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भारत निर्वाचन आयोग सचिवालय

SECRETARIAT OF THE ELECTION COMMISSION OF INDIA

निर्वाचन सदन, अशोक रोड, नई दिल्ली-110001 Nirvachan Sadan, Ashoka Road, New Delhi-110001

No.56/01/Dispute/PPS-II/2022/Vol-IV

Dated: 17th February, 2023

То

Sh. Eknathrao Sambhaji Shinde,	Sh. Uddhavji Thackeray,
Petitioner in Dispute Case No. 1 of 2022,	Respondent in Dispute Case No. 1 of 2022,
Subh-Deep Bungalow,	Shivsena Bhavan, Gadkari Chowk,
Landmark Society, Thane,	Dadar, Mumbai (Maharashtra)- 400028
Maharashtra,	

Subject: Dispute Case No.1 of 2022- Under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968, Dispute in Shivsena, a recognized Party in the State of Maharashtra - Commission's Final Order- regarding.

Sir,

I am directed to forward herewith a certified copy of Commission's Final Order dated 17th February, 2023, passed in the matter of the Dispute Case no 1 of 2022.

Yours faithfully,

(Vivek Azad) for Under Secretary E-mail: mnayak86@eci.gov.in Extn no – 487, Ph.no – 23052008

Copy to:

- 1. Email to All Chief Electoral Officers
- 2. Guard File



निर्वाचन सदन NIRVACHAN SADAN अशोक रोड, नई दिल्ली - 110 001 ASHOKA ROAD, NEW DELHI - 110 001

DISPUTE CASE NO. 01/2022

CORAM:

ANUP CHANDRA PANDEY	RAJIV KUMAR	ARUN GOEL
(ELECTION COMMISSIONER)	(CHIEF ELECTION COMMISSIONER)	(ELECTION COMMISSIONER)
IN RE: DISPUTE RELATING	TO SHIVSENA UNDER PARAG	RAPH 15 OF THE
ELECTION SYMBOLS (RE	SERVATION AND ALLOTMENT) ORDER, 1968.
PRESENT		

PRESENT:

FOR PETITIONER:

Sh. Mahesh Jethmalani, Senior Advocate Sh. Maninder Singh, Senior Advocate Sh. Siddharth Bhatnagar, Senior Advocate Ms. Malivka Trivedi, Senior Advocate Sh. Chirag Shah, Advocate Sh. Utsav Trivedi, Advocate Sh. Ravi Sharma, Advocate Ms. Mugdha Pande, Advocate Sh. Himanshu Sachdeva, Advocate Ms. Malini Roy, Advocate Sh. Chaitali Jugran, Advocate Sh. Piyush Tiwari, Advocate Sh. Ajay Awasthi, Advocate Sh. Wedo Khalo, Advocate Sh. Nihar Thackeray, Advocate Ms. Sujal Gupta, Advocate Sh. Prabhas Bajaj, Advocate Sh. Navneet R, Advocate Sh. Aditya Sidhra, Advocate FOR RESPONDENT: Sh. Kapil Sibal, Senior Advocate Sh. Devadatt Kamat, Senior Advocate Sh. Amit Anand Tiwari, Advocate

के. एन. भार / K. N. BHAR a, प्रधान सरिव / Sr. Principal Secretary भारता निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिली-110001/ New Delhi-110001

Tel : 011-23052205-18, Fax : 011-23052223-25, Website : www.eci.gov.in "मजबूत लोकतंत्र - सबकी भागीदारी" *"Greater Participation for a Stronger Democracy"* Sh. Vivek Singh, Advocate
Ms. Devyani Gupta, Advocate
Ms. Aparajita Jamwal, Advocate
Mohd. Nizam Pasha, Advocate
Sh. Sabaariswh Subramanian, Advocate
Sh. Javedur Rahman, Advocate
Sh. Harsha Pandey, Advocate
Sh. Rajesh Imandaar, Advocate
Ms. Revanta Solanki, Advocate
Sh. Sunny Jain, Advocate
Sh. Rohit Sharma, Advocate

FACTUAL MATRIX:

1. Shivsena is a recognized State Party in the State of Maharashtra with the symbol "Bow & Arrow" as its reserved symbol and the Party was registered with the Election Commission of India on 12.10.1989 under the provision of Section 29A of the Representation of the People Act, 1951. The Constitution of the Party as available on record of the Commission is as amended in the year 1999. During the course of this dispute case, it was brought to the Commission's knowledge that the aforesaid Constitution of Shivsena was amended in the year 2018. However, this amended Constitution was never brought on record of the Commission as required under Section 29A of the Representation of the People Act, 1951, hereinafter called RPA, 1951. Further, as per the details available with the Commission of the last organisational elections of the Party, as communicated vide letter dated 27.02.2018, Sh. Uddhav Thackeray [hereinafter, "Respondent"] was elected as the 'Shivsena Paksha Pramukh' for a term of five years along with other office-bearers. Sh. Eknath Shinde [hereinafter, "Petitioner"] was appointed as a 'Shivsena Leader' during the aforesaid organisational election.

2. On 25.06.2022, the Commission received a communication from Sh. Anil Desai, Member of Parliament, thereby intimating the Commission of alleged anti-party activities being carried by some of the party MLAs under the leadership of the Petitioner. Thereafter, , Sh. Anil Desai *vide* email dated 01.07.2022 forwarded three letters dated 30.06.2022 whereby it was mentioned that the following members had indulged in anti-party activities and had voluntarily given up the membership of the party:

a) Sh. Eknath Shinde, Shivsena Leader;

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- b) Sh. Gulabrao Patil, Shivsena Deputy Leader;
- c) Sh. Tanji Sawant, Shivsena Deputy Leader;
- d) Sh. Uday Samant, Shivsena Deputy Leader.

It was further mentioned in the aforesaid communication that all the above mentioned four persons had been removed from their respective positions.

3. Thereafter, an email dated 02.07.2022 was received from Sh. Anil Desai whereby the complete organisational structure of the National Executive Representatives of the Party after convening an extraordinary National Executive Meeting on 25.06.2022 was submitted for Commission's perusal and record. The aforesaid fact was reiterated *vide* letter dated 04.07.2022. In the said communication, it was further mentioned that the Respondent is the Shivsena Paksha Pramukh. However, the said communication was not accompanied by supporting documents in prescribed format as was earlier done by the Party in its letter dated 27.02.2018 wherein the requisite information pertaining to the last organisational election had been provided.

4. On 19.07.2022, a petition was filed under Paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968 [hereinafter, "**Symbols Order**"] by the Petitioner stating the following:

- i.That the Petitioner was Shivsena Mukhya Neta and senior leader of the Shivsena Legislature Party [hereinafter, "**SSLP**"] as well as the serving Chief Minister of the State of Maharashtra. That the Respondent is the Shivsena Pramukh.
- ii.That there had been dissatisfaction among the members of the Shivsena on account of corruption in the Maha Vikas Aghadi (MVA) Government and the alliance of Shivsena with political parties of different ideology.
- iii.That the Petitioner had requested the Respondent, who was serving as the Chief Minister of Maharashtra, to change his way of working in the present political scenario and to take steps to align his ideology with the ideology of Late Balasaheb Thackeray.
- iv.That the dispute in the party grew to such an extent that a group led by the Respondent held an unauthorized meeting on 21.06.2022, attended by 24/55 members of SSLP, and passed a resolution to remove the Petitioner from the position of leader of SSLP and appointed Sh. Ajay

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- v.That on the same day i.e., 21.06.2022, 34 MLAs of SSLP (including 4 independent MLAs) held a meeting under the leadership of the Petitioner and passed a resolution reaffirming the Petitioner as the leader of SSLP. Moreover, the aforesaid resolution also declared the appointment of Sh. Ajay Choudhary as leader of SSLP illegal and void.
- vi.That the aforesaid 34 MLAs wrote a letter dated 21.06.2022 to the Deputy Speaker of the Maharashtra Legislative Assembly informing him that the group led by the Petitioner had reaffirmed the appointment of the Petitioner as the leader of SSLP and that Sh. Ajay Choudhary should be recognized as the leader of SSLP.
- vii.That on 22.06.2022, an unauthorized meeting called by Sh. Sunil Prabhu was held at Varsha Bungalow, Mumbai which was attended by only 14/55 MLAs of SSLP wherein it was illegally resolved that those members who did not attend the said meeting should be disqualified. That pursuant to the aforesaid meeting, 16 members of SSLP received notices/ summons from the Principal Secretary, Maharashtra Legislative Assembly under Rule 6 of the Maharashtra Legislative Assembly (Disqualification on ground of Defection) Rules, 1986 r/w the Tenth Schedule of the Constitution and that a response was sought from the said MLAs within a period of 2 days i.e., by 5 P.M. on 27.06.2022.
- viii.That the said 16 members of SSLP, who received notices/ summons for disqualification, filed a writ petition under Article 32 of the Constitution of India before the Hon'ble Supreme Court challenging the aforesaid disqualification proceedings and the same is still pending before the Hon'ble Court.
- ix.That on 28.06.2022, the Hon'ble Governor of Maharashtra issued a letter to the Secretary of the Maharashtra Legislative Assembly, on account of the prevalent political scenario in the State, for convening a special session of the Assembly on 30.06.2022 and to hold a trust vote against the then Chief Minister of the State.

x.That the aforesaid direction of the Hon'ble Governor of Maharashtra was challenged by Sh. Sunil Prabhu before the Hon'ble Supreme Court in W.P.C. No. 470/2022 titled *Sunil Prabhu vs. Principal Secretary*,

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Governor of Maharashtra & Ors wherein it was prayed to stay the order dated 28.06.2022 passed by the Hon'ble Governor of Maharashtra. That, however, the Hon'ble Supreme Court vide order dated 29.06.2022 refused to grant the aforesaid prayer and held that "we do not find any ground to stay convening of the Special Session of the Maharashtra Legislative Vidhan Sabha on 30-06.2022, i.e., tomorrow at 11.00 a.m. with the only agenda of a trust vote." That on the same day, the Respondent resigned from the post of the Chief Minister of Maharashtra.

- xi.That on 30.06.2022, the Petitioner met the Hon'ble Governor to stake claim to form the next government in the State of Maharashtra and that consequently, he was sworn in as the Chief Minister of the State. Further, the Petitioner was directed by the Hon'ble Governor to prove his majority on the floor of the House on 04.07.2022.
- xii.That on 03.06.2022, the Hon'ble Speaker of the Maharashtra Legislative Assembly recognized the Petitioner as the leader of SSLP. That thereafter, the legally appointed Chief Whip of SSLP issued a whip to all members of SSLP to vote and support the Petitioner at the trust vote scheduled on 04.06.2022. That although the Petitioner received support from two-thirds of the members of SSLP, some members, who were associates of the Respondent, voted contrary to the aforesaid whip.
- xiii.That the Chief Whip of SSLP was therefore, constrained to file petition under Rule 6 of the Maharashtra Legislative Assembly (Disqualification on ground of Defection) Rules, 1986 against the said MLAs on 05.07.2022.
- xiv.That being aggrieved by the direction of the Hon'ble Governor in inviting the Petitioner to form the government, Sh. Subhash Desai, belonging to the group led by the Respondent, filed a writ petition under Article 32 of the Constitution challenging the decision dated 30.06.2022 of the Hon'ble Governor to invite the Petitioner to take oath as the Chief Minister of the State.
- xv.That the Petitioner enjoyed support of 40/55 MLAs of SSLP in the Maharashtra Legislative Assembly and 12/19 MPs of Shivsena in the Lok Sabha.
- xvi.That on 18.07.2022, a meeting of the Shivsena Pratinidhi Sabha was convened whereby the Petitioner was appointed as the "Mukhya Neta"

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- xvii.That in view of the aforesaid facts and circumstances, it was evident that there was a split in the Shivsena wherein one group was led by the Petitioner and the other group led by the Respondent.
- xviii.That during the ongoing dispute, leaders of both the groups have expelled/ disqualified members of the other group which is also indicative of a split in the Shivsena.
- xix.That the Commission is required to apply the "Test of Majority" in the legislative and organisational wings of the party to determine the present dispute and that the said test has been reaffirmed by the Hon'ble Supreme Court in the matter of **Sadiq Ali vs. Election Commission of India** [(1972) 4 SCC 664] and consistently applied by the Commission in a plethora of political party disputes.
- xx.That in the facts and circumstances of the case, it is prayed to allot the Shivsena party symbol "Bow & Arrow" to the group led by the Petitioner.

5. The Commission *vide* letter dated 22.07.2022, addressed to the Petitioner as well as the Respondent, stated that after due consideration of the information available on record, it was of the opinion that there are two rival groups in the Shivsena Party, one led by the Petitioner and the other led by the Respondent, wherein each group was claiming to be the party and therefore, the matter required substantive determination by the Commission under Paragraph 15 of the Symbols Order. The Commission further directed therein that the communications received from both the groups be exchanged and that both groups submit their respective documentary evidence of support in the organisational and the legislative wings of the party by 08.08.2022.

6. On 08.08.2022, the Commission received documents from Sh. Chirag Shah, Ld. Counsel for the Petitioner, whereby it was stated that in compliance of the Commission direction in letter dated 22.07.2022, the said documents are being submitted. Further, liberty was sought for filing further documents, if so necessary, or if directed by the Commission. In the said communication, the Petitioner *inter alia* submitted affidavits of support of 12/19 Lok Sabha MPs of Shivsena, 40/55 MLAs of Shivsena in the Maharashtra Legislative Assembly and further submitted a chart showing support for the Petitioner in the organisational structure of the Party.

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7. On 23.08.2022, the Commission received a letter from Sh. Chirag Shah, Ld. Counsel of the Petitioner whereby additional affidavits of members of the Shivsena from various district of the State, showing support in favor of the Petitioner, were filed.

8. On 23.09.2022, the Commission received a letter from Sh. Chirag Shah, Ld. Counsel for the Petitioner whereby additional affidavits for Rajya Prabhari/ Chief of State, showing support in favor of the Petitioner, were filed.

9. In the meantime, an application dated 06.08.2022 was received from Sh. Vivek Singh, Ld. Counsel on behalf of the Respondent, wherein it was stated that the Petitioner had not disclosed a vital fact that the very status of the Petitioner and his so-called supporters in the Maharashtra Legislative Assembly is subject to disqualification proceedings which is sub judice before the Hon'ble Supreme Court in W.P.C. No. 493/2022 titled Subhash Desai vs. Principal Secretary, Governor of Maharashtra & Ors. That an I.A. had been preferred by the Respondent in the aforesaid matter seeking a stay on the proceedings before the Hon'ble Commission till the adjudication of the disqualification proceedings are sub judice before the Hon'ble Supreme Court. That during the course of arguments before the Hon'ble Supreme Court, a suggestion had been made that an application be moved before the Commission for seeking time and that the Commission would favorably consider the same. The same was recorded in the order dated 04.08.2022 passed by the Hon'ble Supreme Court in W.P.C. No. 493/2022. That in view of the aforesaid facts, it was prayed on behalf of the Respondent that the Commission defer/ adjourn the proceedings in the present dispute for 4 weeks.

10. The Commission *vide* letter dated 10.08.022 informed Sh. Vivek Singh, Ld. Counsel of the Respondent, that in view of the application dated 06.08.2022 filed by the Respondent, the Respondent was now to furnish written submissions along with supporting documents by 23.08.2022.

11. On 23.08.2022, another application was received from Sh. Vivek Singh, whereby it was requested to defer the proceedings before the Commission for further 4 weeks in view of the observations of the Hon'ble Supreme Court on 23.08.2022 in W.P.C. No. 493/2022 wherein the matter was referred to a Constitution Bench of the Hon'ble Court and the counsel for ECI was asked to communicate to the Commission not to take any action in the meantime.

12. The Commission *vide* letter dated 26.08.2022 informed Sh. Vivek Singh that the request made in the application dated 23.08.2022 had been accepted

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13. On 27.09.2022, the Constitution Bench of the Hon'ble Supreme Court considered the I.A. No. 101776/2022 & I.A. No. 101777/2022 in W.P.C. No. 493/2022 for impleading the Commission and seeking a stay on the proceedings before the Commission. The Hon'ble Court vide order dated 27.09.2022 allowed the impleadment application but dismissed the application for stay on proceedings before the Commission by holding that "there shall be no stay of the proceedings before the Election Commission".

14. Following the aforesaid order passed by the Hon'ble Supreme Court, the Commission received a letter dated 28.09.2022 from Sh. Vivek Singh, Ld. Counsel for the Respondent wherein it was prayed that all documents, applications, etc filed on behalf of the Petitioner or any other person be supplied to the Respondent and that three weeks' time be granted to file their reply.

15. On 29.09.2022, the Commission issued a letter to the Respondent wherein it was stated that in the light of the Hon'ble Supreme Court's order dated 27.09.2022 in W.P.C. No. 493/2022, the Respondent was to file his written submission along with supporting documents by 07.10.2022, as directed earlier by the Commission in the letter dated 22.07.2022,

16. On 01.10.2022, another letter was received from Sh. Vivek Singh, Ld. Counsel for the Respondent wherein it was mentioned that documents being filed by the Petitioner have not been supplied to the Respondent and that it has come to their knowledge, through media reports and organisational members of the party, that a large number of forged and fabricated affidavits have been filed on behalf of the Petitioner which required thorough examination. It was requested therein that all documents filed on behalf of the Petitioner be supplied to the Respondent and that thereafter, two weeks' time be granted to file their reply.

17. On 03.10.2022, the Commission *vide* Press Note No. ECI/PN/73/2022 announced bye-elections to fill various vacancies in Legislative Assemblies across different States which included 166- Andheri East Assembly Constituency of Maharashtra. The date of issue of notification, last date of filing nomination papers, date of poll and date of counting was 07.10.2022, 14.10.2022, 03.11.2022 and 06.11.2022 respectively.

18. On 04.10.2022, the Commission received a letter from Sh. Chirag Shah, Ld. Counsel for the Petitioner, enclosed with an application under Paragraph

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18 of the Symbols Order to urgently hear, dispose and allow the petition dated 19.07.2022 filed by the Petitioner in view of the announcement of bye-election for 166- Andheri East Assembly Constituency of Maharashtra. It was prayed therein that the symbol "Bow & Arrow" be allotted to the group led by the Petitioner at the earliest.

19. On 06.10.2022, the Commission received a letter from the office of the Chief Electoral Officer, Maharashtra regarding the likelihood of claims by two factions of the Shivsena as the real party and guidance was sought *inter alia* on following points:

1) If the candidates of both factions of Shiv Sena file their Nomination Forms in 166-Andheri East A.C. and also bring the notice in Form 'A' and Form 'B' from respective factions claiming as Shiv Sena, the concerned Returning Officer will face a dilemma at the time of scrutiny of nomination papers. So what guidance is available for him to make his decision?

2) If candidates from both factions of Shiv Sena make a claim for the same election symbol i.e., Bow and Arrow, question of allotting symbol may arise and how to deal with this matter by concerned Returning Officer?

20. On 07.10.2022, the Commission issued a letter to the Respondent whereby it was direted that in view of the notification of the schedule for byeelection to 166- Andheri East Assembly Constituency of Maharashtra , which was issued *vide* Press Note dated 03.10.2022 and the application dated 04.10.2022 received on behalf of the Petitioner under Paragraph 18 of the Symbols Order, the Respondent should file his response latest by 08.10.2022, as requested by the Commission in its earlier letter dated 29.09.2022.

21. On 07.10.2022, the Commission received an application from Sh. Vivek Singh, Ld. Counsel for the Respondent, wherein it was stated that the Respondent had filed preliminary reply to the petition on behalf of the Petitioner. It was prayed in the said application that no order be passed in the present petition without affording an opportunity of oral hearing to the Respondent.

22. On 07.10.2022, the Commission also issued letters to both the Petitioner as well as the Respondent to submit proof of service of their respective documents to the other group and that in case no reply was received, the Commission would take appropriate action in the matter keeping in view the ongoing bye- elections.

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23. On 08.10.2022, the Respondent filed his reply to the application made by the Petitioner under Paragraph 18 of the Symbols Order. Therein, it was stated that any decision on the prayer made in the said application required leading of evidence, consideration of the material documents and evidence on record, and detailed hearing. Moreover, it was stated therein that the Respondent enjoyed a majority in the legislative as well as the organisational wing of the Party. Furthermore, it was contended that the petition filed by the Petitioner was not maintainable and therefore, no relief was to be granted to his application filed under Paragraph 18 of the Symbols Order. It was prayed therein that the Commission maintain *status quo* till final hearing on the petition under Paragraph 15 of the Symbols Order takes place, after providing adequate opportunity to lead evidence and conducting oral hearing and that the Petitioner's application under Paragraph 18 of the Symbols Order be rejected.

24. That the Commission, after considering all the facts made available before it by various communications received from both the groups as well as the letter dated 06.10.2022 received from the Chief Electoral Officer, Maharashtra, passed an interim order dated 08.10.2022 freezing the symbol of "Bow & Arrow" reserved for Shivsena. Relevant extract of the said order is reproduced here below for ease of reference:

"(37) The steps envisaged under Para 15 proceedings, prior to hearing the Parties, interalia, require both parties to the dispute to submit their respective documentary evidence of support claimed by them in the organisational and Legislative Wings of the Party. They may also submit the list of members of various Committees formed in the internal party elections held. Thereafter, the Commission initiates the hearing of such representatives of the groups as desire to be heard. This is consistent with the past approach of the Commission. In the present case the process of submission of documents was initiated vide order of the Commission of 22.07.2022 (see para 10 above) and the time line has been extended several times. Therefore, the steps/process which is required to be completed before the date of hearing, when fixed, is at present still in progress."

"(38) A parallel statutory development under the RP Act 1951, having direct bearing on the matter at hand, is by way of the Press Note issued by the Commission on 03.10.2022, announcing the Schedule of Elections for 7 seats to the State Legislative Assemblies of various states. The prescribed time schedule [for nomination / scrutiny / withdrawal /symbol allotment etc.] in the notification is governed by statutory timelines. The outer limit of conduct of bye-elections i.e. 6 months from the date of vacancy is governed by Section 150 & 151A of the RP Act 1951. This has been complied with in the Commission's Press Note of 03.10.2022. Para 5 of the Symbols Order enables a State recognized party, such as Shivsena, to have a reserved symbol'. The 'reserved' symbol can be utilized for bye-elections and general election to be held not only in the State of its registration, but it is also allowed to have priority of same symbol in case they choose to contest elections in other States. Therefore, the queries of CEO Maharashtra stated in Para 29 assume significance and have a direct bearing on the smooth conduct of the elections announced by the Commission."

"(40) Having regard to the above facts and circumstances as indicated under para 38 & 39 above, it is evident that the time available is not adequate to ensure the due process which is required to be completed for the proceedings under Para 15, as indicated in para 37 above. However, the Commission takes note of the urgency involved with regard to use of party symbol and party name due to the schedule of the bye-elections announced."

"(41) Accordingly, in order to place both the rival groups on even keel and to protect their rights and interests, and going by the past precedence, the Commission hereby makes the following Interim Order, to cover the purpose of the current Bye-elections and to continue till the final determination of the dispute in the matter in terms of Para 15 of the Symbols Order:-

a) Neither of the two groups led by Sh. Eknathrao Sambhaji Shinde (Petitioner) and other led by Sh. Uddhav Thackeray (Respondent) be permitted to use the name of the party "Shivsena" simplicitor;

b) Neither of the two groups shall also be permitted to use the symbol "Bow & Arrow", reserved for "Shivsena";

c) Both the groups shall be known by such names as they may choose for their respective groups, including, if they so desire, linkage with their parent party "Shivsena"; and

d) Both the groups shall also be allotted such different symbols as they may choose from the list of free symbols notified

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 ब. प्रवान सचिव / Sr. Principal Secretary

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by the Election Commission for the purposes of the current by elections."

"(42) Accordingly, both the groups are hereby directed to furnish, latest by 01:00 PM on 10th October, 2022

(i) The names of their groups by which they may be recognized by Commission and to this end, give three options in order of preference, anyone of which may be approved by the Commission and;

(ii) The symbols which may be allotted to the candidates set up, if any, by the respective groups. They may indicate the names of three free symbols, in the order of their preference, anyone of which may be allotted to their candidates by the Commission."

25. On 08.10.2022, the Respondent, under protest, proposed three names, 'ShivSena (Balasaheb Thackeray)', 'ShivSena (Uddhav Balasaheb Thackeray)' and 'ShivSena (Balasaheb Prabodhankar Thackeray)' and three symbols, 'Trishul', 'Surodaya' and 'Mashaal' in the said order of preference in compliance of the above-mentioned letter of the Commission. It was further stated therein that the list of free symbols maintained by the Commission did not have a symbol which reflected the ideology and ethos of Shivsena and hence, the proposed three symbols may be accepted by the Commission in exercise of its power under Article 324 of the Constitution. On 10.10.2022, the Commission accepted the name ShivSena (Balasaheb Thackeray) and included the symbol 'Mashaal/ Flaming Torch' in the list of free symbols and thus allotted the same to the group led by the Respondent for the purpose of the 166-Andheri East Assembly Constituency bye-election and till the final order was passed in the dispute case.

26. On 10.10.2022, the Petitioner proposed three names, ShivSena (Balasaheb Thackeray)', 'Balasahebanchi ShivSena', 'ShivSena (Balasahebanchi), and three symbols, 'Trishul', 'Rising Sun' and 'Gada' in compliance of the Commission's order dated 08.10.2022. The Commission vide letter dated 10.10.2022 accepted the name 'Balasahebanchi ShivSena' for the group led by the Petitioner. With respect to the proposed symbols, it was stated by the Commission that two of them i.e., Trishul and Gada, had religious connotation while the third, Rising Sun, was the reserved symbol for Dravida Munnetra Kazhagam, a recognized State Party in Tamil Nadu. Therefore, the Respondent was requested to furnish a fresh list of 3 symbols by 10 am of 11.10.2022. Subsequently, the Petitioner vide letter dated

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के. एन. भार / K. N. BHAR a. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India तिर्वाचन सदन / Nirvachan Sadan अश्रोक रोड / Ashoka Road 11.10.2022 furnished a fresh list of 3 symbols out of which the Symbol "Two Swords and Shield/ Dhal Talwar" was accepted by the Commission. The Commission in its letter dated 11.10.2022 noted that while the said symbol was not in the list of free symbols, the Commission declared it to be a free symbol and thus, allotted it to the Petitioner for the purpose of the 166-Andheri East Assembly Constituency bye-election and till the final order is passed in the dispute case.

27. Thus, the names and symbols allotted to both the groups by the Commission till the pendency of the dispute case stood as follows:

Group/ Faction	Name	Symbol
Eknath Shinde	Balasahebanchi	Two Swords
(Petitioner)	ShivSena	& Shield
Uddhav Thackeray	ShivSena (Uddhav	Flaming
(Respondent)	Balasaheb Thackeray)	Torch

28. Thereafter, the Respondent filed a petition before the Hon'ble Delhi High Court titled Uddhav Thackeray vs. the Election Commission of India & Anr. [WPC No. 15616/2022] wherein the impugned order dated 08.10.2022 (freezing of symbol 'bow & arrow') was challenged. It is also pertinent to mention that alongside challenging the impugned order, the Petitioner also raised the issue of maintainability of the proceedings before the Commission under paragraph 15 of the Symbols Order. However, the Ld. Single Judge Bench of the Hon'ble Delhi High Court vide order dated 15.11.2022 dismissed the writ petition and held as follows:

"1. There is a split between members of the 'Shivsena' is a recognized political party in the State of Maharashtra. One group/ faction is led by Sh. Eknathrao Sambhaji Shinde ['Respondent No. 2'] and the other by Sh. Uddhav Thackeray ['Petitioner']. Both claim to its poll symbol of 'bow and arrow' ['the symbol']. In this background, before Election Commission of India/ Respondent No. 1 ['ECI'], a dispute petition under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968 ['Symbols Order'] was filed by Respondent No. 2 on 19th July, 2022 [...]"

"9. Para 15 of the Symbols Order was brought into force to deal with a situation where there are rival sections or groups of a recognised political party, each of which claims to be that party. The state of affairs or dispute that has been referred to ECI in the pending dispute petition is the exact situation contemplated under para 15 of the Symbols Order.

के. एन. भार / K. N. BHAR a. प्रधान संचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिली-110001 / New Delhi-110001 ECI has the power to decide if one or none of the rival groups is a recognised political party. Therefore, the argument of non-maintainability of the Dispute Petition before ECI to render the impugned order to be without jurisdiction, is a wholly incorrect submission before the ECI. Nonetheless, it is still open for Petitioner to make such submission as he deems fit, and this court is not making any comment or opinion on the merit of proceedings before the ECI."

"10. As regards Mr. Sibal's contention that no petition under para 15 of Symbols Order can lie unless there exist splinter groups or rival sections of the recognised political party, it must be noted that there is sufficient material on record before ECI to embark upon para 15 of the Symbols Order. There are two rival factions, i.e., Petitioner and Respondent No. 2, both claiming to be the original or majority faction. This hard truth cannot be discounted, therefore, ECI's jurisdiction is plainly demonstrable from the pleadings before ECI to meet the prima facie test for assuming jurisdiction. As regards the contention that Respondent No. 2 had given up his membership on 23rd June, 2022, and therefore he cannot claim to represent the party and/ or that he has no support from anyone else and has alone maintained the petition are issues which would require deliberation in detail. The Impugned Order does not deal with the same and ECI has not given any finding thereon, as yet. Therefore, no opinion needs to be expressed by this Court on this issue and it's is best left open for adjudication in the appropriate proceedings."

"11. The Petitioner has raised a jurisdictional objection regarding nonmaintainability of the Dispute Petition before ECI, and the Court is confident that the same would be examined on its own merits by ECI while rendering the final decision, notwithstanding the lack of trust exhibited by the Petitioner."

"12. [...] Before the Supreme Court, it was also argued that the proceedings before ECI should not continue as Respondent No. 2 has voluntarily given up his membership of Shivsena and it would thus not be appropriate to permit Election Commission to proceed with the Dispute Petition. Therefore, concededly, the issue of disqualification is pending before the Supreme Court. Nonetheless, upon a request made for stay of Dispute Petition, it was categorically declined by the Supreme Court vide order dated 27th September, 2022 [...]"

के. एन. भार / K. N. BHAR a. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sada अशोक रोड / Ashoka Road नई दिल्ली-110001 / New Delhi-11000 "13. Therefore, proceedings before ECI were not interdicted despite Petitioner having raised jurisdiction issues."

"18. In the opinion of the Court, ECI's counsel had only agreed for accommodating the Petitioner's request for extension of time. However, since adequate time was not available for ECI to complete proceedings under Para 15, taking note of the urgency involved with regard to the party symbol and name, in light of the scheduled and upcoming byeelections, pending final determination, the course of action adopted by ECI was within its jurisdiction under Para 18 of Symbols Order, as well as the plenary powers of ECI as recognized by the Supreme Court."

"20. In light of the fact that there is no interdiction by the Supreme Court regarding the proceedings to be conducted by ECI, in the opinion of the Court, it would be in the interest of both the parties as well as the general public, that the proceedings are concluded expeditiously. <u>Accordingly, ECI is directed to adjudicate the Dispute Petition under Para</u> <u>15 of the Symbols Order as expeditiously as possible</u>."

"21. For the foregoing reasons, the present petition is dismissed along with pending applications."

(Emphasis Supplied)

29. The above judgment of the Single Judge Bench of the Hon'ble Delhi High Court was challenged by the Respondent herein in **Uddhav Thackeray vs. Election Commission of India & Anr.** [LPA No. 717/2022] wherein again the issue of maintainability of the proceedings before the Election Commission of India was raised. The Division Bench of the Hon'ble Delhi High Court *vide* order dated 15.12.2022 rejected the appeal and held as follows:

"3. The main grievance of Mr. Kapil Sibal, learned Senior Counsel appearing for the Appellant, is with regard to the observations made in Paragraph 11 of the impugned Judgment. The same reads as under:-

"11. The Petitioner has raised a jurisdictional objection regarding non-maintainability of the Dispute Petition before ECI, and the Court is confident that the same would be examined on its own merits by ECI while rendering the final decision, notwithstanding the lack of trust exhibited by the Petitioner."

"4. It is pertinent to mention that the Appellant has filed an application before the State Election Commission raising the two preliminary issues, namely:-

के. एन. भार / K. N. BHAR ब. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road a) Whether there is any split in the political party i.e. Shiv Sena;

b) Whether petition can be maintained at the behest of a person who has given up membership of the party and incurred disqualification under Xth Schedule of the Constitution of India."

"6. <u>It is pertinent to mention that the two preliminary issues which are</u> sought to be raised by the Appellant are pending before the Apex Court in Writ Petition (Civil) 493/2022, yet the Apex Court vide Order dated 27.09.2022 in IA Nos.101776-77/2022 has held that there shall be no stay on the proceedings before the Election Commission of India. Therefore, the Election Commission of India is free to proceed with the adjudication of the dispute pending before it."

"7. It is needless to state that the Election Commission of India will proceed in accordance with the procedure followed by the Commission while adjudicating a petition under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968."

"8. In view of the above, no further Orders are required to be passed in this appeal. Resultantly the LPA is disposed of, along with the pending application(s), if any."

(Emphasis Supplied)

30. In the meantime, the Commission was in receipt of various letters from respective counsels of the Petitioner and the Respondent whereby affidavits of support of the members of Shivsena were submitted.

31. On 10.11.2022, the Commission received a letter from Sh. Chirag Shah, Ld. Counsel for the Petitioner, wherein it was stated that in compliance of the Commission's direction in the order dated 29.09.2022, the Petitioner had submitted all the documents and therefore, requested the Commission to proceed with final hearing of the matter.

32. On 12.11.2022, the Commission issued a letter to the Petitioner as well as the Respondent directing each side to confirm that all the documents submitted by them were properly indexed and numbered; to furnish further documents, if any; to confirm service of all documents to the other group; to confirm receipt of all documents from the other group. Further, it was directed therein that the above-mentioned details were to be furnished to the Commission by 23.11.2022 and that in case no further documents were received by the said date, it would be assumed that the concerned group had

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33. Thereafter, the Commission *vide* letter dated 29.11.2022, addressed to both the Petitioner as well as the Respondent, informed that the date of personal hearing for the present Dispute Case was fixed on 12.12.2022 and directed both the groups to submit further written statements/ documents, if any, by 09.12.2022.

34. The first hearing in the matter was held on 12.12.2022 wherein the Interim Applications dated 09.12.2022 filed by the Respondent were taken on record. At the request of the parties, the matter was adjourned to 10.01.2023.

35. At the hearing held on 10.01.2023, Senior Advocate Kapil Sibal appeared on behalf of the Respondent and made the following submissions:

- i.At the outset, it was submitted that there had never been any previous instance where such a dispute in a recognized party, being dealt with by the Commission, involved disqualification of legislators under the Tenth Schedule of the Constitution who were claiming a split in the political party.
- ii. That though the Hon'ble Supreme Court and the Hon'ble Delhi High Court, refused to stay the present proceedings pending before the Commission, the orders of the Hon'ble Court did not imply that the issue of maintainability of the petition filed by Sh. Eknath Shinde under paragraph 15 of the Symbols Order, 1968 was already decided. He emphasized on the order dated 15.12.2022 passed by the Division Bench of the Hon'ble Delhi High Court in LPA No. 717/2022 wherein the Hon'ble Court observed that *"it is needless to state that the Election Commission of India will proceed in accordance with the procedure followed by the Commission while adjudicating a petition under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968".*
- iii. That now it was ECI's discretion to hear the issue of maintainability of the petition as a preliminary issue before proceeding to the merits of the case or to decide the issue of maintainability while passing the final order. However, it was insisted that the Commission records its decision in the order sheet so that the parties can appeal against such order, if required.
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iv.That the "Test of Majority" as relied on by the Petitioner in his petition dated 19.07.2022 was not the sole test to be considered by the

ফ. एन. भार / K. N. BHAR ब. प्रधान सचिव / Sr. Principal Secretary भारत निर्याचन आयोग Election Commission of India नेर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road 1ई दिल्ली-110001/ Naw Delbi-110001 Commission in deciding disputes under Paragraph 15. That the test of the Constitution is also a relevant and important test.

36. On behalf of the Petitioner, Sh. Eknath Shinde, Ld. Senior Advocate Mahesh Jethmalani appeared and made the following submissions:

- i.That the issue of maintainability has been raised by the Respondent before the Hon'ble Supreme Court as well as the Hon'ble Delhi High Court and the Hon'ble Courts refused to give any relief to the Respondent. That the same set of arguments are now being repeated before the Commission.
- ii.That the preliminary issue of maintainability of the petition, as being raised by the Respondent, already stood decided by the Commission since in the letter dated 22.07.2022 addressed to both the factions by the Commission, it is explicitly mentioned that the Commission is of the opinion that rival factions have emerged in the Shivsena party which requires consideration under Paragraph 15 of the Symbols Order, 1968.
- iii.That in paragraph 24 of the Sadiq Ali case, it was mentioned that the Commission after considering various criteria for determining which of the rival groups was the Congress concluded that the "criteria other than that of the numerical strength or majority could not provide a satisfactory solution". The Ld. Senior Counsel submitted that in the present case, the Petitioner enjoyed support of 40/55 MLAs and 13/19 MPs and thus, in compliance of paragraph 24 of the Sadiq Ali case, his faction was the Shivsena Party.
- iv. That as per paragraph 26 of the Sadiq Ali case, the "Test of Majority" and numerical strength "was a very valuable and relevant test" and "whatever might be the position in another system of government or organisation, numbers have a relevance and importance in a democratic system of government or political set up and it is neither possible nor permissible to lose sight of them".
- v.That number of seats and percentage of votes secured by a political party in an election form the crucial test for recognition of such a political party as a National Party/ State Party under the Symbols Order, 1968. That the Hon'ble Supreme Court, in paragraph 27 of the Sadiq Ali case, had also observed that "if the number of seats secured by a political party can be relevant consideration for the recognition of a political party, one is at a loss to understand as to how the number of seats in the

के. एन. भार / K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 Parliament and State Legislatures held by the supporters of a group of the political party can be considered to be irrelevant".

- vi.That in each of the tests laid down in Paragraph 6B of the Symbols Order for recognition of a State Party, the faction led by the Petitioner had a numerical superiority over the faction led by the Respondent.
- vii. That the Commission in the Sadiq Ali case (supra) had considered the "Test of Party Constitution" as well and had found that both the groups therein were violating the provisions of the Party Constitution and hence relied on the "Test of Majority". The said fact is recorded in paragraph 31 of the Sadiq Ali case wherein the Hon'ble Court observed that "All that this Court is concerned with is whether the "Test of Majority" or numerical strength which has been taken into account by the Commission is in the circumstances of the case a relevant and germane test. On that point, we have no hesitation in holding that in the context of the facts and circumstances of the case, the "Test of Majority" and numerical strength was not only germane and relevant but a very valuable test".
- viii.That the "Test of Party Constitution" could not be relied on in the present case since the Constitution of Shivsena, as amended in the year 2018, was undemocratic and which subverted inner party democracy. The Ld. Senior Counsel submitted that the original Constitution of the Shivsena was amended in the year 1999 after the Commission had written to Late Balasaheb Thackeray, the then President of the Shivsena, to amend the Constitution to make it more democratic. However, the changes introduced by the Late Balasaheb Thackeray were reversed by the Respondent in the year 2018 by making another amendment in the party Constitution which gave the power of appointment of most of the Party Office-bearers to the Party President. Therefore, reliance on such a Party Constitution was untenable for deciding the present dispute.

37. After submissions by Senior Advocate Mahesh Jethmalani, Senior Advocate Shri Maninder Singh made the following submissions on behalf of the Petitioner:

i.That the maintainability of the petition already stood decided by the Commission in the letter dated 22.07.2022 addressed by the Commission to both the parties wherein it was recognized that rival factions had emerged and that the matter required consideration under paragraph 15 of the Symbols Order, 1968. Further, it was submitted that the Hon'ble Delhi High Court in order dated 15.11.2022 in WPC

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- No. 15615/2022 had in the very first paragraph observed that there was as a split in the Shivsena party. That the issue of maintainability was also raised before the Constitutional Bench of the Hon'ble Supreme Court and the Hon'ble Court *vide* order dated 27.09.2022 had refused to grant a stay on the proceedings pending before the Commission.
- ii. That the Hon'ble Supreme Court in paragraph 40 of the Sadiq Ali case (supra) had observed that the Commission is an authority created by the Constitution and vested with the power, under Article 324 of the Constitution, to conduct elections to Parliament and State Legislature and to the office of President and Vice-President and the fact that the power to resolve a party dispute has been vested in such a high authority would provide a guarantee that the Commission would exercise such power in a fair and reasonable manner. Thus, the Commission has a "plenary power" to decide such disputes.
- iii.That the Commission has to act with "promptitude" while deciding a dispute under paragraph 15 of the Symbols Order. The Hon'ble Supreme Court in paragraph 28 of the Sadiq Ali case had observed that "the Commission in deciding matters under Paragraph 15 has to act with a certain degree of promptitude and it has to see that the inquiry does not get bogged down in a quagmire".
- iv.That the Commission has to act in a "practical" manner to determine which test to apply in deciding a dispute under paragraph 15 and placing reliance on paragraph 27 of the *Sadiq Ali case*, the Ld. Counsel submitted that the rule of majority or numerical strength was the most important test since any political party is given recognition under Paragraph 6A and 6B of the Symbols Order based on the number of seats secured by it in an election.

38. Lastly, Shri Siddharth Bhatnagar, Senior Advocate appearing on behalf of the Petitioner, submitted that all the office-bearers elected as per the 2018 Constitution of Shivsena were appointed by the Shivsena Paksha Pramukh and thus, the organisational structure of the Party could not be said to be democratic. Hence, any reliance on the 2018 Constitution of the Party, which was a 'self-serving Constitution', was untenable.

39. The Commission posted the matter on 17.01.2023 for further hearing in the matter.

At the hearing held on 17.01.2023, Senior Advocate Kapil Sibal 40. appeared on behalf of the Respondent and made the following submissions:

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- i.At the outset, it was submitted that Paragraph 15 of the Symbols Order, 1968 contemplates the jurisdiction of the Commission to decide a dispute arising in a recognized political party. However, in the present case, the Petitioner has failed to provide any evidence of a split in the Shivsena. It was submitted that a split or emergence of rival factions in a Party for the purpose of Paragraph 15 of the Symbols Order, 1968 did not mean a split in the legislative wing of the Party but also a split at the organisational level. Thus, the 'claim of the Petitioner was not a faction but only a fiction'.
- ii. That the Petitioner in his petition dated 19.07.2022 has contended that on 21.06.2022, an unauthorized meeting was called by the Respondent, Sh. Uddhav Thackeray, wherein a resolution to remove Petitioner as leader of Shivsena Legislature Party was passed through 24/55 members of Shivsena Legislature Party. That this only indicated a split in the Shivsena Legislature party. He further submitted that between the period of 21.06.2022 i.e., the date of the above meeting and 19.07.2022 i.e., when the Petitioner filed his application under Paragraph 15 of the Symbols Order, 1968, the Petitioner has failed to give any evidence regarding any split in the Shivsena Party.
- iii. That the judgment of Sadiq Ali (supra) on which the Ld. Counsels for the Petitioner are heavily relying is not applicable to the present case since it did not deal with an issue of disqualification proceedings pending against a party to the dispute. The very fact that disqualification proceedings against the sole Petitioner herein, and against the MLAs on whom the Petitioner has placed reliance to indicate a split in the Party, are pending consideration of the Hon'ble Supreme Court and also since alternate symbols have already been allotted by the Commission to both the groups till the pendency of the present dispute case, there is no need to act with promptitude.
- iv. That it would be "statutorily advisable" for the Commission to maintain status quo in the matter as the question of disqualification of the "sole Petitioner" was pending before the Hon'ble Speaker of the Maharashtra Legislative Assembly. To substantiate this submission, the Ld. Senior Counsel submitted that if the symbol of Shivsena was allotted to the Petitioner and if the disqualification proceedings pending before the Hon'ble Speaker of the Maharashtra Legislative Assembly went against the Petitioner, the decision of the Commission in allotting the symbol to the Petitioner will be imposted

ৰ. प्रधान संदिव / Sr. Principal Secretary भारत लिर्वाचन आयोग Election Commission of India नेर्वाचन सदन / Nirvachan Sadan अशोक जेड

the Petitioner will be impacted. एन. भार/к. N. BHAR v.That for the Commission to decide a dispute under Paragraph 15 of the Symbols Order, 1968, it is relevant that the following three conditions exist:

i.Emergence of rival faction in the Party.

- ii.Evidence of emergence of rival factions.
- iii.The satisfaction of the Commission, on the basis of the above evidence, that a rival faction has emerged causing a split in the Party.

That, in the present case, no evidence has been presented by the Petitioner which indicates emergence of a rival faction.

- vi.That the application dated 19.07.2022 filed by the Petitioner under Paragraph 15 of the Symbols Order, 1968 only shows the emergence of a split in the Shivsena Legislature Party and not the Party itself which is substantiated by the following facts mentioned therein:
 - i.The meeting called by the Respondent was attended by 24/55 members of the Shivsena Legislature Party and the illegal and unlawful resolution passed therein to remove Petitioner as leader of the Legislature party was communicated to the Hon'ble Dy. Speaker of the Maharashtra Legislative Party.
 - ii.That on 21.06.2022, 34 MLAs from SSLP passed a resolution reaffirming the Petitioner as Leader of SSLP.
 - iii.That on 22.06.2022, Sh. Sunil Prabhu, claiming to be group leader of SSLP issued a notice to the Petitioner to attend a meeting at 5 pm on the same day. That the Petitioner and other members of SSLP responded to the letter by Sh. Sunil Prabhu clearly stating that he had no authority to call the meeting of the SSLP.
 - iv.That a "hopeless minority" of about 14/55 MLAs attended the unauthorized meeting held at Varsha Bungalow, Mumbai.
 - v.That 16 members of the SSLP received notices/ summons from the Principal Secretary, Maharashtra Legislative Assembly about the disqualification proceedings initiated against them under the Tenth Schedule of the Constitution.
 - vi.That on 30.06.2022, the Petitioner met the Hon'ble Governor of Maharashtra and staked claim to form the Government and that

के. एन. भार /K. N. BHAR द. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 he was directed by the Hon'ble Governor to prove his majority on the floor of the Assembly on 04.07.2022.

- vii.That on 03.06.2022, the Hon'ble Speaker passed an order recognizing Petitioner No. 1 as the leader of the SSLP.
- viii.That on 04.07.2022, several MLAs of SSLP intentionally defied the whip of the legally appointed Chief Whip and voted against the cabinet of the State of Maharashtra, pursuant to which disqualification proceedings under the Tenth Schedule were initiated against them.

Thus, the above-mentioned facts mentioned in the application dated 19.07.2022 talked only about a split in the Legislative Wing of the Party and not the Party itself. Therefore, the Petitioner is only trying to "usurp" the Party based on a claim in the Legislative Wing.

- vii.That the translated copy of the minutes of the meeting of Pratinidhi Sabha held on 18.07.2022, annexed as Annexure – 5 of the Application dated 19.07.2022, mentions that the Petitioner was appointed as "Shivsena Mukhya Neta" although it has not been shown as to who called the said meeting and who attended it. Further, no other evidence of occurrence of this meeting on 18.07.2022 has been placed.
- viii.That the Ld. Counsels for the Petitioner had called the Constitution of Shivsena, as amended in the year 2018, as undemocratic since it subverted inner party democracy. That this issue was never raised by the Petitioner when he was enjoying the "fruits of undemocratic Constitution" while serving as a Minister in the previous government. The Ld. Senior Counsel further submitted that during the last organisational election held as per the 2018 Constitution, the Petitioner was appointed as "Shivsena Leader" by the Respondent and had not raised any issue about the nature of Constitution then.
- ix. That the Constitution of Shivsena, as amended in the year 2018, is on record with the Commission and no questions have been raised over the nature of this Constitution till now. The Ld. Senior Counsel also submitted that as per Article V of the aforesaid Constitution of the Party, *"the Party shall bear true faith and allegiance to the Constitution of India as by law established and to the principles of socialism, secularism, democracy and would uphold the sovereignty, unity and integrity of India"* which is in compliance with Section 29A(5) of the RP Act, 1951.

के. एन. भार /K. N. BHAR a. प्रधान सचिव / Sr. Principal Secretary भारत निर्याचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 x. That the Petitioner has sworn allegiance to the aforesaid Constitution of the Party and therefore, cannot raise question over the validity of the same. Further, it was submitted that if the Petitioner had an issue with the Constitution of the Party, he had no right to claim the symbol of the Party and should form his own Party.

41. At the request of Sh. Kapil Sibal, Ld. Senior Advocate, the Commission posted the matter on 20th January, 2023 for further hearing.

42. At the hearing held on 20.01.2023, Sh. Kapil Sibal, Ld. Senior Advocate, and made the following submissions on behalf of the Respondent:

- i.At the outset, it was submitted that a situation had not arisen in the present case which required the invoking of Paragraph 15 of the Symbols Order, 1968. He submitted that a dispute for the purposes of Paragraph 15 of the Symbols Order, 1968 had to occur at a particular point of time and that such dispute cannot evolve.
- ii. That the resolution dated 18.07.2022 claimed to be passed by the Petitioner did not mention the emergence of any split in the Shivsena party. That the said resolution only mentioned facts such as the alleged dissatisfaction of the party cadre with the Maha Vikas Akhadi alliance. That it was not mentioned in the resolution or its minutes as to when the meeting was called, who called the meeting, what was the venue and who attended it which demonstrated that the meeting was only a sham.
- iii.That the petition dated 19.07.2022 mentions the meeting of Rashtriya Karyakarini wherein the appointment of the Petitioner as the 'Mukhya Neta' is reaffirmed but the date of the said meeting was shown to be 27.07.2022 i.e., post the date of the petition itself.
- iv.That the Commission takes cognizance of emergence of a rival faction or group for the purposes of Paragraph 15 of the Symbols Order, 1968 after all the facts available before it are taken into consideration. That in the present case, the facts available before the Commission before the letter dated 22.07.2022 was issued to both the parties was the petition dated 19.07.2022. That this petition only indicated a split in the legislature party of Shivsena and not the party itself.
- v.That there was not even a split in the legislature party of the Shivsena since the Tenth Schedule of the Constitution provides for such a split only when there is a split in the political party. That in the present case,

 the Petitioner is trying to make a case that the legislature party and the political party are one and the same.

- vi.That a rival faction or group emerging within a political party and claiming to be that party under Paragraph 15 of the Symbols Order, 1968 must do so within the framework of the party Constitution. That any faction or group that does not work as per the party Constitution should not be recognized by the Commission as the said party.
- vii.That if the Petitioner does not accept the Constitution of the Party, as amended in the year 2018, he must establish his own political party and that if the Petitioner does not approve of the Party Constitution, then he does not have right to claim the symbol of the Party under Paragraph 15 of the Symbols Order.
- viii.That the Petitioner himself was appointed during the last organisational elections but was in fact appointed by the Respondent, in exercise of his power provided under the Party Constitution, as the Leader of Shivsena. That the Petitioner then did not raise any grievance with the nature of Party Constitution.
- ix.That the Commission must only consider that Constitution of the party which is on record with it and which was in existence at the time of arising of the dispute between rival factions or groups of the party. That in the present case, the Petitioner was not acting as per the party Constitution which was on record with the Commission.
- x.That the Commission in **Dispute Case No. 1/ 1978** titled **Indira Gandhi vs. Brahmananda Reddy** had explicitly stated that the "Test of Majority" or numerical strength was the sole test to be applied by the Commission in determining a dispute under Paragraph 15 of the Symbols Order. That in the said order, the Commission had observed that

"it is also well settled that all the tests laid down may not be present in a given case" and "to take a view that the Commission, while deciding cases falling under paragraph 15 of the Symbols Order should not be concerned with the party Constitution would be to introduce utter chaos in the functioning of political parties in the country and the operation of symbols order would be rendered a plaything between the various shades of opinion or groups in a political party." The Ld. Senior Counsel also drew attention to the observation of the Commission in the above order wherein it

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- xi.That in the present case, the Petitioner has failed to produce single evidence of any split in the party and has in fact, committed a fraud on the party Constitution by assuming a position i.e., 'Mukhya Neta' which is not even mentioned in the party Constitution.
- xii.That in the Brahamananda Reddy case (supra), the Commission had held that the convention called by the Petitioner, Smt. Indira Gandhi, was not as per the party Constitution. It was further held therein that it was not shown as to why the convention was called, why it became necessary to hold such a convention, who called the convention, what was the agenda of the convention and who were invited to attend it. In the present case too, the above factors are visible and hence, the actions of the Petitioner were not as per the party Constitution.
- xiii.That in the Brahamananda Reddy case (supra), the Commission had further held that there was no sufficient evidence made available by the Petitioner which indicate prima facie split in the party. That, in the present case, there was not even sufficient information for starting an enquiry as to whether a split has occurred in Shivsena.
- xiv.That the Commission in **Dispute Case No. 1 of 1994** titled **George Fernandez vs. S.R. Bommat**, reiterated the above observation made in the order of Brahmananda Reddy case and held that a group or section which wants to form a rival group within the party must first exhaust all the remedies available to it under the party Constitution and should approach the Commission when the other group has frustrated its efforts whimsically or capriciously. That in the George Fernandez case (supra), the Commission had further observed that while there is an obligation on the part of all the political parties to abide by their party Constitution, it is even more so on the part of the recognized political parties to scrupulously observe the same, particularly in the matter of their democratic functioning.

xv.That there the case of *Sadiq Ali (supra)* was not applicable in the present case since no dispute had occurred as was in the case of *Sadiq Ali* and

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that the facts mentioned in the petition dated 19.07.2022 at the best indicated a split in the legislature party.

xvi.That disqualification proceedings against the Petitioner and 39 other MLAs supporting him was pending before the Hon'ble Speaker of the Maharashtra Legislative Assembly and if the symbol is allotted to any of the factions before the decision of the Hon'ble Speaker, the decision of the Commission will have an "irreversible consequence". That a new jurisprudence was evolving in the present case due to the pendency of disqualification proceedings against the group which claimed that a split had occurred in the party and thus, the Commission should take a decision only after the disqualification proceedings pending before the Hon'ble Speaker are concluded.

43. Shri Devadatt Kamat, Ld. Senior Advocate, also appeared on behalf of the Respondent and made the following submissions:

- i.That if the Commission concludes that a split has occurred in the Shivsena party, then weightage has to be given to the Organisational Wing of the party rather than the Legislative Wing. That it is an admitted fact that the Petitioner enjoys majority support in the Legislative Wing but the Respondent enjoys majority support in the Organisational Wing of the party.
- ii.That it is the Pratinidhi Sabha of Shivsena which represents the Organisational Wing of the party.
- iii. That the meeting of Pratinidhi Sabha allegedly called by the Petitioner on 18.07.2022 was held one day prior to the filing of the present petition dated 19.07.2022 and was illegal as no notices were given for holding the said meeting. Further, the Petitioner has failed to provide any evidence apart from minutes of the meeting which itself is a sham. That the said meeting of Pratinidhi Sabha was contrary to the party Constitution as neither the Shivsena Paksha Pramukh chaired the said meeting nor it has been shown that a quorum for conducting it existed. That no reliance can be placed on such meeting for the purposes of the present case.
- iv.That in **Dispute Case No. 1 of 1996** titled **Arjun Singh vs. The President Indian National Congress**, the Commission in its order dated 12.03.1996 had held that the Commission in deciding a dispute under paragraph 15 of the Symbols Order, 1968 is required to accept and judge the evidence before them and that as per the norms of the

Evidence Act, 1872, the burden of proof in a case lies on the Petitioner and not on the Respondent. That, in the present case, the Petitioner has failed to provide any evidence of the meeting of Pratinidhi Sabha held by the Petitioner on 18.07.2022.

- v.That in the above-mentioned meeting of the Pratinidhi Sabha, a resolution to dissolve the Rashtriya Karyakarini was passed which was completely illegal as the functions to be performed by the Pratinidhi Sabha, as per the party Constitution, do not include dissolution of Rashtriya Karyakarini.
- vi.That the appointment of the Petitioner as "Mukhya Neta" of the Shivsena by the alleged meeting of the Pratinidhi Sabha on 18.07.2022 was also illegal as no such position exists as per the party Constitution and that the powers of the Shivsena Paksha Pramukh cannot be arrogated or usurped by a so called Mukhya Neta.
- vii.That all the versions of the party Constitution, including that which has been illegally amended by the Petitioner, do not provide for the Rashtriya Karyakarini to amend the party Constitution. That the amendments made in the party Constitution post the date of the dispute are irrelevant in adjudication of the present dispute.
- viii. That in **Dispute Case No. 4 of 1995 titled K.P. Unnikrishnan vs. Sarat Chandra Sinha**, the Commission *vide* order dated 19.03.1996 had held that any meeting of the party held without following the party Constitution was null and void. That in the said case, it was held that the decision to remove the party president, without following the norms laid down in the party Constitution, was non est and had no legal effect.
 - ix. That in **Re: Nationalist Congress Party case**, it was held by the Commission that holding of conventions contrary to the party Constitution was completely illegal and could not be relied upon.
 - x.That the Petitioner has attempted to take control over the Shivsena party without following the democratic and Constitutional norms. That the Petitioner is using the Symbols Order, 1968 in a bid to avoid the intra party elections of the Shivsena which is the only legitimate way of proving his majority in the party.
- xi.That the Petitioner had no locus to file the present petition since he was removed as Leader of Shivsena on 30.06.2022 i.e., much prior to the alleged Pratinidhi Sabha meeting held on 18.07.2022.

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- xii.That political alignment cannot form the basis of filing a petition under paragraph 15 of the Symbols Order, 1968 and that principle has been affirmed by the Commission in **Dispute Case No. 5 of 2017** titled **Chhotubhai Amarsang Vasava vs. Nitish Kumar** and in **Re: Nationalist Congress Party case**.
- xiii.That the Respondent enjoys a majority support in the Organisational Wing of the party which includes 6/9 elected Leaders of Shivsena, 13/21 Deputy Leaders of Shivsena and all Secretaries, as intimated to the Commission on 27.02.2018. That the Respondent also enjoys an overwhelming support among the Zilla Sampark Pramukhs, Zilla Pramukhs and Vibhag Pramukhs of the party.
- xiv.That Shri Mahesh Jethmalani, Ld. Senior Advocate, had submitted a written note at the hearing held on 10.01.2023 wherein certain facts pertaining to the changes in the organisational structure of the party have been mentioned. That such changes do not form part of the pleadings i.e., the petition dated 19.07.2022 filed by the Petitioner and therefore, a counsel at a later stage cannot assert facts through a written note, which were not part of the petition.
- xv.That in the written note submitted by Mahesh Jethmalani, Ld. Senior Advocate, it has also been stated that 87 Vibhag Pramukhs of Shivsena support the Petitioner. However, as per the party Constitution, such vibhag pramukhs cannot form part of the Pratinidhi Sabha and therefore, have no legal sanction.
- xvi.That the Respondent enjoys an overwhelming majority in the rank and file of the party and as per the members who were part of the Pratinidhi Sabha pursuant to the organisational elections in 2018. That the organisational majority test is the test to be applied in the present case as done by the Commission in the case of **K.P. Unnikrishnan case**.

44. On behalf of the Respondent, Shri Amit Anand Tiwari, Ld. Advocate submitted that the Respondent had raised issue over the affidavits filed in support of the Petitioner and that the Petitioner has not raised any such issue over the affidavits of support filed by the Respondent.

45. Thereafter, on behalf of the Petitioner, Shri Mahesh Jethmalani, Ld. Senior Advocate made the following rejoinder submissions:

i.That the 1999 Constitution of Shivsena, amended under the Presidentship of Late Balasaheb Thackeray after considering

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- ii.That there was a threat to life of all the MLAs supporting the Respondent after the emergence of split on 21.06.2022 which caused them to shift to Guwahati. That certain Party members supporting the Respondent had given open threats to the life of MLAs supporting the Petitioner. That under these circumstances, the MLAs supporting the Petitioner signed the affidavits in Guwahati.
- iii.That a political party is inclusive of the legislative party and thus, a split in the latter is a sufficient ground to approach the Commission under Paragraph 15 of the Symbols Order.

46. Subsequently, on behalf of the Petitioner, Shri Maninder Singh, Ld. Senior Advocate, made the following submissions:

- i.That the indirectly elected members of the Legislature are not to be included while deciding the "Test of Majority" in the Legislative Wing of the Party and therefore, the Members of Upper House of Parliament and State Legislature are not to be included for determining such majority.
- ii.That under Paragraph 6A and 6B of the Symbols Order, recognition as a National/ State political party is given by the Commission based on electoral performance of such political parties in direct elections i.e., elections to Lok Sabha and Legislative Assemblies and not the indirect elections to the Rajya Sabha and Legislative Council. Hence, for the test of legislative majority, the Commission should consider only the aforesaid elected members of the House.
- iii.That following the observations made in the *Sadiq Ali case (supra)*, the Commission should use its plenary powers to decide such disputes in recognized political parties in a practical manner and with a degree of promptitude.
- iv.That there can be no infirmity if the name and symbol of the Party is allotted to one faction pending the decision of Supreme Court. That the consequence of decision in present dispute and the case before the Hon'ble Supreme Court will automatically flow from law and there is no

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need to wait for the final adjudication of the case pending before the Hon'ble Court.

47. The Commission, thereafter, directed both the parties to file their final written submissions, if any, by 30.01.2023.

ISSUES FRAMED:

48. Considering the facts presented before the Commission and the submissions made on behalf of both the groups, the following issues are framed for adjudication of the present dispute case:

A. Whether the petition dated 19.07.2022 filed by the Petitioner is maintainable under Paragraph 15 of the Symbols Order in view of the pending disqualification proceedings.

B. Whether a split has occurred in the Shivsena Party.

C. If Issue (B) is answered in the affirmative, then which test is to be applied for adjudication of the present dispute case.

D. Which group/ faction is entitled to use the symbol "Bow & Arrow"?

ISSUE A.

WHETHER THE PETITION DATED 19.07.2022 FILED BY THE PETITIONER IS MAINTAINABLE UNDER PARAGRAPH 15 OF THE SYMBOLS ORDER IN VIEW OF THE PENDING DISQUALIFICATION PROCEEDINGS.

49. Ld. Counsels representing the Respondent vehemently contended that the petition dated 19.07.2022 filed by the Petitioner was not maintainable as he is the sole Petitioner and against whom, disqualification proceedings are pending before the Hon'ble Speaker of the Maharashtra Legislative Assembly.

50. On maintainability, the Petitioner primarily relied upon the "fact" of dispute being manifest and also that their position stands validated by the Hon'ble Delhi High Court and Hon'ble Supreme Court in categorically permitting Election Commission of India to continue with proceedings under Paragraph 15 of the Symbols Order. Sh. Kapil Sibal, Ld. Senior Counsel for the Respondent, emphasized the uniqueness of the present dispute due to the overlap with the "disqualification proceedings" under the Tenth Schedule. He argued that the Hon'ble Courts "not staying the proceedings" does not automatically cover the substantive aspects of pendency of disqualification petition, i.e. in itself being a bar on maintainability. The reason being that the outcome of disqualification may have a bearing on actualization of decision

के. एन. भार / K. N. BHAR ब. प्रयान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India नेर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road गई दिल्ली-110001/ New Deihi-110001 under Paragraph 15. In this regard, it is pertinent to mention that the aforesaid issue was raised on behalf of the Respondent before various judicial forums. Firstly, the issue of maintainability of the proceedings before the Commission under Paragraph 15 of the Symbols Order was raised before the Hon'ble Supreme Court in **Subhash Desai vs. Principal Secretary, Governor of Maharashtra & Ors.** [W.P.C. No. 493/2022]. The Constitution Bench of the Hon'ble Supreme Court considered the aforesaid issue after hearing Ld. Counsels for both the groups at length and held *vide* order dated 27.09.2022 that:

"1 The interlocutory application for impleadment/intervention is allowed.

2 We have heard Mr Kapil Sibal and Dr Abhishek Manu Singhvi, senior counsel appearing on behalf of the Petitioner in support of the application for stay of the proceedings before the Election Commission.

3 Mr Neeraj Kishan Kaul, Mr Maninder Singh and Mr Mahesh Jethamalani, senior counsel appeared on behalf of the contesting parties.

4 Mr Tushar Mehta, Solicitor General appeared on behalf of the Governor and Mr Arvind Datar, senior counsel appeared on behalf of the Election Commission of India.

<u>5 There shall be no stay of the proceedings before the Election</u> <u>Commission</u>.

6 The Interlocutory Application seeking stay shall accordingly stand dismissed."

(Emphasis supplied)

51. Thereafter, the Respondent herein filed a petition before the Hon'ble Delhi High Court titled **Uddhav Thackeray vs. the Election Commission of India. & Anr.** [WPC No. 15616/2022] wherein again the issue of maintainability of the proceedings before the Commission under Paragraph 15 of the Symbols Order was raised. However, the Ld. Single Judge Bench of the Hon'ble Delhi High Court, after referring to the aforesaid order of the Constitution Bench of the Hon'ble Supreme Court, *vide* order dated 15.11.2022 dismissed the writ petition and held as follows:

"10. As regards Mr. Sibal's contention that no petition under para 15 of Symbols Order can lie unless there exist splinter groups or rival sections of ут. эту /к. N. BHAR

प्रधान सचिव / Sr. Principal Secretary

ारत लिर्वाचन आयोग lection Commission of India बीवन सदन / Nirvachan Sadan शोक रोड / Ashoka Road the recognised political party, it must be noted that there is sufficient material on record before ECI to embark upon para 15 of the Symbols Order. There are two rival factions, i.e., Petitioner and Respondent No. 2, both claiming to be the original or majority faction. This hard truth cannot be discounted, therefore, ECI's jurisdiction is plainly demonstrable from the pleadings before ECI to meet the prima facie test for assuming jurisdiction. As regards the contention that Respondent No. 2 had given up his membership on 23rd June, 2022, and therefore he cannot claim to represent the party and/ or that he has no support from anyone else and has alone maintained the petition are issues which would require deliberation in detail. The Impugned Order does not deal with the same and ECI has not given any finding thereon, as yet. Therefore, no opinion needs to be expressed by this Court on this issue and it's is best left open for adjudication in the appropriate proceedings."

"11. The Petitioner has raised a jurisdictional objection regarding nonmaintainability of the Dispute Petition before ECI, and the Court is confident that the same would be examined on its own merits by ECI while rendering the final decision, notwithstanding the lack of trust exhibited by the Petitioner."

"12. [...] Before the Supreme Court, it was also argued that the proceedings before ECI should not continue as Respondent No. 2 has voluntarily given up his membership of Shivsena and it would thus not be appropriate to permit Election Commission to proceed with the Dispute Petition. Therefore, concededly, the issue of disqualification is pending before the Supreme Court. Nonetheless, <u>upon a request made for stay of Dispute Petition, it was categorically declined by the Supreme Court vide order dated 27th September, 2022 [...]"</u>

<u>"13. Therefore, proceedings before ECI were not interdicted despite</u> <u>Petitioner having raised jurisdiction issues.</u>"

(Emphasis supplied)

52. Thereafter, the Respondent challenged the above judgment of the Ld. Single Judge Bench of the Hon'ble Delhi High Court in **Uddhav Thackeray vs. Election Commission of India & Anr.** [LPA No. 717/2022] wherein again the issue of maintainability of the proceedings before the Election Commission of India was raised. The Division Bench of the Hon'ble Delhi High Court, after referring to the aforesaid order of the Constitution Bench of the Hon'ble



के. एन. भार / K. N. BHAR a. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 Supreme Court, *vide* order dated 15.12.2022 rejected the appeal and held as follows:

"3. The main grievance of Mr. Kapil Sibal, learned Senior Counsel appearing for the Appellant, is with regard to the observations made in Paragraph 11 of the impugned Judgment. The same reads as under:-

"11. The Petitioner has raised a jurisdictional objection regarding nonmaintainability of the Dispute Petition before ECI, and the Court is confident that the same would be examined on its own merits by ECI while rendering the final decision, notwithstanding the lack of trust exhibited by the Petitioner."

"4. It is pertinent to mention that the Appellant has filed an application before the State Election Commission raising the two preliminary issues, namely:-

a) Whether there is any split in the political party i.e. Shiv Sena;

b) Whether petition can be maintained at the behest of a person who has given up membership of the party and incurred disqualification under Xth Schedule of the Constitution of India."

"6. It is pertinent to mention that the two preliminary issues which are sought to be raised by the Appellant are pending before the Apex Court in Writ Petition (Civil) 493/2022, yet the <u>Apex Court vide Order</u> <u>dated 27.09.2022 in IA Nos.101776-77/2022 has held that there</u> <u>shall be no stay on the proceedings before the Election Commission of</u> <u>India. Therefore, the Election Commission of India is free to proceed</u> <u>with the adjudication of the dispute pending before it."</u>

"7. It is needless to state that the Election Commission of India will proceed in accordance with the procedure followed by the Commission while adjudicating a petition under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968."

(Emphasis supplied)

53. In view of the aforesaid judicial pronouncements, it is stated that the Respondent raised the issue of maintainability of the petition filed by the Petitioner herein under Paragraph 15 of the Symbols Order before various judicial forums and prayed for a stay on proceedings before the Commission. However, as mentioned above, a Constitution bench of the Hon'ble Supreme Court in WPC No. 493/2022 *vide* order dated 27.09.2022 held that "There

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shall be no stay of the proceedings before the Election Commission". Thereafter, the Hon'ble Delhi High Court in WPC No. 15616/2022 vide order dated 15.11.2022 held that "the Court is confident that the same would be examined on its own merits by ECI while rendering the final decision" which was later affirmed by the Hon'ble Delhi High Court in LPA No. 717/2022 vide order dated 15.12.2022 wherein it was again held that "the Election Commission of India is free to proceed with the adjudication of the dispute pending before it." Thus, on each occasion, the said contention was rejected by the Hon'ble Courts and it was held that there shall be no stay on proceedings before ECI on account of the issue of maintainability being raised by the Respondent herein.

54. It is also noteworthy to mention that both the groups have filed disqualification proceedings against the legislators supporting the other group under Rule 6 of the Maharashtra Legislative Assembly (Disqualification on ground of Defection) Rules, 1986 read with the Tenth Schedule of the Constitution. However, the jurisdiction of the Hon'ble Speaker with respect to disqualification proceedings under the Tenth Schedule is separate from that of the jurisdiction of the Commission in deciding disputes under Paragraph 15 of the Symbols Order and does not overlap.

55. Moreover, disqualification of a legislator from membership of the Legislature by the Speaker is different from removal of a person from membership of a political party. The former situation is governed by the Tenth Schedule of the Constitution, whereas the latter is governed by the Constitution of the political party. The disqualification under the Tenth Schedule results in the member ceasing to be a member of the House. This does not necessarily mean that he ceases to be a member of that political party.

56. Furthermore, the act of initiating disqualification proceedings by both the groups was done after 21.06.2022 i.e., the date till which the Party stood united. In previous instances, the Commission has considered the status of members of a political party which is under dispute to be that which existed at an 'undisputed point of time'. This is done to ensure that the action of expelling/ removal by one faction of the members belonging to the other faction does not give an undue advantage to one of the rival groups/ factions. In the present case, the origin of the dispute can be seen in the separate meetings of SSLP held on 21.06.2022. Hence, this Commission, by applying the above principle, is of the view that respective claims of the rival as existed

on undisputed point of time i.e., before 21.06.2022, shall be considered for determination of the split in the present dispute case.

57. Thus, in view of the above-mentioned judicial pronouncements of the Hon'ble Supreme Court and the Hon'ble Delhi High Court, this Commission is of the view that the issue of maintainability of the present petition raised by the Respondent ought to be rejected. Our categorical conclusion is that proceedings are clearly maintainable, both as substantially fulfilling the matrix laid down in Paragraph 15 of the Symbols Order in terms of the facts made available to the Commission, and the specificity of the impact of pendency of "disqualification proceedings" having been comprehensively argued in the Hon'ble High Court and Hon'ble Supreme Court.

ISSUE B.

WHETHER A SPLIT HAS OCCURRED IN THE SHIVSENA PARTY.

58. The Petitioner in his petition dated 19.07.2022 had submitted that a split had occurred in the Shivsena whereby two groups, one led by him and the other by the Respondent, had emerged. The Petitioner had relied on the fact of political alignment and alliance with political parties of different ideologies as the reason for emergence of such a split. He further submitted that a majority of members in the legislative and Organisational Wing of the Shivsena were supporting the Petitioner. On behalf of the Respondent, it was fervently argued that the petition only indicated a possible split in the Shivsena Legislature Party and not the Party itself and that political realignment could not be a ground for split in the Party. It was further argued that there should be a 'vertical split' in the Party and that such split should not be of 'evolving' nature but rather, should have occurred at a particular point of time.

59. With regard to the issue of political alignment of a Party, it is submitted that the same is of no relevance for the Commission to decide a dispute for the purpose of Paragraph 15 of the Symbols Order. However, emergence of a separate group or rival faction in the Party which is a result of any political alignment, either solely or in combination with other factors, depending on the facts of the case, can be essential for the Commission to decide about existence of split.

60. In the present case, there were other factors which indicated a split in Shivsena. The indicator of the emergence of a split in Shivsena was the holding of separate meeting of the Legislature Party on 21.06.2022. As per the

Petitioner, a meeting held by the group supporting the Respondent, 24/ 55 के. एन. भार / K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary रत निर्वाचन आयोग ction Commission of India नेवचिन सदन / Nirvachan Sadan

MLAs of the SSLP attended the meeting and passed a resolution for removing the Petitioner as leader of SSLP. Whereas at the meeting held by the Petitioner, 34/55 MLAs of SSLP attended the meeting and reaffirmed their faith in Petitioner as leader of SSLP. It is also pertinent to mention that both the groups appointed their own Leaders as well as Chief Whips of SSLP in the Maharashtra Legislative Assembly. Additionally, both the groups also initiated disqualification proceedings against the MLAs who were supporting the other group under Rule 6 of the Maharashtra Legislative Assembly (Disqualification on ground of Defection) Rules, 1986. Similarly, both the groups appointed their own supporters as Leader of the Shivsena Party in the Lok Sabha.

61. Another pertinent fact was the letter dated 25.06.2022 received by the Commission from Sh. Anil Desai wherein it was mentioned that the Petitioner and some MLAs under his leadership were indulging in anti- party activities and that it was suspected that the delinquent MLAs may try to establish a new political party using the name 'Shiv Sena' or 'Balasaheb'. The extract of the said letter is reproduced here below:

"You are aware of the prevailing political situation in the State of Maharashtra owing to the anti-party activities being carried by some of the MLAs under the leadership of Eknath Shinde. This, despite the said MLAs being elected on the platform of the Shiv Sena political party, founded by Late Shri Balasaheb Thackeray, way back in the year 1966."

"On account of the anti-party activities and conduct of MLAs under Eknath Shinde which is detrimental to the interests of the Shiv Sena founded by Shri Balasaheb Thackeray, we suspect that the delinquent MLAs will be trying to create confusion by establishing a new political party by misusing the name of 'Shiv Sena' or 'Balasaheb'."

"While we cannot prevent Shri Eknath Shinde and his cohorts from establishing any political party they wish to, however we strongly object to any such party being created in the name of or using the names 'Shiv Sena' or 'Balasaheb'."

"We wish to intimate you in advance so that we are put to notice in case any such move is made by the any of the defectors of ShivSena."

Subsequently, the Commission also received three separate letters dated **62**. 01.07.2022 from Sh. Anil Desai wherein it was stated that Sh. Eknath Shinde, Sh. Tanji Sawant, Sh. Uday Samant and Sh. Gulabrao Patil had "indulged in anti-party activity" and have "voluntarily given up the membership of the

Shivsena". In the said letters, it was further mentioned that the said persons के. एन. भार / K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary रत निर्वाचन आयोग ction Commission of India बन सदन / Nirvachan Sadan ोक रोड / Ashoka Road दिल्ली-110001 / New Delhi-110001

had been removed from their respective position in the Shivsena organisational set up by the Shivsena Paksha Pramukh i.e., the Respondent under the provisions of the Party Constitution. This Commission is of the view that the aforesaid letters were further evident of emergence of a rival group in the Shivsena.

63. The next point to be considered is whether a split in the legislative wing of the Party results in a split in the Party itself. It is stated that under Paragraph 15 of the Symbols Order, the Commission adjudicates a dispute when rival groups emerge in a 'recognized' political party. The recognition is dependent upon the electoral performance of the concerned political party, as explained under Paragraph 6A & 6B of the Symbols Order.

64. Thus, the aforesaid provisions indicate that the electoral performance of a political party is not only essential for getting recognition under the Symbols Order but also for its continued recognition. In view of the said legal position, this Commission is of the view that for any dispute involving a recognized political party, where the dispute primarily revolves around the claim over the recognized symbol of the concerned political party, the legislative wing of the Party cannot be viewed in isolation.

65. There is no doubt that it is the organisational structure of the party including the grassroot workers who toil and labor and turn an association of individual members into an election machinery, which then contests an election and the resultant fruit is the popular vote received by it. The final product of the whole cycle is the election of legislators, such as members of Parliament and members of State Legislature, who win such elections on the name and symbol of the concerned political party. Thus, there exists an organic link between the legislators and the Party organisation which cannot be ignored or thought of as wholly separate.

66. It is also apposite to mention that most often, members of the legislative wing are also part of the organisational wing of the Party. In the present case, the Petitioner who is a Member of Legislative Assembly was also a "Shivsena Leader" i.e., part of the organisational structure of Shivsena, before the dispute arose. Similarly, the Respondent, who is a Member of the Legislative Council, served as the Shivsena Paksha Pramukh i.e., the position which is at the very apex of the organisational structure of Shivsena, if the 2018 Constitution of the Party is seen.

के. एन. भार / K. N. BHAR ब. प्रवान संविद / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिली-110001/ New Delhi-110001 **67.** In **Dispute Case No. 02/2019** ["Kerala Congress (M) Dispute"], the Commission, while deciding the issue of whether a split had occurred in the Party, made the following observations in its order dated 31.08.2020:

"35. The Commission has carefully considered the above rival submissions and contentions of Learned Senior Counsels representing the Parties. Both the parties have made submissions regarding the State Committee meeting held on 16.06.2019 and the disputed election of the Petitioner as the Chairman of KC(M). The legality of the above-mentioned meeting and election is not a determinative factor in deciding whether a split has occurred in the Party. It is on record that two lower courts, the Hon'ble Munsiff Court at Idukki and the Court of Sub-Judge, Kattapana, have already pronounced their judgments on this issue and that on behalf of the Petitioner, it has been submitted that an appeal against the decisions of the said courts will be made before the Hon'ble High Court of Kerala. In addition, the Petitioner has not prayed for his declaration as the Chairman of KC(M) in the Petition filed by him. Therefore the Commission will not go into the issue of the validity of the above-mentioned meeting of the State Committee and the subsequent election of the Petitioner as the Party Chairman."

"36. The first indicator of the emergence of a split in KC(M) was holding of separate State Steering Committee by both the groups, in relation to the bye-election held for 93- Pala Assembly Constituency. On behalf of the Respondent, it has been submitted that in the State Steering Committee meeting held on 23.08.2019, it was decided that the Party would not contest the said bye-election. On the other hand, it has been submitted on behalf of the Petitioner that another meeting of the State Steering Committee was held on 30.08.2019, wherein it was decided that the Party would contest the said bye-election and a sub-committee led by Sh. Thomas Chazikkadan, Lok Sabha MP, would propose a suitable candidate. This meeting, held on 30.08.2019, was claimed to be attended by 50/96 members."



"37. In addition, on the basis of the affidavits submitted by both the parties showing their support in the Legislative Wing and the Organisational Wing, it appears clear that two rival groups have emerged in KC(M). Four out of the seven elected legislators (1 Lok Sabha MP, 1 Rajya Sabha MP and 2 MLAs) had signed the Petition dated 18.10.2019, stating that rival factions had emerged in KC(M) and this in itself is an indicator of a split in the Legislative Wing of the Party. On the other hand, three out of seven

legislators have filed affidavits in support of the Respondent, Sh. P.J. Joseph. Therefore, there is no doubt in the fact that the Legislative Wing of the Party has split into two factions, led by the Petitioner and the Respondent. Similarly, a split in the Organisational Wing of the Party is also seen. Both the Parties claimed a majority support in the State Committee and submitted affidavits of members supporting them. Since both the Parties failed to provide the original list of members of the State Committee, and the list submitted by both substantially differed, the Commission decided to proceed on the basis of a common list that comprised of the list of 305 undisputed members, i.e., the names which figured in the State Committee list submitted by both the parties. From among the above-mentioned undisputed members of the State Committee, 174 have filed affidavits in support of the Petitioner while 117 have filed affidavits in support of the Respondent Jaffidavits of 5 members were found in support of both the factions and is therefore excluded from consideration]. This clearly indicates a split in the apex representative body of KC(M)."

68. It is also relevant to mention herein the contention made on behalf of the Respondent that holding of meetings/ conventions which are in violation of the party Constitution are not to be considered for determining whether a split has occurred in the Party. It was further argued that the Petitioner had himself admitted in his petition dated 19.07.2022 that the Respondent was the Shiv Sena Paksha Pramukh. To substantiate this contention, reliance was placed upon the order passed by the Commission in **Dispute Case No. 01/1978** [**Indira Gandhi vs. Brahmananda Reddy**]. However, in the said case, the Commission while holding that status quo ante be maintained, observed that sufficient documentary evidence had not been produced before the Commission. Relevant extract of the order is reproduced here below for ease of reference:

"In spite of the fact that sufficient time was given to Shri Chawla to file all the relevant documents and furnish full information on these vital matters, no such papers were brought on record to enable me to come to the satisfaction that a dispute really existed within the meaning of paragraph 15 of the Symbols Order. In the circumstances, I do not see that sufficient information has been made available to me to come to a prima facie conclusion that there are two rival groups of the Indian National Congress each of whom claims to be that party which alone would require me to conduct a detailed enquiry to determine which of those two rival groups, is the Indian National Congress. But I do not wish to dismiss the application of Smt. Indira Gandhi at this stage. I propose to keep the matter pending till sufficient material and evidence is adduced before me to be satisfied on the preliminary point that a dispute has really arisen between two rival groups of the Indian National Congress."

In the above case, the claim of applicant therein relied solely on a convention, the record of which was never placed before the Commission. However, in the present case, evidence have been made available before the Commission which indicates that rival groups exist in Shivsena.

69. It is also apt at the present juncture to examine some of the recent orders passed by the Commission in dispute cases of recognized political parties. In the **Dispute Case No. 01/2017** ["**Samajwadi Party Dispute**"], the Commission while deciding the issue of whether a split had emerged in the Samajwadi Party made the following observations in its order dated 16.01.2017:

16. [...] In his letters dated 1st January, 2017 and 2nd January, 2017, Shri Mulayam Singh Yadav had himself informed the Commission that an emergency National Convention was convened by Shri Ram Gopal Yadav on 1st January, 2017 at Janeshwar Mishra Park, Lucknow, in which certain resolutions were allegedly passed and he prayed that no cognizance should be taken by the Commission of those resolutions as the said convention itself was unConstitutional and convened by a person who stood expelled from the party. Shri Sibal further pointed out that Shri Mulayam Singh Yadav in his letters dated 1st and 2nd January, 2017 had stated that the Central Parliamentary Board of the party had declared the above Convention as unConstitutional and also declared the resolution said to have been passed at that Convention illegal and null and void. Shri Sibal further submitted that the above referred convention, though claimed by Shri Mulayam Singh Yadav as unConstitutional, was attended by overwhelming majority of the delegates of the State Legislature elected on the ticket of the Samajwadi Party. In view of the party and more than 90% of the elected Members of Parliament and Uttar Pradesh above facts and circumstances, Shri Sibal contended that there could not be any doubt in the mind of anyone that there are two rival groups in the Samajwadi Party and as each of those groups claims to be that party there has been a split in the party within the meaning of para 15 of the Symbols Order which needs determination by the Commission."

के. एन. भार /K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आरयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 "17. On the other hand, Shri Mohan Parasaran, senior learned counsel appearing for Shri Shri Mulayam Singh Yadav, submitted that there is no split in the party because, even as per their own case set up by the Shri Akhilesh Yadav group, Shri Mulayam Singh Yadav continues to be in the Samajwadi Party. He submitted that the sole claim made by Shri Akhilesh Yadav group is that Shri Akhilesh Yadav has been elected as the President of the party at the above mentioned convention held on 1st January, 2017, and thus the question before the Commission is whether Shri Akhilesh Yadav has been rightly elected as the President of the party in accordance with the party Constitution and the dispute relates to the internal administration or management of the party which does not mean that there is a split in the party resulting in the formation of two rival groups within the meaning of para 15 of the Symbols Order [...]"

"18. Shri Parasaran also submitted that the reference to the word 'split' in the Commission's letter dated 4th January, 2017 to Shri Mulayam Singh Yadav should mean only the prima facie presumption of the Commission and not an irrefutable presumption of satisfaction of the Commission in terms of para 15 of the Symbols Order. He stated that for arriving at a irrebuttable satisfaction about the existence of a split in the party, the Commission has to first hear both the groups and the Commission could change its prima facie view if any of the groups could rebut that presumption."

"20. The Commission has carefully considered the above rival submissions and contentions of Shri Kapil Sibal and Shri Mohan Parasaran. <u>As has</u> <u>been rightly pointed out by Shri Sibal, the very first communication dated</u> <u>30th December, 2016 of Shri Mulayam Singh Yadav to the Commission</u> <u>gave a clear indication as to an impending split in the Samajwadi Party.</u> <u>Subsequent developments of holding a convention by Shri Ram Gopal</u> <u>Yadav on 1st January, 2017, passing of resolution in that convention</u> <u>electing Shri Akhilesh Yadav as the President of the Party, declaring</u> <u>convention as unConstitutional by Shri Mulayam Singh Yadav and</u> <u>reiterating his claim that he continues to be the National President of the</u> <u>party are clear manifestations of the split having been formalized on that</u> <u>day [...]"</u>

(Emphasis supplied)

In the aforesaid case, the Commission thus gave weightage to circumstances that indicated a split such as holding of separate conventions, declaration of

के. एन. भार /K. N. BHAR व. प्रधान संचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सरन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 the same as unConstitutional by the other group and conflicting claims of separate leaders as head of the Party. In the present case, similar facts can be seen. On 21.06.2022, separate meetings were held by both the factions and there was a clear tussle over who was to be the leader of SSLP.

70. In view of the aforesaid facts, this Commission is of the view that a split has not only occurred in the Legislative Wing of the Shivsena but in the Party itself.

ISSUE C.

IF ISSUE (B) IS ANSWERED IN THE AFFIRMATIVE, THEN WHICH TEST IS TO BE APPLIED FOR ADJUDICATION OF THE PRESENT DISPUTE CASE.

71. The Petitioner in his petition dated 19.07.2022 had contended that the Commission should apply the "Test of Majority" as affirmed by the Hon'ble Supreme Court in the case of *Sadiq Ali (supra)*. On the other hand, it was contended on behalf of the Respondent that the "Test of Majority" was not the sole test to be applied in adjudicating a dispute case under Paragraph 15 of the Symbols Order. It was submitted that the "Test of Aims and Objects' and "Test of Party Constitution" were also important tests which had to be considered by the Commission.

"Test of Aims and Objects"

While the Ld. Counsels on behalf of the Respondent contended that the 72. Petitioner's acts were against the "Test of Aims and Objects" of the Party Constitution, the Petitioner responded to the above contention by asserting that it is the Respondent who, in the act of forming a coalition with parties of different ideologies, has deviated from the aims & objects of the Party and, that, the same formed the core point of disagreement and disappointment in the rank and file, the office bearers and the elected representatives of the Shivsena, and which is the genesis of the present dispute. On behalf of the Petitioner, it was submitted that the Respondent was running the Party in a manner which was opposed to the ideologies of the Shivsena Party and its founder, Late Balasaheb Thackeray. However, this contention was vehemently opposed by Ld. Counsels for the Respondent who submitted that the ideology of the Shivsena, as described in Article V of the Party Constitution, was that "the Party shall be committed to rational secularism, socialism and national integrity" and that there was no departure from following such ethos by the Respondent or the Party.

के. एन. भार / K. N. BHAR a. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 **73.** This Commission carefully considered the aforesaid arguments and counter-arguments on the test of "Aims and Objects" of the Party Constitution. The Respondent has attempted to build a scenario of "moving away" of a group of individuals and this act of "moving out"/ defiance was shown to be evidence of the Petitioner having no faith in "aims & objects" of the Party Constitution. In fact, the Petitioner's claim that in July 2022 they convened a gathering of the "Party" and reiterated their adherence to 'aims & objects' by restoring the Constitution of 1999. That claim, of course, was countered by the Respondent, as non-relevant, as it occurred posterior to the assumption of dispute by the ECI.

74. Apart from the above submissions, there were no further averments from both the groups regarding the test of "Test of Aims and Objects" of the Party Constitution. It is evident that this test cannot yield an effective outcome of Paragraph 15 proceedings, as both sides claim adherence to the same. Therefore, the application of this test will render an inconclusive answer for the purpose of adjudicating the present dispute case.

"Test of the Party Constitution".

Next, both sides moved to the "Test of the Party Constitution". The 75. Petitioner argued that the test of the Constitution of the party could not be relied on in the present case since the Constitution of Shivsena, as amended in the year 2018, was undemocratic and which subverted inner party democracy. The Ld. Senior Counsel submitted that the original Constitution of the Shivsena was amended in the year 1999 after the Commission had written to Late Balasaheb Thackeray, the then President of the Shivsena, to amend the Constitution to make it more democratic. However, the changes introduced by the Late Balasaheb Thackeray were reversed by the Respondent in the year 2018 by making amendments in the party Constitution which gave the power of appointment of most of the party office-bearers to the Party President. The Party Constitution, as amended in 2018, will yield non-democratic and biased outcomes, as its design was changed to curb inner party democracy and to stifle dissent. Further, it was contended that the said amendment of 2018 was in the teeth of the prevailing instructions of ECI. Therefore, reliance on such a party Constitution was untenable for deciding the present dispute.

76. On behalf of the Respondent, Sh. Kapil Sibal, Senior advocate, argued that a rival faction or group emerging within a political party and claiming to be that party under Paragraph 15 of the Symbols Order, 1968 must do so within the framework of the party Constitution. That any faction or group that

does not work as per the party Constitution should not be recognized by the

Commission as the said party. Further, it was submitted that if the Petitioner does not accept the Constitution of the Party, as amended in the year 2018, he must establish his own political party and that if the Petitioner does not approve of the Party Constitution, then he does not have the right to claim the symbol of the Party under Paragraph 15 of the Symbols Order.

77. It was further submitted by Sh. Kapil Sibal that the Petitioner himself was not elected during the last organisational elections but was in fact appointed by the Respondent, in exercise of the latter's power provided under the Party Constitution, as the Leader of Shivsena and that the Petitioner then did not raise any grievance about the Party Constitution. Moreover, it was submitted that the Commission must only consider that Constitution of the party which is on record with it and which was in existence at the time of arising of a dispute between rival factions or groups of the party Constitution which was on record with the Commission.

78. Sh. Devadatt Kamat, Senior Advocate, further argued on behalf of the Respondent that he enjoys an overwhelming majority in the rank and file of the party and as per the members who were part of the Pratindhi Sabha pursuant to the organisational elections in 2018. That the organisational majority test is the test to be applied in the present case as was done by the Commission in the *K.P. Unnikrishnan case*. To substantiate this argument, it was submitted that the Petitioner had conducted meetings of the Pratindhi Sabha as well as that of Rashtriya Karyakarini and that he had assumed the position of "Mukhya Neta" which did not even exist as per the Party Constitution.

79. The 2018 amendment of the Party Constitution being referred to by both sides needs to be contextualized. The Shivsena Party was formed in the year 1969. When in 1989, Section 29A was incorporated in the Representation of the People Act 1951, the Commission facilitated its registration. On the persuasion & advice of the Commission (during 1997-1998), the Party finally amended its Constitution to do away with position of Shri Bala Saheb Thackeray as "Shivsena Pramukh" for life or till he so desires and with the provisions for nomination of office bearers solely by the "Shivsena Pramukh". Removal of such clauses allowed the Commission to take that amended Constitution of Shivsena on record in the year 1999.

80. The decision of the Commission both in 1989 and thereafter in 1997, was in the genre of on-going and continuous attempts of ECI to "mainstream"

के. एन. भार /K. N. BHAR a. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 the pre-existing political parties into the framework of the newly introduced the Section 29A of Representation of the People Act, 1951.

81. In this context, it is relevant to consider that on 16.07.98, the Commission directed Chief Electoral Officer, Maharashtra to communicate to Shivsena the observation of ECI stating "that in nutshell, the party Constitution envisages the president nominating the electoral college that is to elect him. This goes against the spirit of democracy and negates the very purpose for which the entire exercise was carried out". In their reply dated 29.4.99, Shivsena, inter alia made the following specific points regarding the concern of democratic deficit in their proposed Constitutional change:

- (i) In fact, the electoral college consists of not only of representatives elected by the ordinary members of the party but also the peoples' representatives i.e. the Shivsena's Members of the Parliament and the Members of the Legislative Assembly and the Legislative Council. Thus, the Pratinidhi Sabha is a body with much broader base in its true sense.
- (ii) The Commission has always maintained that political parties being vehicles of different ideologies must chalk out for themselves, their own manner of functioning and embody the same in their Constitution and all that the Commission insisted is that persons who act or speak on behalf of recognized political parties should be elected members of the party and this should be explicitly put in the party's Constitution."

82. During this dispute, both sides had referred to a further amended Constitution of 2018, which is not on record of the Commission. In this context it is critical to refer to conditions of registration of the Shiv Sena Party as communicated by the Election Commission of India vide its letter No. 56/R/166/89/5147-80 dated 19.10.1989 inter alia stipulating in para 2, the statutory requirement under section 29 A of RP Act, 1951 as under:

"As provided in sub-section (9) of the section 29A of the Representation of the People Act, 1951, the party shall communicate to the Commission without delay any change in its name, head office, office-bearers or in any other material matters".

Further, the "Guidelines prescribed by the ECI in 2010 in exercise of powers conferred by Article 324 of the Constitution of India and Section 29 A of the R P Act, 1951 specifically provides that each Constitution carries a clause for amending Constitution of the party as under:

Clause (xviii): The applicant party must submit authenticated proof to show that the party Constitution has been adopted by the General Body of

the Party

के. एन. भार /K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 Clause (xxii): The applicant party must ensure in its Constitution itself vide a specific clause in the party Constitution that any amendment to the Constitution must be approved by the General Body of the party.

The amendment in the Constitution of the party is undoubtedly the most critical material change. Needless to add that such material change, as the amendment of the Constitution itself, needs to follow a rigour such as submission of authenticated copy of the resolution, attendance, etc besides other documents. There is no available evidence of such supporting documents having been supplied earlier or even during the proceedings.

83. The Commission vide letter dated 25.1.2018 sought information from all recognized parties to confirm the outcome of inter party elections by 28.2 2018. Vide letter dated 27.02.2018, Sh. Anil Desai informed the Commission of the names of office-bearers of Shivsena after the completion of the organisational elections, obfuscating the fact of changes made in the Party Constitution under which the organisational elections and appointment of office-bearers was made. The information of change in the Party Constitution was not linked to such changes in the office-bearers. It is clear that the 'Constitution' being cited to by both groups i.e., as amended in 2018, was not categorically taken on record by the Commission. The Petitioner also, although silent from 2018 till the present proceedings, disputes the amendment (though being in his specific knowledge) now and argues against its arbitrary design & its non-democratic character. The Respondent cites the same document, thereby attempting to displace the 'agreed' Constitution of 1999 surreptitiously, being without a confirmation or scrutiny of the amendment process itself having been followed diligently.

84. The Commission has applied the 'Test of Party Constitution', in its primary manifestation to allow the Commission to distinguish between frivolous disputes and avoidance of subterfuge. In fact, it can be viewed as an extension of the 'maintainability', and the preceding paragraphs above clearly show that the fact of the dispute not being non-serious, is not made out.

85. In the next manifestation of the 'Test of Party Constitution', is the issue of the design of the Constitution i.e. whether the group or faction which has approached the Commission has exhausted the internal remedy or due to an impasse, it has approached the Commission under para 15. In the matter of **dispute of INC**, order stated:

"The exhaustion of internal remedy was itself premised on two independent aspects, i.e. the group which approaches the

 Constitution has to show that "it has exhausted all the remedies available to it under the Constitution of the party to assert its majority, but that the other group has frustrated its efforts whimsically or capriciously and is not itself functioning in accordance with the provisions of the Constitution of the party **or** democratic norms."

(Emphasis supplied)

86. The Constitution being referred to and submitted in the pleadings by way of its plain reading on the vital axis of remedy /modality of dissent, in such factual circumstances, stifles all options of rival group in its very formulation. Rule III of Part II of the 2018 Constitution defines 'Breach of Discipline' *inter alia* to be:

[...]

(d) Taking a Party dispute to any other agency outside the Party. [...]

(g) Forming groups against the interest of the Party. In such cases, it will be the sole authority of the ShivsenaPakshaPramukh to decide which group is acting against the interest of the Party.

Further, Rule II provides for a disciplinary action committee which will draw its own procedures to conduct an enquiry in matters of indiscipline. It also provides for an opportunity to explain and answer such charges made.

In the present facts, the Respondent did not lead evidence of initiating disciplinary proceedings against the Petitioner and his group, as per the Rules mentioned above. They have invoked the plea of Petitioners group 'voluntarily giving up' the membership of the Party by indulging in anti- party activities. Therefore, apart from the design concerns, the process too appears to dehor even the limited democratic ethos of the Party. Further, provision for removal of Shiv Sena Paksh Pramukh is not discernable.

87. Further, the 2018 amendment of the Party Constitution has made the position of "ShivSena PakshaPramukh" a power center and as per Article XI of the said Constitution, the extensive power and functions of the "ShivSena PakshaPramukh" are as follows:

• Shivsena Paksha Pramukh shall be the President of the Party and shall be elected by the members of the Pratinidhi Sabha from amongst the members of Rashtriya Karyakarini (Shivsena Leaders).

के. एन. भार /K. N. BHAR a. प्रधान संचिद / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nivachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 • The term of Shivsena Paksha Pramukh shall be for a period of five years.

• Shivsena Paksha Pramukh shall be the highest authority in the party, and his decisions in all matters concerning the Party policy and the Party administration shall be final. Shivsena PakshaPramukh can withhold, remove or annul the appointments to any post mentioned in Article VIII.

• Shivsena PakshaPramukh shall have the right to dissolve the Rashtriya Karyakarini at any given time.

• Shivsena PrakshaPramukh may, at his discretion co-opt member/s as Shivsena Leader/s and Deputy Leader/s of the party. The members so appointed as a Shivsena Leader or a Deputy Leader as the case may be, shall assume the office of Shivsena Leader or a Deputy Leader and work under the guidance of direction of Shivsena PakshaPramukh, However, member so appointed by Shivsena PakshaPramukh as a Shivsena Leader, shall follow the process of filing his/her nominations in the next intra-party elections and get himself/herself elected by the Pratinidhi Sabha to be a member of Rashtriya Karyakarini (Shivsena Leader).

• Similarly, a Deputy leader appointed by Shivsena PakshaPramukh shall follow the process of filing his/her nominations in the next intraparty elections and get himself/herself elected by the Pratinidhi Sabha. Shivsena PakshaPramukh, shall appoint the office-bearers of the Party as mentioned in Schedule VII(B), Koshadhyaksha, Secretary, Sanghatak, Samanvayak and office bearers of affiliated organisations (article XII) of Shivsena.

• Shivsena PakshaPramukh shall remove any office bearer/s or member/s of the Party in the Organisational structure of the Party as mentioned in the Article VIII of the Constitution and inform the Rashtriya Karyakarini and the Party's disciplinary committee.

His decision shall be final.

• No Party office-bearer or Member other than Shivsena PakshaPramukh shall have the authority to expel any party officebearer or member from the party.

In view of the aforesaid powers entrusted upon the ShivSena PakshaPramukh, by the 2018 amendment of the Party Constitution, there cannot be any other inference but that the Party President has been vested with authoritarian powers. This consequently compromises on the norms of intra-party

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democracy and perpetuates fieldom of an individual over the rights of innumerable party workers.

88. It is also pertinent to mention that in the **Samajwadi Party Dispute** also, a contention was made on behalf of the Respondent therein that primacy be given to the "Test of Party Constitution" for adjudicating the dispute. In the said case also, one of the crucial factors indicating the emergence of rival groups was a convention called by the claimant therein which was alleged to be unconstitutional by the other faction. In this regard, the Commission made the following observation in its order of 2017:

"27. Now, coming to the question as to what test has to be applied by the Commission or what parameters have to be kept in view by the Commission while deciding matters under para 15 of the Symbols Order, Shri Kapil Sibal, as mentioned above, has taken the stand that the Commission is required only to apply the "Test of Majority" or numerical strength of the rival groups or sections in the legislative and Organisational Wings of the party. Shri Mohan Parasaran has taken the contrary view that the Commission has first to judge the relative claims of the rival sections or groups on the touchstone of their functioning as per the provisions of the party Constitution."

"28. In the context of the above rival submissions and contentions of Shri Kapil Sibal and Shri Mohan Parasaran, it is relevant to take note of the Commission's order dated 11th January, 1971 in the matter of first split in the Indian National Congress which arose in 1969 after the promulgation of the Symbols Order in 1968. In that order, the Commission observed that the test based on the provisions of the Constitution of the party was hardly of any assistance in view of the removals from membership and expulsions from the committees of the party of the members belonging to one group by those belonging to the opposition group [...] In view of the above, the insistence by Shri Mohan Parasaran that the Commission should decide the matter on the test of functionality of the rival groups on the touchstone of the party Constitution is hardly of any assistance to him and the Commission cannot go into validity or otherwise of the removals and expulsions and counter removals and counter expulsions of members or leaders by one group or the other. For the same reasons, it is not necessary for the Commission to go into the question whether the convention held by Shri Akhilesh Yadav on 1st January, 2017 at Lucknow was convened in accordance with the provisions of the party Constitution or not, as here also, there are contentious issues relating to the



5. एन. भार /K. N. BHAR प्रधान अचित / Sr. Principal Secretary TYCET निर्वा रून आत्यो ना lection Commission of India वींधन सरन / Nirvachan Sadan शोक रोड / Ashoka Road शिली-110001/ New Delhi-110001 interpretation and application of various provisions of the party Constitution. Pertinent here to take note of the submission made by Shri Kapil Sibal that if a substantial number of members of the party feel disappointed with the functioning of the party managers and those managers obstruct the redressal of their grievances under the party Constitution, the political functioning of the political party cannot be frustrated by their inaction or their failure to act in accordance with the party Constitution. In any democratic institution, which the political parties are, the will of majority should prevail in the internal functioning of the party and if the majority will is suppressed or not allowed to have a proper expression, it will amount to 'tyranny of the minority'."

"29. Having thus come to the conclusion that the present dispute cannot be decided on the touchstone of the functioning of the rival groups as per the party Constitution, the Commission has to necessarily apply the "Test of Majority", i.e., numerical strength of the rival groups, both in the legislative and Organisational Wings of the party. In taking this view, the Commission is fortified by the observations and ruling of the Supreme Court in above referred case of Sadiq Ali (supra)."

89.Furthermore, it is apt to refer to the observations made by the Hon'ble Supreme Court in **Sadiq Ali** (supra) whereby the "Test of Majority" was held to be a very valuable and relevant test for deciding political party disputes:

"26. The figures found by the Commission of the members of the two Houses of Parliament and of the State Legislatures as well as those of AICC members and delegates who supported Congress 'J' have not been shown to us to be incorrect. In view of those figures, it can hardly be disputed that substantial majority of the members of the Congress in both its Legislative Wing as well as the Organisational Wing supported Congress 'J'. <u>As Congress is democratic organisation, the "Test of</u> <u>Majority" and numerical strength, in our opinion, was a very valuable and relevant test. Whatever might be the position in another system of Government or organisation, numbers have a relevance and importance in a democratic system of Government or political set up and it is neither possible nor permissible to lose sight of them. Indeed it is the view of the majority which in the final analysis proves decisive in a democratic set up."</u>

े. एन, भार /K. N. BHAR प्रयान संदि। / Sr. Principal Secretan । एस नियदियन आयोग ection Commission of India बिल्मी-110001/ New Delhi-110001 दिल्ली-110001/ New Delhi-11000 "27. It may be mentioned that according to Paragraph 6 of the Symbols Order, one of the factors which may be taken into account in treating a political party as a recognized political party is the number of seats secured by that party in the House of People or the State Legislative Assembly or the number of votes polled by the contesting candidates set up by such party. If the number of seats secured by a political party or the number of votes cast in favour of the candidates of a political party can be a relevant consideration for the recognition of a political party, one is at a loss to understand as to how the number of seats in the Parliament and State Legislature held by the supporters of a group of the political party can be considered to be irrelevant. We can consequently discover no error in the approach of the Commission in applying the rule of majority and numerical strength for determining as to which of the two groups, Congress 'J' and Congress 'O' was the Congress Party for the purpose of Paragraph 15 of Symbols Order."

(Emphasis supplied)

90. The paradox of India being the world's largest democracy and its political field being occupied by some Parties which are being treated as fiefdoms is disconcerting. For a truly functioning democracy, it is important that one of the key stakeholders i.e., the political parties are run in a democratic manner and this in turn can be ensured only if the Constitution being adopted by them does not allow concentration of power in the hands of a few. In *All Party Hill Leaders' Conference, Shillong vs. Captain M.A. Sangma & Ors.* [AIR 1977 SC 2155], the Hon'ble Supreme Court had rightly held that

"India is a Democratic Republic and the elements of democratic concept and process should imbue every phase and feature of life, social and political" and that "Democracy cannot thrive as democracy by being an oligarchy masquerading for democracy."

91. Governance in a multi-party democracy like India is steered by political parties and when the Constitutions adopted by such political parties are based upon democratic norms, it makes India's democracy healthier and more vibrant. On the other hand, when a party Constitution turns its functionaries into puppets controlled by a leader with unabridged powers, the path only leads to degradation in democratic governance of the country. In such a scenario, deciding a dispute in a recognized political party on the basis of a Constitution which creates a power center rather than democratizing the

के. एन. भार /K. N. BHAR a. प्रधान संविव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाधन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road गई दिल्ली-110001/ New Delhi-110001 organisation will lead this Commission, a creature of the Constitution of India, blinking its eye to a foundational principle on which our Constitution was built upon.

92. On 25.11.1949, Dr. B.R. Ambedkar addressed the Constituent Assembly of India for the last time where he made a spirited defence of the newly drafted Constitution of India. It is germane to refer to certain excerpts from the said speech now famously called "the Grammar of Anarchy":

"As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr. T. T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."

(Emphasis supplied)

93. Section 29A of the Representation of the People Act, 1951, which deals with registration of political parties, was inserted *vide* the Representation of the People (Amendment) Act, 1989. The Statement of Objects and Reasons appended to the Bill which was subsequently passed by the Parliament as the aforesaid Amendment Act stated the following:

"At present, there is no statutory definition of political party in the Election Law. The recognition of a political party and the allotment of symbols for each party are presently regulated under the Election Symbols (Reservation and Allotment) Order, 1968. It is felt that the Election Law should define political party and lay down procedure for its registration. It is also felt that the political parties should be required to include a specific provision in the memorandum or rules and regulations governing their functioning that they would fully be committed to and abide by the principles enshrined in the preamble to the Constitution."

ফ. एन. भार / K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nivachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 (Emphasis supplied)

The intention of the lawmakers to make political parties commit to and abide by the principles enshrined in the preamble of the Constitution, which includes democracy, cannot be interpreted in a way which excludes the application of these principles in the inner party functioning of the political parties seeking registration.

94. In the present case, the Constitution of Shivsena, as amended in the year 2018, gives unabridged powers to the ShivSena PakshaPramukh. Further, in the final written submission submitted by the Respondent himself on 30.01.2023, it has been stated that *"under the scheme of the Party Constitution, the Shivsena Paksha Pramukh exercises overarching control in matters of admission and removal of members and is the highest authority within the Party. Shivsena Paksha Pramukha and Shivsena Party are two sides of the same coin and can never be separated." This assertion of the respondent significantly buttresses the Petitioner's position in the amendment to the Constitution in 2018 being a colourable exercise to give unbridled powers to the respondent and to stifle dissent. Thus, the Petitioner claims that both in its design and in its working, a backsliding from the 1999 Constitution is manifest.*

95. The above facts give traction to our previously noted concerns of the surreptitious nature in terms of non-communication of amendment and equally importantly the process of amendment in the Constitution of the party not being in accordance with the conditions as communicated by the Election Commission of India vide its letter No. 56/R/166/89/5147-80 dated 19.10.1989 to Shiv Sena *inter alia* stipulating in para 2, the statutory requirement under section 29 A of RP Act, 1951. Further this is not in sync with clause (xviii) and (xx ii) of the "Guidelines prescribed by the ECI in exercise of powers conferred by Article 324 of the Constitution of India and Section 29 A of the R. P.Act, 1951. In view of the aforesaid facts, the "Test of Party Constitution" will not come to aid of this Commission in deciding the present case.

This Commission is of the considered view that the only test to be applied in determining the present dispute is the "Test of Majority".

ISSUE D.

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WHICH GROUP/ FACTION IS ENTITLED TO USE THE SYMBOL "BOW & ARROW"?

96. After determining the test to be applied for deciding the present dispute case, it is to be examined as to which group enjoys the majority with respect to support in the legislative and the organisational wing of the Shivsena.

97. While there is no legal sequencing, we begin by examining the support enjoyed by both the groups in the organisational wing of the Party. The organisational wing, as noted by both sides, originates in the totality of party members. Therefore, for the test, a filter has been invoked by the Commission previously to achieve a cut off to determine at what level of the party organogram the test should run and thus the issue as to which of the bodies in the organisational structure of Shivsena are to be considered as the organisational wings for adjudication of the present dispute.

While the Petitioner in his petition dated 19.07.2022 has mentioned the 98. support enjoyed by him in the organisational wing of the Party, he has simultaneously argued that the Constitutional design in effect puts all powers in the hands of the Respondent, who then amended the Constitution in 2018 and thus the 'source' of the organisational count is contaminated. In the written submission dated 09.12.2022 of the Petitioner, it was submitted that he enjoyed majority support in the organisational wing of the Party. To substantiate this submission, the Petitioner indicated that more than 12 lakh primary members, 144 Padaadhikari of SSPP, 12 Rajya Prabharis as well as large number of district office-bearers of Shivsena were supporting him. Further, it was mentioned therein that the Pratinidhi Sabha, through a meeting held on 18.07.2022, and the Rashtriya Karyakarini, through the meeting held on 27.07.2022, had resolved in favor of the Petitioner. In the final written submission dated 30.01.2023, it has been stated on behalf of the Petitioner that as per the 2018 amended Constitution, he enjoys the support of 4 Shivsena Leaders and 6 Shivsena Deputy Leaders besides support of 49 Zilla Pramukhs, 87 Vibhag Pramukhs, 40 MLAs, 13 MPs and thus an overwhelming majority of 199 in the Pratinidhi Sabha.

99. On behalf of the Respondent, a preliminary reply dated 07.10.2022 was received wherein it was stated the Respondent enjoyed a majority support in the organisational wing of the Party. Relevant extract of the said reply is as follows

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"09. It is submitted that lakhs of primary members, office bearers of the organisation and an overwhelming majority of the <u>Rashtriya</u> <u>Karyakarini, which is the highest body in the organisational structure of</u> <u>the Shivsena</u> have pledged unconditional support and allegiance to the leadership of the Respondent therein."

"10. It may not be out of place to mention that out of around 220 members of the Rashtriya Karyakarini of Shivsena, which depicts

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<u>Shivsena</u>, more than 160 of its members have overwhelmingly supported the Respondent."

"48. <u>It is submitted that in so far as the Organisational Wing is</u> <u>concerned, the Rashtriya Karyakarini (National Executive) is the</u> <u>Organisational structure recognized by the Constitution of the Shivsena</u>. The said Organisational structure of the Shivsena has been communicated from time to time to this Hon'ble Commission. It is submitted that out of over 220 members of the Rashtriya Karyakarini, over 160 members have pledged support and complete allegiance to the leadership of the Respondent herein. Copy of Affidavits of support of all such members of the Rashtriya Karyakarini have been annexed herewith as a separate volume- VOLUME-IV."

(Emphasis supplied)

In the reply dated 08.10.2022 filed by the Respondent to the application under Paragraph 15 of the Symbols Order filed by the Petitioner, a chart was submitted therein, whereby it was shown that the Respondent enjoyed the support of 160/234 Rashtriya Karyakarini members as on 23.01.2018 i.e., when the last organisational elections were held. However, the 2018 Constitution, on which he placed reliance, fixes the strength of this body at 13. Further, on behalf of the Respondent, the preliminary reply dated 07.10.2022 and the reply dated 08.10.2022 to the petition mentions the support enjoyed by him in the Rashtriya Karyakarini as 160/220 and 160/234 respectively. It has not been stated as to when and how the strength of the Rashtriya Karyakarini was increased. However, the Respondent in his final written submission dated 30.01.2023 claimed support of 6 Shivsena Leaders out of 8 remaining Shiv Sena leaders.

100. Again, in the written submission dated 09.01.2023 filed on behalf of the Respondent, the submission regarding the Organisational Wing of the party, was reiterated in toto and it was reaffirmed that "*Rashtriya Karyakarini* (*National Executive*) is the Organisational structure recognized by the Constitution of the Shivsena".

101. The Respondents have also disputed the legality of the meetings of the Pratinidhi Sabha and election of Petitioner as 'Mukya Neta', both as being evidence of Petitioners group having moved out of the Shiv Sena's Constitutional and Organisational umbrella and, a fact which cannot be considered as any basis for the adjudication, as it occurred posterior to 21.06.2022. The Respondent's Counsel, while conceding the majority of the

Petitioner in the legislative wing, continued with his line of argument as mentioned in preceding para, to say that the numerical yield, i.e. Respondent's claim of majority in organisational structure, in effect proves his initial point that there is no dispute in the political party but it is only so in its legislative wing & therefore, not within the framework of Para 15. He obviously places primacy to this test and attempts to place it in a legal sequence of being discharged first and, only if it does not yield a verifiable outcome, can ECI proceed to the legislative majority test-which in any case is covered by the disqualification proceedings.

102. The vital question for this Commission is to decide whether to consider one or both of the two aforesaid organisational bodies of Shivsena i.e., the Rashtriya Karyakarini and the Pratinidhi Sabha, to be the organisational wing for determining a numerical majority therein or, to consider other bodies mentioned in the Party Constitution. The Commission in **AIADMK Dispute Case** had held that "...the Commission will look into the relative strength of the two groups in the <u>apex representative body</u>, of the organisational structure of the Party as provided for in the Party Constitution." Further, in the case of **Sadiq Ali** (supra), the Hon'ble Supreme Court considered the issue of ascertaining the support among the primary members of the Party and held that:

"28. It is no doubt true that the mass of Congress members are its primary members. There were obvious difficulties in ascertaining who were the primary members because there would in that event have been allegations of fictitious and bogus members and it would have been difficult for the Commission to go into those allegations, and find the truth within a short span of time. The Commission' in deciding that matter under paragraph 15 has to act with a certain measure of promptitude and it has to see that the inquiry does not get bogged down in a quagmire. This apart, there was practical difficulty in ascertaining the wishes of those members. The Commission for this purpose could obviously be not expected to take referendum in all the towns and villages in the country in which there were the primary members of the Congress. It can, in our opinion, be legitimately considered that the members of, AICC and the delegates reflected by and large the views of the primary members."

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(Emphasis supplied)

Thus, the Commission has to look into the majority support enjoyed by the rival factions in the apex representative body of the Party as provided in the Party Constitution. In order to do so, the Commission looked at Party Constitution of 2018 being cited by both the groups.

103. A perusal of <u>Article VIII</u> of the Shivsena Constitution, as amended in the year 2018, shows that the Rashtriya Karyakarini is second only to the ShivSena PakshaPramukh in the organisational structure. Further Article XI (B) of the aforesaid Constitution states as follows:

"(B) COMPOSITION OF RASHTRIYA KARYAKARINI

The Rashtriya Karyakarini of the party shall consist of 13 members. The term of the Rashtriya Karyakarini shall be for five years; and at the end of the term **Rashtriya Karyakarini shall be elected by the Pratinidhi Sabha.** The members of the Rashtriya Karyakarini shall be called Shivsena leaders. Rashtriya Karyakarini shall have power to lay rules and regulations regarding the functions of all office-bearers and Fronts of the Party. ShivsenaPakshaPramukh shall preside over the meetings of Rashtriya Karyakarini and his decision will be final and binding on the Rashtriya Karyakarini."

Further clause (C) of the aforesaid Article explains the duties to be performed by the 'Shivsena Leaders' who form the Rashtriya Karyakarini. The said duties *inter alia* include surveying and reporting to the Party President the functioning of the Party; spearheading election campaigns; channelizing party propaganda and publicity; executing decisions of the Party President; and to look into the grievances of the Shivsainiks and office-bearers.

104. Clause (J) of Article XI of the aforesaid Constitution deals with Pratinidhi Sabha and it states as follows:

"(J) PRATINIDHI SABHA



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Pratinidhi Sabha shall consist of ShivSena PakshaPramukh, members of the Rashtriya Karyakarini i.e., Shivsena Leaders, Deputy Leaders, Secretaries, Sanghatak Samanvayak, Rajya Sampark Pramukhs, Zilla Sampark Pramukhs, Rajya Pramukhs, Zilla Pramukhs and elected members of all the houses of State Legislature and the Parliament. The Vibhag Pramukhs from Mumbai have been awarded a special status that of Zilla Pramukh and as such they shall be members of Pratinidhi Sabha. Rajya Pramukh and Zilla Pramukhs from any other State than Maharashtra shall be eligible for representation on the Pratinidhi Sabha if and only if the Party secured 10% of the polled votes in that State in the General Elections. The function of Pratinidhi Sabha shall be as follows:

1. To elect ShivsenaPakshaPramukh and Rashtriya Karyakarini from amongst the elected members of the Rashtriya Karyakarini.

2. To elect the Deputy Leaders.

3. To appraise the Rashtriya Karyakarini regarding the activities of the Party in the various regions.

4. To suggest measures on various political and social issues concerning the people. The Pratindhi Sabha shall meet at least twice a year."

105. A perusal of the composition of the Pratinidhi Sabha shows that it is largely an appointed body. The 2018 Constitution in article XI of the party provides that the ShivSena PakhsaPramukh has the power to appoint Sanghatak, Samanvayak, Rajya Sampark Pramukhs, Zilla Sampark Pramukhs, Rajya Pramukhs and Zilla Pramukhs as well to co-opt any member as Leader and 33 Deputy Leader of Shivsena. Thus, this body of the Shivsena, ex facie does not pose confidence of being a truly democratic body. Hence, any creation of this body can also be not relied upon for adjudicating a dispute case under Paragraph 15 of the Symbols Order. Article XI(B) of the 2018 Constitution of the Party states that the Rashtriya Karyakarini shall be elected by the Pratinidhi Sabha. Thus, the Rashtriya Karyakarini is a body which is in fact 'elected' by a largely 'appointed' Pratinidhi Sabha. To sum up the situation, it is apt to quote the observation of the Commission communicated to Shiv Sena through the then Chief Electoral Officer, Maharashtra:

"To put in nutshell, the party Constitution envisages the President nominating the Electoral College that is to elect him. This goes against the spirit of democracy and negates the very purpose for which the entire exercise was carried out."

106. In this regard, Sh. T.N. Seshan, the then Chief Election Commissioner, in the order dated 16.10.1994 passed in **Dispute Case No. 1 of 1994** titled **George Fernandez vs. S.R. Bommai** wherein had stated that:



"48. The Commission had observed in its order dated 25.01.1978 in the case of dispute in the Indian National Congress that a group or section which wants to form a rival group or section within a party must exhaust all the remedies available to it under the Constitution of the party to assert its majority and should come to the Commission if the other group has

frustrated its efforts whimsically or capriciously and not in accordance with the party Constitution or democratic norms. In almost all the cases of disputes in political parties with which I had the occasion to deal, allegations have been made that the disputes had arisen or splits occasioned due to the arbitrary or capricious acts of certain office bearers who were not allowing the will of majority to prevail. But in all such cases what the Commission was confronted with was some office bearers occupying or sticking to their offices by the manipulative tactics of postponing or not holding altogether the organisational elections in the party and with some adhoc committees or bodies constituted of some handful of nominated members chosen at the whim and fancy of the leaders at the top. The "Test of Majority" in such adhoc nominated bodies also becomes redundant. Firstly, such adhoc nominated bodies having been formed by the party bosses themselves will naturally consist of the favoured persons who will rarely go against the wishes of those to whom they owe their very existence in those bodies. In the next place, such nominated persons cannot be truly termed the representatives of the primary members who had no say or hand in their appointments and consequently the decisions taken by such adhoc nominated bodies, even if by majority, cannot be regarded as the decisions reflecting the wishes and aspirations of the majority of primary members. Confronted with such situation, the Commission finds itself in a helpless situation to grant relief to those who approach it seeking protection against the tyranny of the privileged few who have been treating the political parties headed by them as their fiefdom."

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107. Be that as it may, the 'Rashtriya Karyakarini', is being referred to by the Petitioner and the respondent as the Apex body, with a numerical universe of 13. As mentioned above, the Rashtriya Karyakarini is a body which is elected by Pratinidhi Sabha which itself is a largely appointed body. Further, the 2018 Constitution of the Party states that the strength of Rashtriya Karyakarini shall be 13 members. However, as per the letter dated 27.02.2018, by way of which details of the last organisational elections were communicated, names of only 9 elected Shivsena Leaders were mentioned and details of the other 4 positions in the Rashtriya Karyakarini was not mentioned therein. 4 Shivsena Leaders were "appointed" by the ShivSena PakshaPramukh, who are required to be elected by the Pratinidhi Sabha during the next organisational elections to become members of the Rashtriya Karyakarini, as mentioned in the Party

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Constitution. The credibility of the numerical count in Rashtriya Karyakarini is being eroded by the smallness of the 'counting universe' being 13. It also is being denuded by an opaqueness in the description of its membership and, it being situated in a non-democratic system.

108. The Commission attempted to apply the "Test of Majority" in the organisational wing. However, it could not come to a satisfactory conclusion inter alia because of the following reasons:

- I. The basis of any organisational composition is the Constitution. Unfortunately, the Constitution which is being professed is not the one which is on record of the Commission. The Commission's record shows 1999 Constitution, whereas the Constitution being alluded to is that of 2018. Non-communication of both, the "material change" of amendment, and of the equally important process of the amendment in the Constitution of the party is non-compliant with the conditions of registration as communicated by the Election Commission of India to Shiv Sena vide its letter No. 56/R/166/89/5147-80 dated 19.10.1989. These conditions *inter-alia* stipulate in para 2, the statutory requirements under section 29 A of RP Act, 1951; and also, clause (xviii) and (xxii) of the "Guidelines prescribed by the ECI in 2010, which have been issued in exercise of powers conferred by Article 324 of the Constitution of India and Section 29 A of the RP Act, 1951
- II. Our assessment manifestly <u>echoes</u> our concern of democratic deficit conveyed in 1999 to Shivsena. The Rashtriya Karyakarini having 14 "elected" members and 5 "nominated" members i.e. 19 members in the 1999 Constitution has been reduced to 13 members in the 2018 Constitution. Even within these reduced 13 members, confusion in pleadings is manifest, as narrated in preceding paragraphs.
- III. The 2018 Party Constitution in Article XI provides that the ShivSena PakhsaPramukh has the power to appoint Sanghatak, Samanvayak, Rajya Sampark Pramukhs, Zilla Sampark Pramukhs, Rajya Pramukhs and Zilla Pramukhs as well to co-opt any member as Leader and Deputy Leader of Shivsena. Article XI(B) of the 2018 Constitution of the Party states that the Rashtriya Karyakarini shall be elected by the Pratinidhi Sabha. Thus, the Rashtriya Karyakarini is a body which is in fact 'elected' by a largely 'appointed' Pratinidhi Sabha. Consequently, this body of the Shivsena, ex-facie does not generate confidence of being a truly democratic body. Hence, numerical strength in such

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body cannot be relied upon with confidence while adjudicating a dispute case under Paragraph 15 of the Symbols Order.

- IV Both the factions mentioned the support of lakhs of primary workers supporting them. But in view of the promptitude and practicality requirement as per Sadig Ali case, the Commission did not go into the actual head count of the primary members.
- V. In the final written submission dated 30.01.2023, the Petitioner claims support of 4 Shivsena Leaders and 6 Shivsena Deputy Leaders besides support of 49 Zilla Pramukh, 87 Vibhag Pramukhs, 40 MLAs, 13 MPs and thus an overwhelming majority of 199 in the Pratinidhi Sabha. The Respondent claims the support of 6 out of 8 surviving Shivsena Leaders, 13 out of 21 surviving elected Deputy Leaders and 7 out of 10 surviving appointed Deputy Leaders, besides all five Secretaries as well as majority of the Zilla Pramukhs, Vibhag Pramukhs, etc.
- VI. On behalf of the Respondent, the preliminary reply dated 07.10.2022 and the reply dated 08.10.2022 to the petition mentions the support enjoyed by him in the Rashtriya Karyakarini as 160/220 and 160/234 respectively. However, the 2018 Constitution, on which he placed reliance, fixes the strength of this body at 13. It has not been stated as to when and how the strength of the Rashtriya Karyakarini was increased. From the above, it is clear that there is lack of clarity on the members in Rashtriya Karyakarini. Neither faction has categorically given the exact composition of the Pratinidhi Sabha
- VII. Even if we take the number of members in the Rashtriya Karyakarini as 13 (presently reduced to 12 after the death of one member), which is provided in the 2018 Party Constitution, the support claimed by the Respondent is only 6, which is not majority. Universe of count is too slender to be a basis of determination in a Party dispute when such Party has lakhs of primary members.
- VIII. Therefore, by the time we reached the stage of assessing the varying and competing claims of exact numbers of support by either group, the foundational basis of holding organisational aspects as fundamental or valuable to Para 15 Disputes is shaken in the present case.

Based on above, we have come to the conclusion that the 'Test of majority' in the organisational wing of the Party is not leading us to a

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satisfactory outcome. Therefore, this Commission will now proceed to examine the 'Test of Majority' in the legislative wing of the Party.

"TEST OF MAJORITY" AND THE LEGISLATIVE WING

109. The very basis of the recognition of a political party is in terms of percentage of votes polled in election to the legislative assembly and or to the House of People and number of elected members. The political party gains recognition on the basis of votes polled and or number of seats as prescribed in Para 6A, 6B and 6C of the Symbols Orders as reproduced below:

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

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

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

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

(iv) At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State; or

(v) At the last general election to the House of the People from the State, or at the last general election to the Legislative Assembly of the State, the candidates set up by the Party have secured not less than eight percent of the total valid votes polled in the State."

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

(i) The candidates set up by the party, in any four or more States, at the last general election to the House of the People, or to the Legislative Assembly of the State concerned, have secured not less than six percent of the total valid votes polled in each of those States at that general election; and, in addition, it has returned at least four members to the House of the People at the aforesaid last general election from any State or States; or

(ii) At the last general election to the House of the People, the party has won at least two percent of the total number of seats in the House of the People, any fraction exceeding half being counted as one; and the party's candidates have been elected to that House from not less than three States; or

(iii) The party is recognized as State party in at least four States."

Further, for a continued recognition of a political party, paragraph 6C of the Symbols Order lays down certain conditions which are as follows:

"6C Conditions for continued recognition as a National or State Party.-

(1) Notwithstanding anything in Paragraph 6A and Paragraph 6B, if a political party recognized as a State Party or National Party fails to fulfil the conditions of Paragraph 6A or, as the case may be, Paragraph 6B, at the next general election to the House of the People or, as the case may be, to the Legislative Assembly of the State, following the general election to the House/Assembly concerned on the basis of which it got recognition (hereinafter referred to as "the next election"), it shall continue to be treated as recognized State Party or National Party, as the case may be.



(2) If a recognised political party continues to be treated as recognised National Party or State Party after the next election to the House of the People or, as the case may be, to the Legislative Assembly of the State under the provisions of sub-paragraph (1), the question whether it shall further continue to be so recognised after any subsequent general election to the House of the People or, as the case may be, to the Legislative Assembly of the State concerned, shall be subject to the fulfilment by the party of the conditions specified in Paragraph-6A or 6B, as the case may be."

110. With respect to the "Test of Majority" in the legislative wing, the Petitioner claims an overwhelming majority support of 40 MLAs out of 55 and support of 13 Members of Parliament (Lok Sabha) out of 19 MPs. Petitioner argues that majority in legislative wing is reflective of the popular link to the

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rank and file of party (who are also voters) to deny the validity of organisational majority test per se. Petitioner further contextualises **Sadiq Ali** framework to state that, there, the organisational test played out because, a priori, the ECI and the Apex Court assessed the organisational structure to be democratic and thus truly reflecting the link with the Party Members. On behalf of the Petitioner, learned counsel, Maninder Singh, takes the argument of "direct" support of electors, further by stating that the conditions of recognition should define this nexus and, thus, Rajya Sabha MPs should not be included in the numerical count.

111. The Respondent Counsel continued the line of argument that (while not contesting the numbers) the test of legislative wing essentially reflects the turbulence in the legislative wing, whose adjudication lies under Schedule X of the Constitution of India.

112. With respect to the legislative wing of the Party, this Commission has to first deal with the contention raised by the Respondent that the affidavits of support filed on behalf of the Petitioner suffer from defects. It has been submitted that the affidavits filed by 12 Lok Sabha MPs in support of the Petitioner were verified at New Delhi but notarized in Mumbai and that handwritten entries therein were not stamped/ verified on any of the affidavits and that residential address of two MPs was mentioned to be same. Furthermore, with respect to the MLAs who filed affidavits in support of the Petitioner, it has been contended that only 39/40 MLAs have filed their affidavits and that among these, 2 have been signed by the same person.

113. In this regard, it is stated that the Commission in **AIADMK Dispute** had, on the issue of technical discrepancies in the supporting affidavits, had held that:

के. एन. भार /K. N. BHAR व. प्रवान सचिव / St. Principal Secretary भारत निर्वाचन आचाना Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road "The Commission is also of the view that for the purposes of Paragraph 15 adjudication under the Symbols Order, it is a quasi-judicial authority and a tribunal within the meaning of Article 136 of the Constitution, as held by the Hon'ble Supreme Court in the case of APHLC (supra). Thus, the provisions of Civil Procedure Code and Evidence Act do not apply with the same rigor as they apply in judicial proceedings before the courts of law. The affidavits under reference have been filed in this case only to show that the deponents of those affidavits support a particular group and not by way of evidence in a judicial proceeding, in this strict sense in which it is understood under the provisions of the Evidence Act and the Civil Procedure Code. It is pertinent to point out here that the Respondents have not questioned the veracity of the statements made by the deponents of those affidavits and have merely pointed out certain technical defects therein. They have not claimed that the deponents of those affidavits are in fact supporting their cause."

114. The aforesaid observation was also reiterated in the **Kerala Congress** (M) **Dispute** wherein one of the factions had also raised issue over the discrepancies in the affidavits filed by the other faction therein.

115. Therefore, the Commission is not required to go into the technicalities of the affidavits, and it only needs to see from the language of the affidavits to arrive at the conclusion that their authors are supporting or swearing allegiance to a faction. In the present case, though the Respondents have raised doubts over certain affidavits filed in support of the Petitioner, they have not contended that any of the deponents therein are in fact supporting the Respondent.

116. On behalf of the Respondent, it was argued at length and submitted in the written documents that the Petitioner has the support of zero Members in the Legislative Assembly of Maharashtra and that in the Lower House of the Parliament on account of disqualification proceedings pending against the legislators supporting the Petitioner. Therefore, the Commission decided to account for support as per the existing status of such legislators. It is also apposite to mention that disqualification proceedings are pending against legislators who are supporting either of the factions. Thus, such a submission on behalf of the Respondent ought to be rejected.

117. As to the actual numerical count, the Petitioner has submitted that he enjoys the support of 40/55 MLAs of the Shivsena Legislature Party in the Maharashtra Legislative Assembly. With respect to the Lok Sabha, the Petitioner has submitted that he initially enjoyed the support of 12/19 MPs with one more MP later on joining the faction led by the Petitioner, thus bringing the total to 13/19 MPs.

118. On behalf of the Respondent, it has been submitted that he enjoys the support of 15/55 MLAs in the Maharashtra Legislative Assembly; 12/12 MLCs in the Maharashtra Legislative Council; 7/19 MPs in the Lok Sabha and 3/3 MPs in Rajya Sabha.

119. With respect to the MPs in the Lok Sabha, it has been clarified that one of the MPs who was initially in support of the Respondent i.e., Sh. Gajanan Kirtikar, MP from 27- Mumbai North Constituency, *vide* letter dated 14.11.2022 informed the Hon'ble Speaker of the Lok Sabha that he endorsed a

resolution dated 18.07.2022 whereby Sh. Rahul Shewala was appointed as leader of Shivsena Parliamentary Party (SSPP), i.e., the group supporting the Petitioner. An affidavit dated 14.11.2022, wherein Sh. Gajanan Kirtikar expressed support in favor of the Petitioner, was also brought on record of the Commission by Sh. Chirag Shah, Ld. Counsel of the Petitioner, *vide* letter dated 14.11.2022. Thus, the support for the Petitioner among the Lok Sabha MPs stands at 13/19 MPs whereas that of the Respondents stands at 06/19 MPs, although affidavits of only 4 MPs are available.

120. On behalf of the Petitioner, it was contended by Sh. Maninder Singh, Ld. Senior Counsel, that for determining a majority in the legislative wing of the Party, only the legislators elected by the people i.e., Members of the Legislative Assembly and Members of Lok Sabha, should be taken into consideration. Heavy reliance was placed by the Ld. Senior Counsel on Paragraph 6A of the Symbols Order to indicate that it was the performance of the Party in the General Elections to the State Legislative Assembly and the Lower House of the Parliament which was the determining factor for grant of recognition and thus, Members of the Upper House in the State Legislature and the Parliament were of no relevance for the purpose of deciding a dispute case of a recognized political party under Paragraph 15 of the Symbols Order. However, this submission was vehemently opposed by Shri Amit Anand Tiwari, Ld. Advocate for the Respondent, who brought Commission's notice to various previous orders passed in disputes relating to political party wherein the Commission had taken into consideration the support enjoyed by rival factions among the Members of Upper House in the State Legislature and the Parliament.

121. This Commission has perused the orders passed by the Commission in **AIADMK Dispute**, **Samajwadi Party Dispute**, **Janata Dal (United) Dispute** and **Kerala Congress (M) Dispute** and in each of these instances, the support of Members of the Upper Houses were considered for determining numerical support. Thus, this Commission does not agree with the contention made on behalf of the Petitioner and holds that Members of Upper Houses have to be considered for adjudicating the present dispute case.

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122. In light of the aforesaid facts, the support enjoyed by the two factions in the legislative wing of the Shivsena if as follow:

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<u>S1.</u> <u>No.</u>	Category of Members	AffidavitsinsupportofthePetitioner	Affidavits in support of the Respondent
1.	Members of Legislative Assembly of Maharashtra	40/55	15/55
2.	Members of Legislative Council of Maharashtra	0/12	12/12
3.	Members of Parliament (Lok Sabha)	13/19	4/19 (Claimed 6)
4.	Members of Parliament (Rajya Sabha)	0/3	3/3

123. A perusal of the aforesaid chart shows that in the State Legislature of Maharashtra, the Petitioner has the support of 40 out of 67 Members (55 MLAs and 12 MLCs) whereas the Respondent has the support of 23 out of 67 Members (claimed 27/67). With respect to the Members of Parliament, the Petitioner has the support of 13 out of 22 Members (19 Lok Sabha MPs and 3 Rajya Sabha MPs) whereas the Respondent has the support of 7 out of 22 Members (claimed 9/22). Thus, the Petitioner enjoys a clear support in the legislative wing of the Party. The outcome of the majority test in legislative wing clearly reflects qualitative superiority of the majority test in favour of the Petitioner.

124. The 40 MLAs, supporting Petitioner, garnered 36,57327 votes out of total of 47,82440 votes i.e ~76% of votes polled in favor of 55 wining MLAs in the general election to the LA, 2019. This contrasts with 11,25113 votes garnered by 15 MLAs whose support is claimed by the Respondents i.e ~ 23.5% of votes polled in favor of winning 55 MLAs. Further, as against 90,49,789, total votes polled by Shiv Sena in General election to the Legislative Assembly of Maharashtra in 2019 (including the loosing candidates), votes polled by 40 MLAs supporting the petitioner come to ~40 % whereas votes polled by 15 MLAs supporting the Respondents come to ~12% of total votes polled by Candidates contesting on symbol of the party in 2019 general election to the Legislative Assembly of Maharashtra.

के. एन. भार /K. N. BHAR व. प्रधान संचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 **125.** Similarly, the 13 MPs supporting Petitioner garnered 74,88,634 votes out of total of 1,02,45143 votes i.e ~73% of votes polled in favor of 18 MPs in general election to the Lok Sabha ,2019. This contrasts with 27,56,509 votes garnered by 5 MPs supporting Respondents (although claimed 6 and affidavits filed by only 4) i.e ~ 27% of votes polled in favor of 18 MPs. Further, as against 1,25,89064, the total votes polled by Shiv Sena in Lok Sabha election, 2019 (including the loosing candidates), votes polled by 13 MPs supporting the petitioner comes to ~59 % whereas votes polled by 5 MPs (claimed 6 whereas affidavits of only 4) supporting the Respondents comes to ~22%.

126. In view of the foregoing arguments made by the Petitioners and the Respondent a contestation can be discerned both with regard to the sequencing of the steps and invoking the normative significance of each test in relation to the other. Of the 3 tests laid down in Sadiq Ali; i.e. "Aims and Objects, "Test of Party Constitution" and "Test of Majority", it is the last test which consists of test of majority in organisational wing and legislative wing and is capable of yielding a numerical basis. In this regard it is noted that ECI has found that the organisational aspects are invariably falling short, in the absence of normative clarity a priori. Inner workings of the Political Parties which are to be transparent and well disclosed to rank & file and, to the citizens at large, should be 24x7 work in progress. Unfortunately, it not being so, creates a crisis of credibility in assessing claims of positional support. In comparison the legislative wing tests yield an immediately reliable outcome. The status of being a Lok Sabha MP or, a Rajya Sabha MP or, an MLA or, an MLC, follows from The RP Acts 1950 & 51. Thus, it, as a starting universe of a comparative count, posits itself as of highest quality evidentiary value.

127. The Commission has also assessed the issue whether the organisational wing and the legislative wing and the respective tests are capable of being viewed so distinctly as some times they are posited in the arguments. From the very scheme of the R P Act, 1951 and the provisions of the Symbols Order, it is evident that the relationship between the organisational and the legislative wing of any political party is both conjoint and dichotomous. In the act of registration, the organisation structure is the starting point. In the act of recognition, it is the electoral performance. Further, from the above view point, any interpretation which does not see conjointness in the organisation and legislative manifestation of a Political Party is not immediately convincing.

128. Therefore, it is the considered assessment of the Commission that while numerical yields are relevant, but each category of test cannot be seen in a

के. एन. भार /K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road नई दिल्ली-110001/ New Delhi-110001 standalone silo. Plain reading of para 15 mandates the Commission to consider "**all** the available facts and circumstances of the case".

129. The precedents reflect the cojointness and wholesome reading of the tests. As stated by the Commission in Dispute in the matter of **Brahmananda Reddy** (supra)....-:

"Once again the Commission cannot resist the temptation to draw attention to the observations made by the Supreme Court in the APHLC case (which are very much relevant to the present case). As regards the question of test being applied generally in respect of the determination of any specific matter, the Supreme Court in the APHLC case said "the tests are not exhaustive in all cases. It is also well settled that all the tests laid down may not be present in a given case. While some tests may be present, other may be lacking". From this, it could easily be inferred that it is not humanly possible to lay down any particular test as a litmus test which and which alone would govern a matter which has to be determined by a judicial or a quasi-judicial body or authority."

130. The holistic view of the facts, precedents and court rulings have broadly revealed that:

- I. No serious contestation on facts by either side of numerical outcome of legislative wing test has emerged.
- II. There is 'democratic deficit' in the amended Constitution, the process of its amendments and its working.
- III. That respective claims of numerical majority in organisational wing by both factions is not satisfactory.
- IV. That combined reading of the respective numerical counts in the present case, more reliability emerges in the legislative wing.
- V. That within the number count, overwhelming numerical superiority of Petitioner in legislative wing is categorically verifiable. The numerical count included <u>all</u> MPs, MLAs and MLCs.

131. Therefore, through a conjoint and wholesome reading of all aspects, outcome of the tests and embedding the democratic imperative, there is a recognisable basis in the factual material of this dispute, to discern the outcome of legislative wing test as the fulcrum, reflecting both, the fact of the split and, majority.

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Conclusion:

132. The Commission having elaborately dealt with all the aspects of maintainability of the petition, the fact of split in the party, considered and applied three tests as envisaged in **Sadiq Ali**. After analyzing the aforesaid submissions and issues so framed (A to D), discussed at length in the preceding paras, and taking the holistic view, this Commission is of the considered view that:

- I. The present proceedings are clearly maintainable; both as substantially fulfilling the matrix laid down in Paragraph 15 of the Symbols Order in terms of the facts made available to the Commission, and the impact of pendency of "disqualification proceedings" having been comprehensively argued in the Hon'ble High Court and Hon'ble Supreme Court. Further, the jurisdiction of the Commission in deciding disputes under Paragraph 15 of the Symbols Order is separate and independent from that of the jurisdiction of the Hon'ble Speaker with respect to disqualification proceedings under the Tenth Schedule and does not overlap (as dealt in issue A);
- II. Split has occurred in the Shivsena Party (as dealt in issue B);
- Of the three tests mentioned in the Sadiq Ali case (supra) for the purpose III. of adjudicating the present dispute, firstly the 'Test of Aims and Objects of the Party Constitution' was considered. Petitioner asserted that it is the Respondent who, in the act of forming a coalition with Parties of different ideology, has deviated from the "Aims & Objects" of the Party and, that, the same formed the core point of disagreement and disappointment in the rank and file, and that is the genesis of the present dispute. The Respondent's claim was that the ideology of the Shivsena, as described in Article V of the Party Constitution, is that "the Party shall be committed to rational secularism, socialism and national integrity" and that there was no departure from following such ethos by the Respondent or the Party. It was seen that neither of the two factions had made any significant averments on the application of this test and thus, the same was found to be inapplicable in the circumstances of the present case (as dealt in issue C);
- IV. While applying the "Test of Party Constitution",
 - a. The Commission examined the 2018 Constitution of the party in detail. Non-communication of both the "material change" of

amendment and of the equally important process of the amendment in the Constitution of the party is non-compliant with the conditions of registration as communicated by the Election Commission of India to Shiv Sena vide its letter No. 56/R/166/89/5147-80 dated 19.10.1989. These conditions *interalia* stipulate in para 2, the statutory requirements under section 29 A of RP Act, 1951; and also, clause (xviii) and (xx ii) of the "Guidelines prescribed by the ECI in 2010, which have been issued in exercise of powers conferred by Article 324 of the Constitution of India and Section 29 A of the RP Act, 1951;

- b. The amended Constitution of 2018 is not on record of the Commission;
- C. While applying the "Test of Party Constitution", the Commission found that the Party Constitution on which respondent was placing strong reliance is undemocratic;
- d. The complete list of office bearers of various bodies was not provided to the Commission, whenever elections were held or appointments were made;
- e. The amendments in the Constitution in 2018 had undone the act of introducing democratic norms in the Party Constitution of 1999 and the functioning of Shivsena, brought by Late Balasaheb Thackeray at the insistence of the Commission. The amended Constitution of 2018 displaces the agreed' Constitution of 1999, that too without a confirmation or scrutiny of the amendment process itself having been followed diligently;
- f. The Constitution of 2018, confers widespread powers of making various organisational appointments on a single person. Thus, the undemocratic norms of the original Constitution of Shivsena, which was not accepted by the Commission in 1999 have been brought back in a surreptitious manner further making the party akin to a fiefdom;
- g. Further, the 2018 Constitution, by way of its plain reading on the vital axis of remedy /modality of dissent, in such factual circumstances, stifles all options of rival group(s) in its very formulation.
- h. Article XI(B) of the 2018 Constitution of the Party states that the Rashtriya Karyakarini shall be elected by the Pratinidhi Sabha. Thus, the Rashtriya Karyakarini is a body which is in fact 'elected'

एन. भार/K. N. BHAR प्रमान भाषिव/Sr. Principal Secretary रित निर्वाचन आयोग action Commission of India षित सरन / Nirvachan Sadan पिक रोड / Ashoka Road दिली-110001/ New DelhI-110001 by a largely 'appointed' Pratinidhi Sabha. To sum up the situation, it is apt to quote the observation of the Commission conveyed to Shiv Sena in the year 1999 through the then Chief Electoral Officer, Maharashtra, on the draft amendments:

"To put in nutshell, the party Constitution envisages the President nominating the Electoral College that is to elect him. This goes against the spirit of democracy and negates the very purpose for which the entire exercise was carried out".

The paradox of India being the world's largest democracy and its political field being occupied by some Parties which are being treated as fieldoms is disconcerting. For a truly functioning democracy, it is important that one of the key stakeholders i.e., the political parties are run in a democratic manner and this in turn can be ensured only if the Constitution being adopted by them does not allow concentration of power in the hands of a few. Therefore, any reliance on the "Test of Party Constitution" for determining the present dispute case will be undemocratic and catalytic in spreading such practices across parties (as dealt in issue C);

V. It is reiterated that as per the 2018 Constitution of the Party, the Rashtriya Karyakarini is the apex representative body of the Shivsena with strength of 13 members. However, on examining its composition, it was found that the said body was elected by a largely appointed Pratinidhi Sabha. Further, neither of the faction provided details of the actual existing strength of the body. Similarly, the list of office-bearers as communicated to the Commission *vide* letter dated 27.02.2018 does not reflect the details of the members of the Pratinidhi Sabha. Thus, the Test of Majority in the organisational wing could not yield determinable or "satisfactory" finding due to reasons specifically detailed in paragraph 109;

VI. Thus, in the circumstances of the case, the Commission was once again forced to rely upon the "Test of Majority" in the legislative wing for adjudicating the present dispute. The very basis of the recognition of a political party is in terms of percentage of votes it polled in elections to the legislative assembly and or to the House of People and number of elected

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members as per the provisions of para 6 A, 6B and 6 C of the Symbols Order. It was found that:

- a) The outcome of the majority test in legislative wing clearly reflects qualitative superiority of the majority test in favour of Petitioner The 40 MLAs, supporting Petitioner, garnered 36,57327 votes out of total of 47,82440 votes i.e ~76% of votes polled in favor of 55 wining MLAs in the general election to the LA, 2019. This contrasts with 11,25113 votes garnered by 15 MLAs whose support is claimed by the Respondents i.e ~ 23.5% of votes polled in favor of winning 55 MLAs. Further, as against 90,49,789, total votes polled by Shiv Sena in General election to the Legislative Assembly of Maharashtra in 2019 (including the loosing candidates), votes polled by 40 MLAs supporting the petitioner come to ~40 % whereas votes polled by 15 MLAs supporting the Respondents come to ~12% of total votes polled by Candidates contesting on symbol of the party in 2019 general election to the Legislative Assembly of Maharashtra
- b) Similarly, the 13 MPs supporting Petitioner garnered 74,88,634 votes out of total of 1,02,45143 votes i.e ~73% of votes polled in favor of 18 MPs in general election to the Lok Sabha ,2019. This contrasts with 27,56,509 votes garnered by 5 MPs supporting Respondents (although claimed 6 and affidavits filed by only 4) i.e ~ 27% of votes polled in favor of 18 MPs. Further, as against 1,25,89064, the total votes polled by Shiv Sena in Lok Sabha election, 2019 (including the loosing candidates), votes polled by 13 MPs supporting the petitioner comes to ~59 % whereas votes polled by 5 MPs (claimed 6 whereas affidavits of only 4) supporting the Respondents comes to ~22%.
- c) While the application of this test in the legislative wing of the Shivsena has given a clear answer as to which faction is enjoying majority support, the application of this test in the organisational wing of the Party is found to be yielding indeterminable and non-conclusive outcome. Therefore, through a conjoint and wholesome reading of all aspects, outcome of the tests and embedding the democratic imperative, there is a recognisable basis in the factual material of this dispute, to discern the outcome of legislative wing test as the fulcrum, reflecting both, the fact of the split and, majority (as detailed in issue D).

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- **I.** The party name "Shiv Sena" and the party symbol "Bow and Arrow" will be retained by the Petitioner faction;
- **II.** The name of "Balasahebanchi ShivSena" and symbol of "Two Swords and Shield", which was allotted to the petitioner by way of the interim order dated 11.10.22 of the Commission in this dispute case will henceforth be frozen with immediate effect and will not be used;
- **III.** The Petitioner is directed to amend the 2018- Constitution of the Party in line with section 29 A of the RP Act, 1951 and extant guidelines issued by the Commission on registration of political parties inter –alia conforming to internal democracy;
- **IV.** In view of the ongoing bye-elections for 205- Chinchwad, and 215-Kasba Peth of Maharashtra Legislative Assembly, the Respondent faction, which was allotted the name of "ShivSena (Uddhav Balasaheb Thackeray)" and symbol of "Flaming Torch" as per the interim order dated 10.10.22 of the Commission in this dispute case, is hereby allowed to retain the said name and the symbol till completion of the said bye-elections.

134. However, before parting with the present order, it is relevant herein to recall the observations of the then Chief Election Commissioner, noted in the order passed by the Commission in **Janata Dal Dispute** (Order dated 16.10.1994 passed in Dispute Case No. 1 of 1994, In Re: Janta Dal) wherein the importance of inner party democracy in the context of disputes under Symbols Order came to discussed in the following words:

"In almost all the cases of disputes in political parties with which I had the occasion to deal, allegations have been made that the disputes had arisen or splits occasioned due to the arbitrary or capricious acts of certain office bearers who were not allowing the will of the majority to prevail. But in all such cases what the Commission was confronted with was some office bearers occupying or sticking to their offices by the manipulative tactics of postponing or not holding altogether the organisational elections in the party and with some adhoc committees or bodies constituted of some handful of nominated members chosen at the whim and fancy of the leaders at the top. The "Test of Majority" in such adhoc nominated bodies



also becomes redundant. Firstly, such adhoc nominated bodies having been formed by the party bosses themselves will naturally consist of the favoured persons who will rarely go against the wishes of those to whom they owe their very existence in those bodies. In the next place, such nominated persons cannot be truly termed the representatives of the primary members who had no say or hand in their appointments and consequently the decisions taken by such adhoc nominated bodies, even if by majority, cannot be regarded as the decisions reflecting the wishes and aspirations of the majority of primary members. Confronted with such situation, the Commission finds itself in a helpless situation to grant relief to those who approach it seeking protection against the tyranny of the privileged few who have been treating the political parties headed by them as their fiefdom.

49. [...]. While there is an obligation on the part of all registered political parties to abide by their party Constitution, it is even more so on the part of the recognised parties to scrupulously observe the same, particularly in the matter of their democratic functioning. Apart from the said obligation under their party Constitution, the concept of "noblesse oblige" casts a sacred duty upon such recognised parties, which are placed at a higher pedestal even by the law in certain respects, to ensure their functioning on healthy democratic norms to which they bind themselves through the covenant of a written Constitution at the time of seeking registration under section 29A of the Representation of the People Act, 1951.....".

135. The requirement for a written Constitution of political parties and an undertaking to the effect that such Constitution adheres to the norms of democracy prescribed in the Constitution of India is meant to promote inner party democracy. The need for such democratic organisational structure of a political party is often realised not in the heydays but when an internal dispute arises. An organisation ought to have its own mechanism to deal with internal disputes. A political organisation that is performing the difficult role of aggregating the often-differing aspirations of the people that it seeks to represent by democratic contest ought to give much more importance to internal democratic structures which have the ability to resolve disputes democratically. The Constitutions of political parties ought to provide for free, fair and transparent elections to the posts of office bearers and a further free and fair procedure for the resolution of internal disputes. These procedures ought to be difficult to amend and should be amendable only after ensuring a larger support of the organisational members for the same. The very survival and sustenance of the party depends on this. Yet, the party Constitutions are

के. एन. भार / K. N. BHAR व. प्रधान सचिव / Sr. Principal Secretary भारत निर्वाचन आयोग Election Commission of India निर्वाचन सदन / Nirvachan Sadan अशोक रोड / Ashoka Road अशोक रोड / Ashoka Road तर्ह दिल्ली-110001/ New Delhi-110001 often amended to allow for its self-destruction by obliterating the internal democratic mechanisms.

136. In the absence of such democratic internal structures, internal disputes are bound to create rifts and factions leading to determination of the question by the Election Commission under the Symbols Order. However, by the time a dispute comes to the Commission, the Party Constitutions are often seen to have been mutilated to undemocratically appoint people from a coterie as office bearers without any election at all. Such party structures fail to inspire confidence of the Commission and the Commission is forced to ignore the numerical strength of opposing factions in the Organisational Wing altogether despite being conscious of its importance and role as the building block of the party. This seemingly unjust situation is often a creation of the party itself which failed to create a robust Constitution that provides for democratic structures within the party and also to protect the Constitution when it was amended to allow undemocratic methods of appointments.

137. It is indeed paradoxical that the detailed public scrutiny of the inner workings of a Political Party is occasioned when the lens of Para 15 of Symbols Order is invoked. Ideally, and as a moral imperative, flowing from the public trust & confidence that both the electors & their own rank & file places in a Political Party, qua an organisation, in itself should be a compelling basis for all National & State recognized parties to regularly disclose to public at large the key aspects of its inner party functioning, such as organisational details, holding of elections, being compliant with the conditions of registration, to follow the extant guidelines prescribed by the ECI for political parties and to ensure that their Party Constitution reflects democratic ethos and principles of inner party democracy and to upload the copy of Constitution and list of office bearers on their respective websites.

ANUP CHANDRA PANDEY (ELECTION COMMISSIONER)

AJIV KUMAR

(CHIEF ELECTION COMMISSIONER)

/ ARUN GOEL (ELECTION COMMISSIONER)

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PLACE: New Delhi

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