok Sabha u/s 4(1) of the the Central Vigilance Commission, Act, 2003.

(iv) Director of Central Bureau of Investigation - is appointed on the recommendation of the Selection Committee consisting of Prime Minister, Leader of the Opposition in the Lok Sabha and Chief Justice of India under the Delhi Special Police Establishment Act, 1946.

(v) Lokpal and Members - is appointed on the recommendation of the Selection Committee consisting of (a) Prime Minister (Chairperson); (b) the Speaker of the House of the People—Member; (c)the Leader of

Opposition in the House of the People—Member; (*d*) the Chief Justice of India or a Judge of the Supreme Court nominated by him—Member; (*e*) one eminent jurist u/s 4(1) of the the Lokpal and Lokayuktas Act, 2013.

(vi) Chairman: Press Council of India- is appointed on the recommendation of the Committee consisting of Chairman of the Council of States (Rajya Sabha), the Speaker of the House of the People (Lok Sabha) and a person elected by the members of the Council u/s section 5 of the Press Council Act, 1978.

(vii) Judge of Supreme Court and High Court - are appointed on the recommendation of the National Judicial Commission consisting of Chief Justice of India and two seniormost Judges of Supreme Court, Law and Justice Minister and two eminent persons nominated by the Prime Minister, Chief Justice of India, Leader of Opposition (largest party) under the National Judicial Appointment Commission Act, 2014.

4.19 That on 15 January, 2015 a post of member to the Election Commission is vacated on the retirement of Chief Election Commission namely Mr. V.S. Sampath and for the appointment on this post, the selection process is to be initiated.

4.20 That the practice of appointing the members to the Election Commission without making law for adopting fair, just and transparent selection process by constituting an independent and neutral collegium/ committee for recommendation of the name, is violative of Article 14 and 324(2) of the Constitution of India.

4.21 That against the unfair, unjustified and unconstitutional practice of appointing members to the Election Commission, the petitioner made petition on 03.12.2014 before the Prime Minister/Head-Council of Ministers of the Union of India with a prayer to take initiative to make law for laying down a fair, just and transparent selection process by constituting an independent and neutral collegiums/committee for recommending the name for the post of the member of the Election Commission. A true copy of the petition of the petitioner dated 03.12.2014 along with the postal receipt is annexed herewith and marked as Annexure P-6 (Page no. 56 to 60) to this petition.

4.22 That it is stated that on the petition of the petitioner dated 03.12.2014 no reply or information in respect of any action or decision taken thereon, has been given by the Respondents till the date and the aforesaid petition of the petitioner dated

03.12.2014 is still pending and kept undecided by the Respondent.

4.23 That keeping the petition of the petitioner dated 03.12.2014 pending and undecided is illegal, unlawful and unconstitutional and it appears that the Respondent are in hurry to recommend the name for the vacant post of members to the Election Commission illegally, unlawfully and unconstitutionally without considering and deciding the petition of the petitioner dated 03.12.2014.

4.24 That the petitioner has no alternative remedy and is directly approaching this Hon'ble Court under Article 32 of the Constitution of India since the subject matter involve in the petition are the substantial question of law of the Constitutional importance and violation of fundamental right guaranteed under Article 14 of the Constitution of India.

4.25 That in the interest of finality and expeditious resolution of issues raised in this petition, it would be in the interest of justice for this Hon'ble Court to entertain the present writ petition in the shape of the Public Interest Litigation and grant the relief.

5. That the present petitioner has not filed any other petition in any High Court or the Supreme Court of India on the subject matter of the present petition.

6. GROUNDS

That the petitioner begs to prefer the present writ petition on inter alia the following grounds which are taken without prejudice to one another:

A). Because the practice of appointing the member to the Election Commission without following a fair, just and transparent process of selection by constituting an independent and neutral collegiums/selection committee to recommend the name and without making a law for the same as obligated in Article 324(2) of the Constitution, is discriminatory and violative of Article 14 of the Constitution of India.

B). Because the provisions of Article 14 of the Constitution make it obligatory on the Respondents to follow a fair, just and transparent selection process by constituting a neutral and independent collegiums/selection committee for the appointment of the member of the Election Commission, even in the absence of any law, as intended

to be made by the Parliament under Article 324(2) of the Constitution.

C). Because failing in implementing the recommendations of the Dr. Dinesh Goswami Committee; Second Administrative Reforms Commission and Justice Tarkunde Committee to constitute a neutral and independent committee for the fair, just and transparent mode of selection for the appointment of the members to Election Commission is in violation of Article 14 of the Constitution of India.

D). Because 'Integrity and Independence of Election Commission' is the basic feature of the Constitution of India in view of the fact that its functioning greatly determines the quality of governance and strength of democracy and adopting the process of appointment of the member to the Election Commission solely on the recommendation of the executive at Centre without evolving fair and transparent selection process, is undermining the 'Integrity and Independence of Election Commission' in view of the intention expressed by our Constitution makers during Constituent Assembly Debate?

E). Because the process of appointment of the member to the Election Commission also need to be insulated from the political and executive pressure by evolving a neutral and independent collegium/ committee for fair, just and transparent selection, particularly when for the other High Constitutional and Legal Authorities like Judge of Supreme Court and High Court; Chief Information Commissioner/ Information Commissioner; Chairperson and members of the National Human Right Commission; Chief Vigilance Commissioner; Director of Central Bureau of Investigation; Lokpal and other members; Chairman: Press Council of India, the law to constitute a neutral and independent collegiums/selection committee for fair, just and transparent selection to recommend the name, has been adopted and implemented?

F). Because permitting the Respondent to continue to appoint the members to the Election Commission solely on the advice of the political-executive at centre gives ample room for the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation and partisanship and thus causing violation of Article 14 of the Constitution of India.

G). Because by not making a law for ensuring a fair, transparent and justified process of selection for the appointment of the members to the Election Commission under Article 324(2) of the Constitution of India, the Respondents failed in discharging their constitutional obligation continuously since adoption of the Constitution of India, and as such it is needed to be interfered by this Hon'ble Court.

H). Because on the petition of the petitioner dated 03.12.2014, no reply or information in respect of any action or decision taken thereon, has been given by the Respondents till the date and aforesaid petition of the petitioner dated 03.12.2014 is still pending and kept undecided by the Respondents.

I). Because the Respondents are in hurry to recommend the name for the vacant post of members to the Election Commission illegally, unlawfully and unconstitutionally without considering and deciding the petition of the petitioner dated 03.12.2014 pending before the Respondents.

7. PRAYERS

It, is therefore, most respectfully prayed that this Hon'ble Court may be pleased to :

i). issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondents to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India;

ii). issue a writ of mandamus or an appropriate writ, order or direction constituting an interim neutral and independent collegium/ selection committee to recommend the names for the appointment on the vacant post of the member to the Election Commission;

iii). issue a writ of mandamus or an appropriate writ, order or direction commanding the Respondents to decide the petition of the petitioner dated 03.12.2014 for making a law for ensuring a fair, just and transparent selection process by constituting an independent and neutral

collegiums/ selection committee for recommending the names for members to the Election Commission;

iv). pass any other or further order as may be deemed fit and proper in the circumstances of the case; and

v). awards costs of this petition.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL AS IN DUTY BOUND, EVER PRAY.

Drawn & Filed By:

ANOOP BARANWAL
(Petitioner – in - person)

R/o B-34, Badri Awas Yojna,
Teliyarganj, Allahabad, U.P.-211004
E mail: baranwal.anoop@gmail.com
Mobile: 09415215383

Drawn on: 03.01.2015

Filed on: .01.2015

Annexure P-2

COMMITTEE ON ELECTORAL REFORMS

REPORT OF THE

COMMITTEE on

ELECTORAL REFORMS

MAY, 1990

GOVERNMENT OF INDIA

MINISTRY Of Law and Justice

LEGISLATIVE DEPARTMENT

ballot papers, ballot boxes and other materials.

1.4 Sir Antony Eden, Former Prime Minister of United Kingdom was perhaps greatly influenced by these factors when he observed:-

> "Of all the experiments in government which have been attempted since the beginning of Time, I believe that the Indian venture into parliamentary government is the most exciting. A vast sub-continent is attempting to apply to its tens and hundreds of millions a system of free democracy which has been slowly evolved over the centuries in this small island, Great Britain. It is a brave thing to try to do so. The Indian venture is not a pale imitation of our practice at home, but a magnified and multiplied reproduction on a scale we have never dreamt of. If it succeeds, its influence on Asia is incalculable for good. Whatever the outcome, we must honour those who attempt it."

1.5 Leaving now our laurels alone, it becomes imperative to take stock of the present state of affairs which causes real concern and anxiety because of the existence of the looming danger threatening to cut at the very roots of free and fair elections.

1.6 The role of money and muscle powers at elections deflecting seriously the well accepted democratic values and ethos and corrupting the process; rapid criminalization of politics greatly encouraging evils of booth capturing, rigging, violence etc.; misuse of

official machinery, i.e. official media and ministerial; increasing menace of participation of non-serious candidates; form the core of our electoral problems. Urgent corrective measures are the need of the hour lest the system itself should collapse.

1.7 Electoral reforms are correctly understood to be a continuous process. But the attempts so far made in this area did not touch even the fringe of the problem. They proved to be abortive. Some of the recent measures like reduction of voting age and anti-defection law are no doubt laudable and the basic principles underlying those measures should be appreciated. But there are other vital and important areas in election field completely neglected and left high and dry.

1.8 All these four decades, especially after 1967, the demand for electoral reforms has been mounting up. The subject of electoral reforms received wide attention at various Seminars and Forums. Many eminent persons and academicians have written on various aspects of electoral reforms. It would be relevant to make reference in brief to some of them.

(1) The Report of the Joint Parliamentary Committee on amendment to election law - Part I and Part II - submitted in 1972 in two parts and the draft Bill appended thereto.

(2) The Report of the Committee For Democracy (CFD) set up by Shri Jaya Prakash Narayan under the Chairmanship of Justice Tarkunde in August 1974.

(3) Consideration of the various aspects of electoral reforms by the Sub-Committee of Cabinet appointed in 1977.

(4) Consideration of the various aspects of electoral reforms by the Sub-Committee of the Cabinet between 1982 - 1984.

(5) Various Presidential Addresses in Parliament.

(6) Various Reports of Election Commission containing the views, suggestions and recommendations of the Chief Election Commissioners from 1952 onwards and the package of proposals made by the Commission in 1982.

(7) The comments and views of the present Chief Election Commissioner, Shri R.V.S. Peri Sastri, as contained in his Notes circulated at the meeting of the political parties held on 9-1-1990.

(8) The recommendations of the various Seminars including the one organised in March, 1983 by the Institute of Constitutional and Parliamentary Studies in New Delhi to deal with the various aspects of electoral reforms.

(9) Write ups, articles etc. in national press regarding various aspects of electoral law and procedure.

(10) Articles in Periodical "Swarajya" by Shri R. Venkataraman, Preident of India in Sixties (1960)

1.9 Some of the books by eminent authors dealing with either comprehensively the various aspects of electoral reforms or particular important aspects thereof are-

(1) 'Lack of Political Will' by Shri Ramakrishna Hegde, former Chief Minister of Karnataka and at present Deputy Chairman of the Planning Commission.

(2) 'Electoral Reforms' a book by Shri L.P. Singh, former Governor.

(3) 'Rescue Democracy From Money Power' by Shri Rajagopalachari (Rajaji), former Governor-General and an eminent statesman.

(4) Reports of various Seminars addressed by Shri S.L. Shakdher, former Chief Election Commissioner; Shri R.K. Trivedi, Former Chief Election Commissioner; Shri R.V.S. Peri Sastri, Present Chief Election Commissioner; Shri L.K. Advani (MP) and others.

1.10 Thus, there are in existence informative, productive and useful voluminous materials on the subject. The general public has been getting the feeling that there is lack of political will to undertake any useful exercise of electoral reforms.

1.11 In this context, the quick and timely initiative of the Prime Minister, Shri Visvanath Pratap Singh, on the assumption of office of the National Front Government is refreshing. It has revived the hope that meaningful electoral reforms could now be a distinct possibility and efforts would be directed towards removing the serious drawbacks and distortions in the election law and procedure.

1.12 A meeting mainly of the representatives of political parties in Parliament was convened on the 9th January, 1990 at New Delhi under the Chairmanship of the Prime Minister, Shri Vishwanath Pratap Singh. Various aspects of electoral reforms were discussed at the meeting. In summing up of the deliberations, the Prime Minister outlined the following areas of electoral reforms on which general discussions at the meeting took place and broad consensus on the need for corrective measures emerged :-

(1) Change of electoral system with special reference to Proportional Representation System and List System on which divergent views were earlier expressed;

(2) Strengthening of the Election Commission and securing its independence including making the holder of the post of the Chief Election Commissioner ineligible for any office under the government after his term;

(3) More stringent laws to deal with evil of booth capturing and impersonation;

(4) Fresh delimitation to cure the various distortions; provision for rotation of seats reserved for scheduled castes; Reservation of seats for women;

(5) Expeditious disposal of election petitions and appeals by sitting Judges and to manage their other work by appointment of ad hoc Judges;

(6) Examination of the present provision of Anti-Defection Law and introduction of necessary changes to limit its application only to certain areas of legislative activities and to limit the powers of the presiding officers of the Legislatures;

(7) Public Funding of elections;

(8) Fixation of rational basis for ceiling of election expenses and need for removing the present distortions;

(9) Multi-purpose photo identity cards to voters;

(10) Statutory time-limit for holding bye-elections;

(11) Statutory backing to certain provisions of Model Code;

(12) Statutory backing to the Observers' role;

(13) Combating the evil of non-serious candidates contesting elections;

(14) Elimination of misuse of official machinery.

1.13 On the basis of the conclusions at the meeting of 9th January, 1990, the Government constituted a Committee under the Chairmanship of Law Minister Shri Dinesh Goswami with the following members to go into the various aspects of electoral reforms enumerated above:-

1. Shri H.K.L. Bhagat, M.P. (Indian National Congress)

2. Shri L.K. Advani, M.P. (Bharatiya Janata Party)

3. Shri Somnath Chatterjee, M.P. (Communist Party of India) [Marxist]

4. Shri Ghulam Rasool Matto, M.P. (National Conference)

5. Shri Chimanbhai Mehta, M.P.

6. Shri Indrajit M.P.

7. Shri Homi F. Daji, Former M.P. (Communist Party of India)

8. Shri Era Sezhiyan, Former M.P. (Janata Dal)

9. Shri V. Kishore Chandra Deo, Former M.P. (Congress (S))

10. Shri L.P. Singh, Former Governor

11. Shri S.L. Shakdher, Former Chief Election Commissioner

1.14 Shri K.Ganesan, former Secretary, Election Commission of India, who has been appointed honorary Consultant in the Ministry of Law and Justice for the specific work of electoral reforms has been instructed to assist the Committee in its deliberations. Shri J.C. Sharma, Consultant in the Ministry of Law and Justice, Legislative Department has been instructed to assist Shri K. Ganesan in the matter.

1.15 Smt. V.S. Rama Devi, Secretary, Legislative Department, Ministry of Law and Justice, has also been requested to assist the Committee in its deliberations.

1.16 At the first meeting of the Committee held on the 3rd February, 1990 at New Delhi under the Chairmanship of Shri Dinesh Goswami, Law Minister, the Chairman indicated that detailed working paper under various heads of subjects of the contemplated electoral reforms would be prepared and circulated to members.

1.17 Shri K. Ganesan has been instructed to prepare the detailed working paper in consultation with Shri Era Sezhiyan and the Law Minister.

1.18 Detailed Notes under different Headings have been prepared with necessary Appendices thereto. The number of such main headings are 10 in Part-I and the number of sub-items thereunder are 55 covering every main aspects of election law and procedure.

1.19 Under Part - 11, detailed notes on the different electoral systems obtaining in a few countries and the examination of those systems from the point of view of its suitability to Indian conditions have been prepared with necessary Appendices thereto.

1.20 These notes - Parts 1 and " - were circulated to the members of the Committee well in advance.

1.21 Thereafter, the Committee had six meetings as per the details given below:-

1 . 7th March, 1990 "

2. 8th March, 1990

3. 30th March, 1990

4. 31 st March, 1990

5. 2nd April, 1990

6. 11th April, 1990

1.22 At these meetings, the Committee examined the Notes on subjects in Part-I and Part-II and also considered the following additional notes prepared on specific subjects:-

(1) Note on proposal regarding amendment to section 39 of the Representation of the People Act, 1951 (relating to increase in the number of proposers to a nomination paper in the case of elections to Rajya Sabha and Legislative Councils).

(2) Recommendations made by the National Seminar on 'Elections and role of Law Enforcement' organised by the National Police Academy, Hyderabad and a note thereon.

(3) Additional notes on 'Offence of Booth Capturing' prepared in consultation with Shri L.P. Singh.

(4) The opinion of the Attorney-General on the various legislative measures proposed for discouraging non-serious candidates from contesting elections.

(5) A Note containing broad outlines of U.K. law regarding election expenses prepared by Shri Era Sezhiyan.

(6) A Note on 'Contribution by Companies to Political Parties' prepared by Shri L.P. Singh.

1.23 Apart from the above Notes, a brief statement containing gist of the suggestions in the letters received from Members of Parliament and other important persons on electoral reforms in response to the letter of the Minister of Law and Justice dated the 28th December, 1989 inviting their views and suggestions, were also circulated to the members of the Committee. Such of the important suggestions as are

having a bearing on the subjects dealt with in the Notes have also been taken into account by the Committee.

1.24 The Committee concluded its work on the 4th May, 1990 at which the draft final report of the Committee has been approved.

CHAPTER II

Electoral Machinery

1. Set up of multi-member Commission

1.1 Set up of Multi member Commission with three members:- The Committee examined the question of making the Election Commission as a multi-member body. There has been broad agreement among all members about the Commission being a multi-member body. The Committee feels that the Election Commission should be a three member body.

1.2 Mode of Appointment:- As regards the mode of appointment of the Chief Election Commissioner and the two Election Commissioners, the Committee recommends as follows.-

(i) The appointment of the Chief Election Commissioner should be made by the President in consultation with Chief Justice of India and the Leader of the Opposition (and in case no Leader

of the opposition is available, the consultation should be with the leader of the largest opposition group in the Lok Sabha).

(ii) The consultation process should have a statutory backing.

(iii) The appointment of the other two Election Commissioners should be made in consultation with the Chief Justice of India, Leader of the Opposition (in case the Leader of the opposition is not available, the consultation should be with the leader of the largest opposition group in the Lok Sabha) and the Chief Election Commissioner.

(iv) Appointment of Regional Commissioners:- The appointment of Regional Commissioners for different zones as proposed is not favoured. However, such appointment should be made only as envisaged in the Constitution and not on a permanent footing.

2. Steps for securing independence of the Commission

2.1 Various measures have been considered for securing the real independence of the Election Commission.

2.2 The Committee recommends that the protection of salary and other allied matters relating to the Chief Election Commissioner and the Election Commissioners should be provided for in the Constitution itself on the analogy of the provisions in respect of the Chief Justice and Judges of the Supreme Court. Pending such measures being

taken, a parliamentary law should be enacted for achieving the object.

2.3 The Committee feels that the proposal to make the expenditure of the Commission to be 'charged' is not necessary. Such expenditure should continue to be 'voted' as of now.

2.4 Ineligibility for any appointment under the Government after expiry of term- The Committee further recommends that on the expiry of the terms of office, the Chief Election Commissioner and the Election Commissioners should be made ineligible not only for any appointment under the Government but also to any office including the post of Governor the appointment to which is made by the President.

.....

TRUE COPY

Annexure P-3

GOVERNMENT OF INDIA

SECOND ADMINISTRATIVE REFORMS COMMISSION

FOURTH REPORT

ETHICS IN GOVERNANCE

JANUARY 2007

.....

2.1.5 Appointment of the Chief Election Commissioner/Commissioners

2.1.5.1 The present procedure of appointment of the Chief Election Commissioner and other Election Commissioners, is laid down in Article 324 of the Constitution and stipulates that they are to be appointed by the President on the advice of the Prime Minister.

2.1.5.2 During debates in the Constituent Assembly on the procedure for appointment, there were suggestions that the person appointed as the Chief Election Commissioner should enjoy the confidence of all parties and therefore his appointment should be confirmed by a 2/3 majority of both the Houses. Thus even at that stage, there was a view that the procedure for appointment should be a broad based one, above all partisan considerations. In recent times, for statutory bodies such as the National Human Rights Commission (NHRC) and the Central Vigilance Commission (CVC), appointment of Chairperson and Members are made on the recommendations of a broad based Committee. Thus, for the appointment of the Chief Vigilance Commissioner, the Committee consists of the Prime Minister, the Home Minister and the Leader of the Opposition in the Lok Sabha, whereas for the NHRC, the Committee is chaired by the Prime Minister and has as its members, the Speaker of the Lok

Sabha, the Home Minister, the Leader of the Opposition in the Lok Sabha, the Leader of the Opposition in the Rajya Sabha and the Deputy Chairman of the Rajya Sabha.

2.1.5.3 Given the far reaching importance and critical role of the Election Commission in the working of our democracy, it would certainly be appropriate if a similar collegium is constituted for selection of the Chief Election Commissioner and the Election Commissioners.

2.1.5.4 Recommendation:

a. A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members should make recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.

.....

Truecopy

Annexure P-4

The Hindu: June 04, 2012

Advani demands collegium for appointments to constitutional bodies.

(Says present system for appointing EC members does not inspire confidence among people)

Senior BJP leader L.K. Advani called on Sunday for reforming the selection process to fill the posts of Election Commissioners and those in other constitutional bodies and demanded that a broad-based collegium handle all such appointments.

In a letter to Prime Minister Manmohan Singh, Mr. Advani said: "The present system, whereby members to the Election Commission are appointed by the President, solely on the advice of the Prime Minister, does not inspire confidence among the people. Keeping these important decisions as the exclusive preserve of the ruling party renders the selection process vulnerable to manipulation and partisanship."

Mr. Advani's letter comes at a time when Chief Election Commissioner S.Y. Qureshi is set to retire by this month-end, and there will be a vacancy in another constitutional body — the

Comptroller and Auditor-General of India. Notably, even the second Administrative Reforms Commission recommended in 2009 that the CEC and other members of the Election Commission be appointed by a collegium.

Mr. Advani urged Dr. Singh to ensure that the new member to the Election Commission was appointed by a broad-based collegium, comprising the Prime Minister as its chairman and the Chief Justice of India, the Minister of Law and Justice and the Leaders of the Opposition in the Lok Sabha and the Rajya Sabha as its members.

"Indeed, the credibility of this system was severely dented when a dubious appointment to the crucial office of the CEC was made a few years ago. The time has, therefore, come to reform the selection process for the EC and other constitutional bodies, as has indeed been done in the case of the CVC [the Central Vigilance Commissioner] and CIC [the Chief Information Commissioner]," he said.

Mr. Advani said: "There is a rapidly growing opinion in the country which holds that appointments to constitutional bodies such the Election Commission should be done on a bipartisan basis in order to remove any impression of bias, or lack of transparency and fairness. The people of India wish to see that only persons with

competence, integrity and an impeccable record of service get appointed to these crucial bodies, whose functioning greatly determines the quality of governance."

"Article 324 of the Constitution, which deals with the Election Commission of India, should be suitably amended. The phrasing of Article 324 (2) shows that this would not need any constitutional amendment and can be done through an ordinary enactment," he said.

TRUE COPY

Annexure P-5

The Economic Times:

After Advani, DMK, Left demand collegium to select Election Commissioners & CAG

ET Bureau Jun 6, 2012, 03.01AM IST

NEW DELHI: UPA ally DMK and the Left Front have supported BJP veteran LK Advani's demand for abroad-based collegium to appoint the Comptroller and Auditor-General (CAG) and Election Commissioners.

Coming out in support of Advani's demand for transparency in appointments to constitutional posts, DMK chief M Karunanidhi has written in the party's mouthpiece Murasoli, "I am also in agreement with the contents in the letter (of Advani). It cannot be ignored just because it is the opposition view... Prime Minister Manmohan Singh and the central government will accord importance to the opinion and consider those views."

The demand seemed to be gaining political momentum as the Left Front also came out in support. Speaking to ET, CPM general secretary Prakash Karat said: "The stand is correct.

There should be a broad-based committee comprising the prime minister, the Leader of the Opposition, Chief Justice of India and other members to appoint CAG and Election Commissioners. It is important that we have transparency in these appointments. We have such a process for the appointment of the Central Vigilance Commissioner and this should be followed for other constitutional posts as well."

The demand comes at a time when CEC SY Quraishi is set to retire later this month. With at least 10 states heading for assembly elections over the next 18 months and parliamentary elections slated for 2014, the post of Chief Election Commissioner assumes greater significance.

Even CAG Vinod Rai, whose successive reports on coal block allocation and Delhi's international airport land sale have embarrassed the government, will retire in January next year.

In his letter to the prime minister, Advani made a case for a broad-based collegium and said it should comprise the PM, Chief Justice of India, minister of law and justice and leader of opposition of both Houses.

Annexure P-6

To

Prime Minister/ Chairman- Cabinet,

Govt. of Union of Bharat

New Delhi

Ref.: For making a Law and necessary Constitutional Amendment in respect of constitution of "C.E.C./E.C. Appointment Commission".

Respected Sir,

The dynamism in legal development is always of great concern with the development of any nation. Our Constitution makers also hoped that with the progress of time, coming generation of executive and legislature will ensure the dynamism in legal development, which strengthen our democratic value and cause our constitutional institutions more trustful. The recently passed National Judicial Appointment Bill is one welcoming steps in this respect. The idea is that there must be neutral and trustful committee to recommend for the appointment in the high constitutional offices and there should be no room for the appointing authority to choose someone whose loyalty to it is assured.

The constitutional office of Election Commission consisting of one Chief Election Commissioner and two Election Commissioners is also of great importance to maintain and strength the democracy of

the nation. In present prevailing system, the appointment to Election Commission is made by the President on the basis of recommendation of the Prime Minister. Without questioning on the wisdom and trust of the Prime Minister, it is being a concern of strong democracy to evolve a system, which must have the confidence of all concern parties and other neutral high office like Judiciary etc.

Looking the aforesaid aspect, Tarkunde Committee in 1975 had recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.

In 1990 also, the Committee on Electoral Reforms in the chairmanship of then Law Minister, Mr. Dinesh Goswami had made two important recommendation: (1) the appointment of CEC should be made by the President in consultation with Chief Justice and the Leader of the Opposition, and (2) the appointment of other Election Commissioner should be made by the committee in consultation with the Chief Election Commissioner.

In 2009, when the then CEC Sri SY Quraishi was going to be retired, Sri L. K. Advani in 2009 in his letter addressed to the prime Minister also urged and wrote that "The present system whereby members to the Election Commission are appointed by the President, solely on the advice of the Prime Minister, does not evoke confidence

amongst the people." He further advised for constitution of a five members Select-Committee consisting of the PM, the Chief Justice of India, the Law Minister and the Leader of Opposition in both House of Parliament."

Thus it is an issue since long back to rethink and reevaluate the present system of the appointment of the Election Commissioner in Bharat. With the retirement of present Chief Election Commissioner namely VS Sampath on 16 January, 2015, one post in the Election Commission will going to be felt vacant. There are remaining one and half months to make the process of appointment of the Election Commission much democratic, trustful and transparent like the other high offices like Chief Human Right Commissioner, Chief Vigilance Commissioner, Director of CBI, Lokpal, Chairman, Press Council of India of the Judges, of which the appointment is being recommended by the neutral Collegium. Also it has been proposed for constituting a neutral and more trustful collegiums in case of the appointment of the Judges in Supreme Court and High Courts.

In view of the aforesaid, it is hereby demanded that a five members Collegium in the name of Election Commissioner Appointment Commission consisting of Prime Minister, Chief Justice of Bharat, Leader of largest party in Lok Sabha, seniormost Election Commissioner (Chief Election Commissioner) and the Law Minister be constituted. The applicant is hopeful that the foresaid suggestion may be given due consideration by accepting the following prayer:

PRAYER

It is, therefore, requested that kindly place the aforesaid demand of the applicant before the Cabinet of the Government of Union of Bharat to proceed for framing the necessary Bill for the constitution of five members Collegium in the name of Election Commissioner Appointment Commission consisting of Prime Minister, Chief Justice of Bharat, Leader of largest party in Lok Sabha, senior most Election Commissioner (Chief Election Commissioner) and the Law Minister to make procedure for appointment of the Election Commissioners more democratic, trustful and transparent; and accordingly place the same Bill for passing it from the parliament to make it the law of land.

03/12/2014

With Regard

(Anoop Baranwal)

Convener: Centre for Political and Constitutional Research

B-34, Badri Awas, C Lines, Teliarganj, Allahabad (U.P.)-211004

TRUE COPY

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RL ALLAHABAD HIGH COURT 211007

B RU985035872IN

COUNTER NO. 2 CODE SKS

To: THE PM

New Delhi GPO PIN 110001

FROM ANOOP ALLD

WT. 20 GRAMS

AMT. 22.00 03/12/2014 10.44

True Copy

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. No. OF 2015

IN

PUBLIC INTEREST PETITION NO. OF 2015

IN THE MATTER OF

Anoop Baranwal aged about 41 years son of Sri Madan Mohan Baranwal R/o B-34, Badri Awas, C. Lines, Teliarganj, Allahabad, Uttar Pradesh. ..... Petitioner

Versus

The Union of India through its Secretary, Ministry of Law and Justice, Shastri Bhawan, New Delhi-110001 .... Respondents

IN THE MATTER OF

AN APPLICATION FOR PERMITTING THE PETITIONER TO APPEAR AND ARGUE THE CASE IN PERSON [Under Order IV Rule 1(C) of the Supreme Court Rules, 2013]

To,

Hon'ble The Chief Justice of India and His Companion Justices of the Supreme Court of India.

The Humble petition of the Petitioner above named.

MOST RESPECTFULLY SHOWETH

1. That the petitioner above named is seeking permission to appear and argue the case in person.

2. That the petitioner is an advocate and he is confident to assist the Court ably and thus he want to appear and argue the above noted case in person subject to permission of this Hon'ble Court. It is however, declared that in case, the petitioner is found to be unfit during the course of interaction, Legal Aid may be provided to the petitioner to assist this Hon'ble Court.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may be pleased to:

i) PERMIT the petitioner to appear and argue the above noted case in person;

ii) Pass any other or further order as may be deemed fit and proper in the circumstances

Drawn and Filed By

ANOOP BARANWAL
(Petitioner in Person)
R/o B-34, Badri Awas Yojna
Teliyarganj, Allahabad-211004
Mobile: 09415215383

Drawn on: 03.01.2015
Filed on: 13.01.2015

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. No. 45561 OF 2015

IN

WRIT PETITION (CIVIL) NO. 104 OF 2015
(PUBLIC INTEREST PETITION)

IN THE MATTER OF

Anoop Baranwal aged about 41 years son of Sri Madan Mohan Baranwal R/o B-34, Badri Awas, C. Lines, Teliarganj, Allahabad, Uttar Pradesh. ..... Petitioner

Versus

The Union of India through its Secretary, Ministry of Law and Justice, Shastri Bhawan, New Delhi-110001 .... Respondents

IN THE MATTER OF

AN APPLICATION FOR AMENDMENT OF WRIT PETITION RAISING ADDITIONAL FACTS, ADDITIONAL GROUNDS, ADDITIONAL PRAYER.

To,

Hon'ble The Chief Justice of India and His Companion Justices of the Supreme Court of India.

The Humble petition of the Petitioner above named.

MOST RESPECTFULLY SHOWETH:

1. That the aforesaid writ petition has been filed by the petitioner as public interest litigation challenging the constitutional validity of the practice of the Respondents in appointing the member to the Election Commission without following a fair, just and transparent selection process and without constituting a neutral and independent collegiums/selection committee on the ground that such practice is discriminatory and violative of Article 14 of the Constitution and against the provision of Article 324(2) of the Constitution.

2. That the petitioner seeks humble permission to amend the writ petition and raise certain additional facts, additional grounds and additional prayers in view of subsequent developments taken place.

3. That by way of present application, the petitioner is seeking to add the following additional facts in para no. 4 of writ petition:

4.26 That on 12.03.2015, the Law Commission of India made it report no. 255 on the Electoral Reform. In para no. 6.12.1 and 6.12.2 of this report, the Law Commission made

recommendation that the appointment of all the Election Commissioner should be made by the President in consultation with a three-member collegiums or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha and the Chief Justice of India. A true copy of the relevant part of report no. 255 dated 12 March, 2015 of the Law Commission of India is annexed herewith and marked as Annexure P- 7 (Page no. 78 to 85) to this petition.

4.27 That it is relevant to state that till the date, the Respondent has neither adopted the recommendation of the Law Commission of India made in its report dated 12.03.2015 nor the recommendation of Justice Tarkunde Committee made in year 1975 nor of Dinesh Goswami Committee made in year 1990.

4.28 That during the course of pendency of the present writ petition, the Respondent has appointed Sri Achal Kumar Jyoti on one vacant post of member of Election Commission of India on 07.05.2015. Sri Achal Kumar Jyoti has also taken the charge of the member of Election Commission of India on 13.05.2015. It is relevant to state that the petitioner could not get the notification in regard to the aforesaid appointment of Sri Achal Kumar Jyoti and as such the petitioner is not in position to file the same herewith. However, to this effect a

news item in daily newspaper namely 'International Business Times' dated 08.05.2015 has been published, the true copy whereof is annexed herewith and marked as Annexure P-.8 (Page no. 87 to 87) to this petition.

4.29 That it is specifically stated that the aforesaid appointment of Sri Achal Kumar Jyoti has been made by the President solely on the recommendation of the executive in Central Government without deciding the application of the petitioner dated 03.12.2014.

4.30 That it is relevant to state that Sri Achal Kumar Jyoti is a former chief secretary of Gujarat during Narendra Modi's tenure as chief minister and his appointment as a Election Commissioner is being influenced by personal like and dislike of the Prime Minister of India, which is against the basic principle enshrined under Article 14 of the Constitution of India.

4.31 That in India, there are so many qualified and efficient Civil Servants with impeccable integrity, who were liable to be considered on the post of Election Commissioner on which Sri Achal Kumar Jyoti has been appointed, but due to lack of fair, just and transparent mode of selection, they could not be considered.

4.32 That during the course of selection of Sri Achal Kumar Jyoti as a Election Commissioner, no fair, just and transparent process like Inviting the name through open advertisement; Disclosing the name of nominees and inviting information in respect of the ability and character of such nominees; Scrutiny of the candidates with the help of expert search committee by taking into consideration the information received etc. etc. has been adopted.

4.33 That present Chief Election Commissioner Mr. Nasim Zaidi also expressed his opinion on 30.05.2015 that there should be a collegium type set up to choose the Chief Election Commissioner and other Election Commissioners. To this effect a news item in daily newspaper namely 'Times of India' dated 31.05.2015 has been published, the true copy whereof is annexed herewith and marked as Annexure P- 9 (Page no. 88 to 90) to this petition.

4.34 That inaction of the Respondent in not making appropriate law for ensuring just, fair and transparent selection process for member of Election Commission since 1950 is unwarranted and thus to ensure proper implementation of the rule of law, it is in the interest of justice to issue the necessary directions/ guidelines to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive

discharges its role. Such power of issuing directions/ guidelines under Article 32 read with Article 142 of the Constitution of India has also been laid down by this Hon'ble Court in Vineet Narain's case (AIR 1998SC 889). The relevant paragraph no. 51 of Judgment of Vineet Narain's case is relevant to quote here:

> 51. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role. It is in the discharge of this duty that the IRC was constituted by the Government of India with a view to obtain its recommendations after an in depth study of the problem in order to implement them by suitable executive directions till proper legislation is enacted. The report of the IRC has been given to the Government of India but because of certain difficulties in the present context, no further action by the executive has been possible. The study having been made by a Committee considered by the Government of India itself as an expert body, it is safe

top act on the recommendations of the IRC to formulate the directions of this Court, to the extent they are of assistance. In the remaining area, on the basis of the study of the IRC and its recommendations, suitable directions can be formulate to fill the entire vacuum. This is the exercise we propose to perform in the present case since this exercise can no longer be delayed. it is essential and indeed the constitutional obligation of this court under the aforesaid provisions to issue the necessary directions in this behalf. We now consider formulation of the needed directions in the performance of this obligation. The directions issued herein for strict compliance are to operate till such time as they are replaced by suitable legislation in this behalf...

4.35 That it is stated that still a post of member to the Election Commission of India is vacant and the Respondent is under process to recommend the name for the same in the same unconstitutional manner, by adopting which Sri Achal Kumar Jyoti has been appointed.

4. That by way of present application, the petitioner is also seeking to add the following additional grounds in para no. 6 of writ petition:

J). Because the Law Commission of India made it report dated 12.03.2015 recommending that the appointment of all the

Election Commissioner should be made by the President in consultation with a three-member collegiums or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha and the Chief Justice of India and till the date, the Respondent has not adopted either the aforesaid recommendation of the Law Commission of India or the recommendation of Justice Tarkunde Committee made in year 1975 or of Dinesh Goswami Committee made in year 1990.

K). Because in India, there are so many qualified and efficient Civil Servants with impeccable integrity, who were liable to be considered on the post of Election Commissioner on which Sri Achal Kumar Jyoti has been appointed, but due to lack of fair, just and transparent mode of selection, they could not be considered in as much as Sri Achal Kumar Jyoti is a former chief secretary of Gujarat during Narendra Modi's tenure as chief minister and his appointment as a Election Commissioner is being influenced by personal like and dislike of the Prime Minister of India, which is against the basic principle enshrined under Article 14 of the Constitution of India.

L). Because Sri Achal Kumar Jyoti has been appointed as a Election Commissioner without adopting fair, just and transparent selection process like inviting the name through

open advertisement; Disclosing the name of nominees and inviting information in respect of the ability and character of such nominees; Scrutiny of the candidates with the help of expert search committee by taking into consideration the information received etc. etc.

M). Because inaction of the Respondent in not making appropriate law for ensuring just, fair and transparent selection process for member of Election Commission since 1950 is unwarranted and thus to ensure proper implementation of the rule of law, it is in the interest of justice to issue the necessary directions/ guidelines to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role in view of law laid down by this Hon'ble Court in Vineet Narain's case (AIR 1998SC 889).

5. That by way of present application, the petitioner is also seeking to add the following additional prayers in para no. 7 of writ petition:

vi). issue an appropriate writ declaring the appointment of Sri Achal Kumar Jyoti dated 08.05.2015 as member of Election Commission of India unfair, unjustified and against the provisions of Article 14 of the Constitution of India.

vii). issue an appropriate writ, order or direction directing the respondent to adopt the recommendations made by the Law Commission of India in paragraph no. 6.12.1; 6.12.2; 6.12.3; 6.12.4 and 6.12.5 of the report dated 12.03.2015 before making any appointment on the vacant post of member of Election Commission of India.

viii). issue an appropriate writ, order or direction directing the respondent to adopt fair, just and transparent process of selection like Inviting the name through open advertisement; Disclosing the name of nominees and inviting information in respect of the ability and character of such nominees; Scrutiny of the candidates with the help of expert search committee by taking into consideration the information received etc. etc. before making recommendation for the appointment of member of Election Commission of India till the time the legislature/executive does not frame the appropriate law in regard thereof.

6. That the aforesaid additional facts, additional grounds, additional prayers and Annexures P-7, P-8 and P-9 are necessary for the proper adjudication of the present case. The petitioner may kindly be allowed to amend the writ petition and raise the additional facts as stated in the preceding paragraph no. 3, 4 and 5 of the present application.

PRAYER

For the facts, circumstances and reason set out hereinabove, it is most respectfully prayed that this Hon'ble Court may be pleased to:

i). PERMIT the petitioner to amend Writ Petition and raise additional facts, additional grounds and additional prayers in the writ petition as stated in the preceding paragraph no. 3, 4 and 5 of the present application;

ii). pass such other or further order, which this Hon'ble Court deem just and proper in the end of justice and in the circumstances of the case.

AND FOR THE ACT OF KINDNESS AND JUSTICES, YOUR PETITIONER, AS IN DUTY BOUND, SHALL EVER PRAY.

Drawn & Filed By:

ANOOP BARANWAL
(Petitioner -in- person)
R/o B-34, Badri Awas Yojna,
Teliyarganj, Allahabad, U.P.-211004
Mobile: 09415215383

Drawn on: .2015

Filed on: .2015

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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. No. OF 2015

IN

WRIT PETITION (CIVIL) NO. 104 OF 2015
(PUBLIC INTEREST PETITION)

IN THE MATTER OF

Anoop Baranwal aged about 41 years son of Sri Madan Mohan Baranwal R/o B-34, Badri Awas, C. Lines, Teliarganj, Allahabad, Uttar Pradesh-211004. ... Petitioner

Versus

The Union of India ... Respondents

AFFIDAVIT

I, Anoop Baranwal, son of Sri Madan Mohan Baranwal, aged about 41 years, residing at B-34, Badri Awas, C-Lines, Teliarganj, Allahabad (U.P.) - 211004 present at Allahabad do hereby solemnly affirm and state as follows:-

1. That I state that I am the petitioner in the above mentioned matter and I am well conversant with the facts, proceedings

and circumstances of the case and hence competent to swear to this affidavit.

2. That I state that there is no personal gain, private motive and oblique reason in filing the present Public Interest Litigation.

3. That I state that that I have read and understood the contents of the accompanying I.A. [Para no. 1 to Para no. 6 at page no. 63 to 90] and I further state that the facts stated therein are true to my knowledge.

4. That I state that the accompanying annexures along with the accompanying I.A. are true copies of its respective originals.

(Anoop Baranwal)
(Deponent)

Verification:-

Verified at Allahabad on this the 23 day of June, 2015 that the contents of the above affidavit are true and correct to my personal knowledge and belief. Nothing false has been stated therein or material concealed there from.

(Anoop Baranwal)
(Deponent)

Annexure P-7

GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

Report No.255

Electoral Reforms

March 2015

D.O. No.6(3)/240/2013-LC(LS) 12 March, 2015

Dear Shri Sadananda Gowda ji,

The Ministry of Law and Justice, in January 2013, requested the Twentieth Law Commission of India to consider the issue of "Electoral Reforms" in its entirety and suggest comprehensive measures for changes in the law. While working on the subject, the Supreme Court of India, in the matter of "Public Interest Foundation & Others V. Union of India & Anr - Writ Petition (Civil) No. 536 of 2011, directed the Law Commission of India to make its suggestions on two specific issues, viz., (i) 'curbing

criminalization of politics and needed law reforms'; and (ii) 'impact and consequences of candidates filing false affidavits and needed law reforms to check such practice'. In the light of this judgment, the Commission worked specifically on these two areas and, after series of discussions, followed by a National Consultation held on 1st February 2014, submitted its 244th Report titled "Electoral Disqualifications" on 24th February 2014 to the Government of India.

After the submission of Report No.244, the Commission circulated another questionnaire to all registered national and State political parties seeking their views on ten points, the response received was not very encouraging, though. However, the Commission undertook an extensive study to suggest electoral reforms, held various rounds of discussions with the stakeholders and analysed in-depth the issues involved. After detailed deliberations, the Commission has now come up with its recommendations which are put in the form its final Report, Report No.255, titled *"Electoral Reforms"*, which is sent herewith for consideration by the Government.

With warm regards,

Yours sincerely,

Sd/-

[Ajit Prakash Shah]

Shri D.V. Sadananda Gowda
Hon'ble Minister for Law and Justice
Government of India
Shastri Bhawan
New Delhi – 110 115

... ...

CHAPTER VI

STRENGTHENING THE OFFICE OF THE ELECTION COMMISSION OF INDIA

A. Constitutional Protection of all the Members of the ECI

6.1 The ECI is an independent, constitutional body, which has been vested with the powers of superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all Parliamentary and State elections and elections to the office of the President and Vice President *vide* Article 324(1) of the Constitution.

6.2 Article 324(2) stipulates that the ECI shall comprise of the CEC and "*such number of other Election Commissioners, if any, as the President may from time to time fix.*" By an order dated 1st October 1993, the President has fixed the number of Election Commissioners as two, until further orders. There is all round consensus, evident from the Goswami Committee's Report in 1990 (Goswami Committee Report, *supra* note 113, at para 1.1); the ECI's 1998 letter (Mendiratta, *supra* note 161, at 186.); and its 2004 proposed reforms that the number of Election Commissioners should remain at two to ensure the "smooth and effective functioning" of the ECI. Their stated rationale is that:

> *"The three-member body is very effective in dealing with the complex situations that arise in the course of superintending, directing and controlling the electoral process, and allows for quick responses to developments in the field that arise from time to time and require immediate solution. Increasing the size of this body beyond the existing three-member body would, in the considered opinion of the Commission, hamper the expeditious manner in which it has*

*necessarily to act for conducting the elections peacefully and in a free and fair manner". (*ECI 2004 Reforms, *supra* note 203, at 14)

6.3 Article 324(5) of the Constitution is intended to ensure the independence of the ECI and free it from external, political interference and thus expressly provides that the removal of the CEC from office shall be on "*like manner and on the like grounds as a Judge of the Supreme Court*". Nevertheless, a similar impeachment procedure is not prescribed for the other Election Commissioners under Article 324(5), and they are treated on par with the Regional Commissioners. Instead Article 324(5) stipulates that subject to any Parliamentary law, the office tenure of the Election and Regional Commissioners shall be determined by the President and that they cannot be removed except on the CEC's recommendation.

6.4 The ECI in its 2004 Report expressly opined that the current wording of Article 324(5) was "inadequate" and required an amendment to bring the removal procedures of Election Commissioners on par with the CEC, and thus to provide them with the "same protection and safeguard[s]" as the CEC (ECI 2004 Reforms, *supra* note 203, at 14). The proposed amendment by the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010 is along the same lines.

6.5 Equating the removal procedures of the two Election Commissioners with that of the CEC is also in line with the legislative intent of the Parliament. In 1991, the Parliament enacted the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act whereby the retirement age of the CEC was fixed at 65 years, with a salary and other perquisites equal to that of a Supreme Court judge; whereas that of the other Election Commissioners was fixed at 62 years

with benefits equivalent to a High Court judge. However, in 1993, the above Act was amended and the CEC and other Election Commissioners were placed on par on matters of retirement age, salaries and other benefits (Mendiratta, *supra* note 161, at 181). Section 10 of the Act also provided for all three members to have an equal say in the decision making process, with any difference in opinion being resolved "according to the opinion of the majority."

6.6 Commenting on this Act, the Supreme Court in *T.N. Seshan, CEC v Union of India* (1995) 4 SCC 611 held that the CEC was not superior to the Election Commissioners stating:

> *"As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and the ECs. The RCs may be appointed to assist the Commission. If that be so the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324 nor can we attribute it to the Constitution-makers. We must reject the argument that the ECs' function is only to tender advise to the CEC."* [Emphasis supplied]

6.7 It is thus clear that the CEC is at the same position as the other Election Commissioners and only functions as a first amongst equals. Moreover, the Election Commissioners are clearly superior to the Regional Commissioners and Article 324(5) should be amended to reflect that. Given that the removal (impeachment) procedure of the judges of the High Court and Supreme Court is also the same, the benefit of the CEC's

removal procedures under Article 324(5) should also be extended to the other Election Commissioners.

6.8 The Law Commission thus, relying on the Court's observations in the *Seshan's* judgment, and for the reasons aforementioned reiterates and endorses the ECI's proposal to extend the same protection under the Constitution in the matter of removability from office to the Election Commissioners as is available to the CEC. Thus, the second proviso in Article 324(5) after the words "Chief Election Commissioner", the words "and any other Election Commissioner" should be added. In the third proviso, the words "and any other Election Commissioner" should be deleted.

Recommendation

6.9 The following change should be made in Article 324:

- In sub-section (5), delete the words "the Election Commissioners and" appearing after the words "tenure of office of".
- In the first proviso to sub-section (5), after the words "Chief Election Commissioner" appearing before "shall not be removed", add the following words, "and any other Election Commissioner"; also, after the words "conditions of service of the Chief Election Commissioner", add the following words, "and any other Election Commissioner".
- In the second proviso to sub-section (5), after the words "provided further that", delete the words "any other Election Commissioner or" occurring before "a Regional Commissioner".

B. Appointment of the Election Commissioners and the CEC

(i) Appointment process

6.10.1 The power to appointment the CEC and the Election Commissioners lies with the President *vide* Article 324(2) of the Constitution, which states that:

> *"The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."*

6.10.2 Although the issue of appointments was discussed in the Constituent Assembly and a suggestion was floated to make the appointments subject to confirmation by a two-thirds majority, in a joint session of the Parliament, it was rejected (Mendiratta, *supra* note 161, at 179). Consequently, Article 324(2) left it open for the Parliament to legislate on the issue.

6.10.3 The Goswami Committee in 1990 recommended a change to the appointment process, suggesting that the CEC should be appointed by the President in consultation with the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. In turn, the CEC should be additionally consulted on the question of appointment of the other Election Commissioners and the entire consultation process should have statutory backing (Goswami Committee Report, *supra* note 113, at 9).

6.10.4 This was followed by the introduction of the Constitution (Seventieth Amendment) Bill 1990, which was introduced in the Rajya Sabha on 30th May, 1990 providing that the CEC would be appointed by the President after consultation with the Chairman of the Rajya Sabha, the Speaker of the Lok Sabha, and the Leader of the Opposition (or the leader of the largest party) in the Lok Sabha. The CEC was further made a part of the

consultative process in the appointment of the Election Commissioners. However, on 13th June 1994, the Government moved a motion to withdraw the Bill, which was finally withdrawn with the leave of the Rajya Sabha on the same day (Rajya Sabha debates, 13th June 1994, at 600 and 637. See also Mendiratta, *supra* note 161, at 179.).

6.10.5 Consequently, in the absence of any Parliamentary law governing the appointment issue, the Election Commissioners are appointed by the government of the day, without pursuing any consultation process. This practice has been described as requiring the Law Ministry to get the file approved by the Prime Minister, who then recommends a name to the President (Qureshi, *supra* note 1, at 39-40). Thus, there is no concept of collegium and no involvement of the opposition.

6.10.6 The Commissioners are appointed for a six year period, or up to the age of 65 years, whichever is earlier. Further, there are no prescribed qualifications for their appointment, although convention dictates that only senior (serving or retired) civil servants, of the rank of the Cabinet Secretary or Secretary to the Government of India or an equivalent rank, will be appointed. The Supreme Court in *Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi* (AIR 1986 SC 1534) rejected the contention that the CEC should possess qualifications similar to that of a Supreme Court judge, despite being placed on par with them in terms of the removal process.

(ii) Comparative practices

6.11.1 An examination of comparative practices is instructive. In South Africa, the Independent Electoral Commission comprises of five members, including one judge. They are appointed by the President on the recommendations of the National Assembly, following nominations by a National Assembly inter-party committee, which receives a list of at least

eight candidates. This list of (at least) eight nominees is recommended by the Selection Committee, which has four members being, the President of the Constitutional Court; a representative of the Human Rights Commission and the Commission on Gender Equality each; and the Public Prosecutor.

6.11.2 In Ghana too, the seven member Election Commission is appointed by the President on the advice of the Council of State, with the Chairman and two Deputy Chairmen having permanent tenure.

6.11.3 In Canada, the Chief Electoral Officer of "Elections Canada" is appointed by a House of Commons resolution for a non-renewable ten-year term, and to protect their independence from the government, he/she reports directly to Parliament. In the United States, the six Federal Election Commissioners are appointed by the President with the advise and consent of the Senate. The Commissioners can be members of a political party, although not more than three Commissioners can be members of the same party.

6.11.4 In all these cases thus, it is clear that the appointment of the Election Commissioners or the electoral officers is a consultative process involving the Executive/Legislature/other independent bodies.

(iii) Recommendations

6.12.1 Given the importance of maintaining the neutrality of the ECI and to shield the CEC and Election Commissioners from executive interference, it is imperative that the appointment of Election Commissioners becomes a consultative process.

6.12.2 To this end, the Commission adapts the Goswami Committee's proposal with certain modifications. *First,* the appointment of all the Election Commissioners (including the CEC) should be made by the

President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha (or the leader of the largest opposition party in the Lok Sabha in terms of numerical strength) and the Chief Justice of India. The Commission considers the inclusion of the Prime Minister is important as a representative of the current government.

6.12.3 *Second*, the elevation of an Election Commissioner should be on the basis of seniority, unless the three member collegium/committee, for reasons to be recorded in writing, finds such Commissioner unfit.

6.12.4 Such amendments are in consonance with the appointment process in Lokpal and Lokayuktas Act, 2013, the Right to Information Act, 2005 and the Central Vigilance Commission Act, 2003.

6.12.5 Pursuant to Article 324(2), an amendment can be brought to the existing Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 to amend the title and insert a new Chapter 1A on the appointment of Election Commissioners and the CEC as follows:

- Act and Short Title: The Act should be renamed the "Election Commission (Appointment and Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991".

- The short title should state, "An Act to determine the appointment and conditions of service of the Chief Election Commissioner and other Election Commissioners and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto."

Chapter I-A – Appointment of Chief Election Commissioner and Election Commissioners.

2A. Appointment of Chief Election Commissioner and Election Commissioners – (1) The Election Commissioners, including the Chief Election Commissioners, shall be appointed by the President by warrant under his hand and seal after obtaining the recommendations of a Committee consisting of:

(a) the Prime Minister of India – Chairperson

(b) the Leader of the Opposition in the House of the People – Member

(c) the Chief Justice of India – Member

Provided that after the Chief Election Commissioner ceases to hold office, the senior-most Election Commissioner shall be appointed as the Chief Election Commissioner, unless the Committee mentioned in sub-section (1) above, for reasons to be recorded in writing, finds such Election Commissioner to be unfit.

Explanation: For the purposes of this sub-section, "the Leader of the Opposition in the House of the People" shall, when no such Leader has been so recognised, include the Leader of the single largest group in opposition of the Government in the House of the People...

Annexure P- 6

International Business Times

May 8, 2015 13:07 IST

The former Chief Secretary of Gujrat, Achal Kumar Jyoti, was appointed as the Election Commissioner of India on Thursday. Jyoti, who served as the Chief Secretary during Narendra Modi's term as Gujarat's Chief Minister, has filled one of the two vacancies in the three-member panel of the Election Commission of India (ECI). He will serve as the Election Commissioner for a period of three years, resigning at the age of 65 (the official age to demit office under the Constitution), PTI reports.

Born on 23 January 1953, 62 year-old Indian Administrative Service (IAS) officer of the 1975 batch served various posts in Gujarat, including as the Chairman of the Kandla Port Trust between 1999 and 2004 and Managing Director of the Sardar Sarovar Narmada Nigam Ltd. (SSNNL). After retiring as the Chief Secretary in January 2013, he was appointed as the State Vigilance Commissioner of Gujarat, the post he will vacate in June 2015 after his tenure ends. He said he's waiting for the formal orders and will join the new post soon after his retirement.

"I am yet to get formal orders. I was approached by the central government three-four months back for my consent. I expressed my willingness to join the Election Commission. My term as State Vigilance Commissioner ends in June 2015. So I will take the permission of the state government to resign and join the Election Commission as soon as possible.' Said Jyoti, according to the Times of India.

He will join his new post under Chief Election Commissioner Nasim Zaidi, who is one year junior to Jyoti in IAS.

The government will soon appoint the second Election Commissioner to fill up the last vacant position.

TRUE COPY

Annexure P-9

TIMES OF INDIA

CEC favours collegium to choose ECs

PTI | May 31, 2015, 12.46PM IST

Chief Election Commissioner Nasim Zaidi favours a collegium type set up to choose the CEC and Election Commissioners who he says should have equal protection under the Constitution in the matter of removal.

NEW DELHI: Chief Election Commissioner Nasim Zaidi favours a collegium type set up to choose the CEC and Election Commissioners who he says should have equal protection under the Constitution in the matter of removal. He, however, hastened to add that the present system of selection of Election Commissioners and the three-member Commission is working fine.

"I would say that the (present) system has also worked well. But if there is a consensus going forward that this system needs to be replaced by a consultative system, I think the Commission would live with that and work well.

"Even in the absence of this consultative process, CECs and ECs have acted very neutrally, very independently," he told PTI in an interview.

He was responding to a question on the recent recommendation of the Law Commission that the appointment of Election Commissioners, including the CEC, should be made by the President in consultation with a

The collegium should consist of the Prime Minister, the Leader of the Opposition of the Lok Sabha (or the leader of the largest Opposition party in the Lok Sabha) and the Chief Justice of India, it had said. Zaidi recalled that a committee had some years ago recommended a collegium system for appointment of Election Commissioners.

"They focused on Election Commissioners. By seniority, the EC becomes CEC, unless there is something extraordinary. They said the EC should enjoy the confidence of the entire political arena. A bill was also brought, but it did not succeed," he said.

Asked whether he supports the demand raised by his predecessors that all the Commissioners be made equal even in matter of removal, Zaidi said he is in "total agreement with all my predecessor Commissioners. The Commission had been taking it up with Law Ministry. Law Commission has reiterated it and this recommendation has merit".

In its recent report on electoral reforms, the Law Commission has recommended amending Article 324(5) of the Constitution to equate the removal procedures of the two Election Commissioners with that of the CEC. Government appoints the Chief Election Commissioner and other Election Commissioners. The CEC can be removed from office only through impeachment by Parliament. The government can remove the Commissioners either on the recommendation of the CEC or even without it. Zaidi defended the multi-member Commission saying, "three-member Commission is the best, my experience tells me... EC is dealing with the most sensitive subject of democracy. Therefore, it is always essential that more than one person sits, they apply their wisdom and arrive at a decision after detailed discussion and informed decision making."

Responding to suggestions that even one-member poll body was sufficient, he said, "Three-member Commission is a very desirable proposition. Not more (than three) because decision making will be very difficult. Three, we can make very quick decision, on spot."

Election Commission is a permanent constitutional body which was established in accordance with the Constitution on January 25, 1950.

Originally, the Commission had only a Chief Election Commissioner. For the first time two additional Commissioners were appointed on October 16, 1989 but they had a very short tenure till January 1, 1990. Later, on October 1, 1993 two additional Election Commissioners were appointed. The concept of multi-member Commission has been in operation since then, with decision making power by majority vote.

Asked about his view on a 'legally specified bar' on Constitutional dignitaries like ECs taking up political posts after retirement, Zaidi said in the past no CEC or EC has opted for a post-retirement job. "If you look at the history, I think CECs and ECs have not opted for this."

When reminded that at least some have gone for a post- retirement assignment, Zaidi said he would not go into that.

"By and large, CECs after retirement have become part of the society. They have played very active role in generating debate, reflecting on various current issues. I think there is a merit that after retirement, these dignitaries should not enter the political (arena)," he said.

TRUE COPY

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IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

I.A. NO. ____ OF 2015

IN

WRIT PETITION (CIVIL) NO. 104 OF 2015

IN THE MATTER OF:
ANOOP BARANWAL

.....PETITIONER

VERSUS

UNION OF INDIA

.....RESPONDENT

APPLICATION FOR PERMISSION TO AMEND THE PRAYER OF THE WRIT PETITION

To
HON'BLE THE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

The Humble application of the Petitioner above named

MOST RESPECTFULLY SHOWETH:

1. That the present writ petition is being filed seeking transparency in the appointment of the members of the Election Commission of India formulated under Article 324 of the Constitution thereby ensuring its independence from the Executive.

2. That all the facts leading to filing of the present application has been set out in detail in the accompanying Writ Petition and the same are not being repeated herein for the sake of brevity. The petitioner craves permission to rely upon

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the contents of the writ petition.

3. That the Petitioner seeks to amend the prayer clause of the Writ Petition to the effect that it may be substituted by the following:

"In light of the facts advanced and authorities cited, this Hon'ble Court may be pleased:

1. To issue an appropriate writ, direction or order to the Respondent to implement an independent and transparent system for appointment of members of the Election Commission on the lines recommended by the Report of the Committee on Electoral Reforms of May 1990, formulated by the Ministry of Law and Justice, Government of India, the Report of the Second Administrative Reforms Commission, Government of India, of January 2007 and the Report of the Law Commission of India on Electoral Reforms of March 2015; and/or
2. To pass any other order deemed fit in the circumstances of the case."

PRAYER

In the above circumstances, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:

a) Allow the Petitioner to amend the prayer of the writ petition to the effect mentioned above;

(b) Pass such other or further order (s) as this Hon'ble Court may deem and fit in the peculiar facts and circumstances of the case in favour of the Petitioner.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY:

Prashant Bhushan

PRASHANT BHUSHAN
ADVOCATE FOR THE PETITIONER

Drawn On: 8/7/2015
Filed On: 8/7/2015

94 56

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A.No. _____ OF 2015

IN

WRIT PETITION (CIVIL) NO. 104 OF 2015

IN THE MATTER OF:

ANOOP BARANWAL ... PETITIONER

Versus

UNION OF INDIA ... RESPONDENT

AFFIDAVIT

I, Anoop Baranwal , S/o Shri Madan Mohan, R/o B 34, Badri Awas, Teliyaganj, Allahabad-211004, Uttar Pradesh, presently at New Delhi do hereby solemnly affirm and state on oath as under:

1. That I am the petitioner in the instant writ petition and being conversant with the facts and circumstances of the case, am competent to swear this Affidavit.
2. That I have read and understood the contents of the accompanying application for amendment to the prayer of the main writ petition, and I state that the contents of the same are true and correct to the best of my knowledge.
3. I further confirm that I have not concealed in the present application, any data/material /information which may enable this court to form an opinion whether to entertain this application or not and/or whether to grant any relief or not.

DEPONENT

VERIFICATION:

I, the above named Deponent, do hereby verify that the contents of the above affidavit are true and correct to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 8th day of July 2015.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 104 OF 2015

Anoop Baranwal ..Petitioner

Versus

Union of India ..Respondent

COUNTER AFFIDAVIT ON BEHALF OF THE RESPONDENT

I, Shri B.M. Sharma aged about 56 years presently working as Deputy Secretary to the Govt. of India, Ministry of Law and justice, Legislative Department, Shastri Bhawan, New Delhi, do hereby solemnly affirm and state as under:-

1. That I am working as Deputy Secretary to the Govt. of India, Ministry of Law and justice, Legislative Department, Shastri Bhawan and in my official capacity, I am fully conversant with the facts and circumstances of the case. I am competent to swear this affidavit on behalf of the answering respondent.

2. That I have gone through the contents of the present Writ Petition filed by the Petitioner and have understood the same. I have also perused the records pertaining to the case, and I am filling this affidavit in reply on the basis of the knowledge derived by me after perusing the records.

3. That, save and except those, which are matter of record, all the averments, statements and submissions made by Petitioner in the abovementioned Writ Petition are, until and unless specifically admitted, are denied by the answering respondent. The answering respondent craves leave of this Hon'ble Court to file a further detailed affidavit or affidavits if the situation so warrants or this Hon'ble Court so requires.

4. That the present Writ Petition has been filed by the Petitioner praying inter alia to:-

(i) issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondents to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/section

committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India;

(ii) issue a writ of mandamus or an appropriate writ, order or direction constituting an interim neutral and independent collegiums/section committee to recommend the name for the appointment on the vacant post of the member to the Election Commission;

(iii) issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondents to decide the petition of the petitioner dated 03.12.2014 for making a law for ensuring a fair, just and transparent selection process by constituting a neutral and independent collegiums /section committee to recommend the name for recommending the names for member to the Election Commission;

(iv) pass any other or further orders as may be deemed fit and proper in the circumstances of the case; and /

(v) awards cost of this petition.

5. Mr. Prashant Bhushan, Advocate vide Interlocutory Application dated 08.07.2015 has requested this Hon'ble Court that prayer clause in the above said petition may be substituted by the following:

"In the light of the facts advanced and authorities cited, this Hon'ble Court may be pleased:

1. To issue an appropriate writ, direction or order to the Respondent to implement an independent and transparent system for appointment of members of the Election Commission on the lines recommended by the Report of the Committee on Electoral Reforms of May, 1990, formulated by the Ministry of Law and Justice, Government of India, the Report of the Second Administrative Reforms Commission, Government of India and the Report of the Law Commission of India on Electoral Reforms of March, 2015; and /or

2. To pass any other order deemed fit in the circumstances of the case."

6. I submit that at present there is no vacant post of Chief Election Commissioner/Election Commissioner. I further submit that the Chief Election Commissioner and other Election Commissioners (Condition or Service) Act, 1991 [No.11 of 1991] provide for the matters connected to the Chief Election Commissioner and Election Commissioners. Article 324 of the Constitution of India contemplates the provisions of appointment of the Chief Election Commissioner and Election Commissioners. The process and the procedure for appointment of the Chief Election Commissioner and Election Commissioner is as per the constitutional and statutory provisions.

7. I further submit that presently the appointment of Chief Election Commissioner and Election Commissioners in Election Commission is made as per the provisions of Article 324(2) of the Constitution of India and Government of India (Transaction of

Business) Rules 1961 made under clause(3) of article 77 of Constitution of India and nature of cases mentioned against Sl.No.22 of the 3rd schedule to the said Rules and Rule 8 thereof. I further submit that according to these Rules, appointment of Chief Election Commissioner and Election Commissioners requires the approval of Hon'ble Prime Minister and the President of India. Therefore the process and procedure for appointment of the Chief Election Commissioner and Election Commissioners is as per the provisions of the aforesaid constitutional and statutory provisions. This procedure of appointment is in existence for long period.

8. I further submit that regarding recommendations of the Committee/Commission relating to change in the present system of appointment to the post of Chief Election Commissioner and other Election Commissioners, it is prerogative of the Government to accept such recommendations or otherwise. Further making legislation on any subject is the prerogative of Legislature only based on the overall requirement.

Existing system for appointment to the post of Chief Election Commissioner and other Election Commissioners is working smoothly. Further Election Commission since its establishment is working in a free and fair manner. I further submit that the subject matter agitated through this Writ Petition is purely policy matter and the same is in exclusive domain of the legislature and is not a justiciable matter.

9. I further submit that in the year 2012 a reply on similar subject was given to Shri L.K.Advani, Member of Parliament and Shri Gurudas Das Gupta, Member of Parliament by the then Hon'ble Prime Minister Dr.Manmohan Singh and the department was of the view that any change in the procedure for appointment, resignation and removal of the Chief Election Commissioner and other Election Commissioners as suggested would require discussion with other political parties and can be taken up with the other agenda for Electoral Reforms.

I, therefore, submit that in view of the facts stated and submissions made herein above, the present Special Leave Petition is liable to be dismissed.

DEPONENT

VERIFICATION:

I, the above mentioned deponent, do hereby verify that the facts stated in paragraphs 1 to 3 of the Counter Affidavit are true to my personal knowledge and the facts stated in paragraphs 4 to 9 of the Counter Affidavit are true to record maintained in my office and the submissions made therein are based on legal advice which I received and believed to be true.

Verified at New Delhi on this day __ day of October, 2015.

DEPONENT