DR. P. NALLA THAMPY TERAH

v.

UNION OF INDIA & ORS.

May 8, 1985

[Y.V. CHANDRACHUD, CJ, P.N. BHAGWATI, D.A. DESAI, AMERENDRA NATH SEN AND V. BALAKRISHNA ERADI JJ.]

Constitution of India 1950, Art. 14 & Representation of People Act 1951, S. 77 (1), Explanation 1—Scope of—Explained—Political parties spending unlimited money in election of their party candidates—conferment of power—Whether violative of Art. 14 and unconstitutional.

Conduct of Election Rules, 1961, Rule 90. Election—Expenditure—Incurrence of—Applicability of ceiling—whether prevalent.

Section 77(1) of the Representation of the People Act, 1951 provides that every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent, between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive. Section 77(3) provides that the total of the said expenditure shall not exceed such amount as may be prescribed by the Rules framed under the Act. In *Kanwarlal Gupta* [1975] 2 SCR 259 the Court observed that when the political party sponsoring a candidate incurs expenditure *in connection with his election*, as distinguished from expenditure *on general party propaganda*, and the candidate knowingly takes advantage of it or participates in the programme or activity or fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorised the political party to incur such expenditure and he cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure, but his political party has done so. In order to get over the judgment in *Kanwarlal Gupta*, the Representation of the People (Amendment) Ordinance, 1974 was issued which was replaced by the Representation of the People (Amendment) Act, 1974. Section 2 of the Amending Act added two Explanations to section 77(1). Explanation 1 provides that notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorised by the candidate or by his election agent for the purpose of sub-Section (1) of Section 77.

In the writ petition under Art. 32 the petitioner challenged the validity of Explanation 1 to section 77(1) of the Representation of the People Act, 1951 on the grounds: (i) that it enables political parties to spend unlimited monies for the election of the candidates sponsored by them, (ii) that this is arbitrary and violative of Art. 14 because it sanctions serious discrimination between one political party or individual and another on the basis of money power, (iii) that it not only permits but encourages and legitimises the influence of big money in the electoral process and thus militates against the fairness and purity of the electoral process, (iv) that it denies to the citizen right to have full and effective participation in the electoral process and (v) that it nullifies the salutary object of imposing a ceiling on a candidate's expenditure.

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On behalf of the respondent—Union of India it was contended: (i) that Explanation 1 to section 77(1) of the Act was introduced to restore the law as expounded in the decisions of this Court prior to the decision in *Kanwarlal Gupta*, (ii) that the expenditure incurred by political parties in connection with the election of their candidates do not fall within the mischief of section 77(1) read with section 123(6) of the Act, (iii) that Explanation 1 is not violative of Art. 14 and (iv) that legislative policies bearing upon matters governing elections are not open to judicial review.

C

D

Dismissing the Writ Petition and C.M.Ps.,

HELD : 1. Explanation 1 to section 77(1) of the Representation of the People Act, 1951 neither suffers from any constitutional infirmity nor it violates Art. 14. Explanation 1 classifies all political parties or associations in one group and confers upon them the same or similar advantage. Political parties or, politically motivated associations or bodies of persons or, individuals interested in political happenings, are characterised by common attributes, the dominant attribute being that they engage themselves in activities of a political nature. Elections constitute the core of such activities. A classification of this nature bears reasonable relationship with the object of the statute that expenses incurred by those who fall within the particular group should not be regarded as expenditure incurred or authorised by the candidates or his election agent. Classification has to be broadly reasonable in order to sustain the challenge of unconstitutionality. One cannot dissect that process and discover shades within shades to nuffify it on the ground of inequality. [636 G-H; 637 A; C]

E

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2. Explanation 1 to section 77(1) of the Act says that a political party or any other association or any individual, other than the candidate or his election agent, can incur expenses, without any limitation whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election incurred or authorised by the candidate or by his election agent for the purpose of section 77(1). [636 E-F]

G

3. As independent candidate who contests an election without the support of a political party, is at a considerable disadvantage as compared with candidates supported by political parties. But, that does not violate the rule of equality. It is not the election law which creates such inequalities. Inequalities

H

exist apart from that law and are implicit in the unequal positions in which the citizens find themselves. What the law does is to allow, in an equal measure, all political parties, associations or bodies or persons or individuals (other than the candidate or his election agent) to incur expenses in connection with the election of candidate, which need not be included in the return of election expenses which the candidate is required to file. [637 C-E]

4. Preferring political parties for exclusion from the sweep of monetary limits on election expenses, is not so unreasonable or arbitrary as to justify the preference being struck down upon that ground because the statute neither makes the affluence of a political party and electoral standard for acquiring eligibility prescribed by the Explanation nor is it an unwise policy to ensure reasonable reduction in the number of contesting candidates, which can be done by conferring special privileges upon political parties. In any democratic system of government political parties occupy a distinct and unique place. It is through them that the people atttempt to voice or ventilate their grievances. Considering the power which they wield in the administration of governmental affairs, a special conferment of benefits on them in the matter of modalities governing the election process cannot be regarded as unreasonable or arbitrary. [637 G-H; 638 B-C]

5. In *Kanwarlal Gupta* the Court drew a distinction between the expenses incurred by a political party specifically in connection with the election of a particular candidate and the expenditure incurred by it on general party propaganda, the latter not being includible in the return of election expenses which the candidate has to file. The rationale of that decision is that by reason of the important position which political parties occupy they are entitled to incur expenditure for projecting their programmes and popularising their policies. Explanation I obliterates the dividing line drawn in *Kanwarlal Gupta* between expenses incurred 'in connection with' the election of a particular candidate and expenses incurred on 'general party propaganda'. All persons, except the candidate and his election agent, are now free to incur expenditure of the former kind too, without the constraints of ceiling imposed upon election expenditure by section 77(3) read with Rule 90 of the Conduct of Election Rules, 1961. [638 C-E]

6. Whether Explanation I restores the law as it was understood before *Kanwarlal Gupta* or, it makes an innovation is irrelevant for deciding upon its validity. Every law, whether restorative or innovative, has to be tested on the touchstone of the Constitution. [638 G]

7. Election laws are not designed to produce economic equality amongst citizens. They can, at best, provide an equal opportunity to all sections of society to project their respective points of view on the occasion of elections. [639 B]

8. If it is correct that different political parties have been treated equally though they are situated unequally, or that individuals have been discriminated against either *inter se* or in relation to political parties and associations, the only method which would measure up to the required constitutional standard is

the one in which the State would have to allocate funds from its own exchequer in order to enable the various candidates to contest elections. That would be the fairest form of fairness. [639 D-E]

9. Explanation I would not become unconstitutional for the reason that it allegedly renders the main provisions in section 77(1) nugatory by taking away with one hand what is given by the other. The Explanation does not denude the section of its meaning and make it purposeless. Section 77(1) deals with the expenditure 'incurred or authorised by' a candidate or his election agent, in connection with the election. It is obligatory to keep a separate and correct account of such expenditure. Explanation I deals with the expenditure incurred or authorised by a political party or any other association or body of persons or by an individual other than the candidate or his election agent. It is not obligatory for the candidate or his election agent to keep a separate and correct account of such expenditure, because such expenditure is not incurred or authorised by the candidate or his election agent and that such expenditure cannot be deemed to be incurred or authorised by the candidate or his election agent. Section 77(1) on the one hand and Explanation 1 on the other, deal with two different situations wherefore, the latter cannot render the former meaningless. [639 F-H; 640 A-B]

10. If an expenditure which purports to have been incurred, fo rexample, by a political party has in fact been incurred by the candidate or his election agent, Explanation 1 will not be attracted. It is only if the expenditure is in fact incurred or authorised by a political party or any other association or body of persons or by an individual, (other than the candidate or his election agent) that the Explanation will come into play. For seeking protection under Explanation 1 it must be shown that the source of the expenditure incurred was not the candidate or his election agent. Explanation 1 does not create a fiction. It deals with the realities of political situations. It does not provide that that expenditure in fact incurred or authorised by a candidate or his election agent, shall not be deemed to be incurred or authorised by them, if the amount is defrayed by a political party. The object of the Explanation is to ensure that the expenditure incurred, by a political party on its own, without using the funds provided by the candidate or his election agent shall not be deemed to be expenditure incurred or authorised by the candidate or his election agent. If the expenditure is incurred from out of the funds provided by the candidate or his election agent section 77(1) and not Explanation 1 would apply. [640 C-H]

11. The reason why the expression 'shall not be deemed to be' is used in Explanation 1 is that Parliament wanted to get over the effect of the judgment of this Court in *Kanwarlal Gupta's* case. Similalry, the expression 'shall not ever be deemed to have been' is used in the Explanation, to get over the effect of that judgment retrospectively, except to the extent mentioned in clauses (a) and (b) of the Proviso to the Explanation. [641 B-C]

12. The limited range of Explanation 1 ought not to be enlarged. The ceiling placed on election expenses is a basic commandment of the Act, not a

pious edict. Its object is to keep a check on the expenditure incurred by candidates on their own elections, directly or through their election agents. They cannot be permitted to resort to subterfuges in order to evade the restraint imposed by section 77(1) and 77(3) of the Act. Homage to the principle of free and fair elections has to be real, not formal. [641 C-D]

13. The Court is not to lay down policies in matters pertaining to elections. The Court cannot negate a law on the ground that it does not approve of the policy which underlies it. The Court might have its own preferences and perceptions but, they cannot be used for invalidating laws. [641 E-F]

14. The right to contest an election or to vote at it is not a Common Law right. [641 G]

15. The question as regards the constitutional validity of Explanation 1 has to be determined regardless of the consideration as to whether the said Explanation restores the law as it stood before the decision of thts Court in *Kanwarlal Gupta* or whether it introduces a new provision altogether. [642 E]

16. Influence of big money on the election process is regarded universally as an evil of great magnitude.

Kanwar Lal Gupta v. *Amar Nath Chawla*, [1975] 2 SCR 259 explained.

Rananjaya Singh v. *Baijnath Singh* [1955] 1 SCR 671; *Ram Dayal* v. *Brijraj Singh* [1970] 1 SCR 530; *Magraj Patolia* v. *R.K. Birla* [1971] 2 SCR 118; *Smt. Indira Gandhi* v. *Raj Narain* [1976] 2 SCR 347; *Lok Sabha Debates* Vol. XLVII, Nos. 21-27, 12-20 December, 1974 page 279; *Vatal Nagaraj* v. *R. Dayanand Sagar* [1975] 2 SCR 384, 399; *Tata Iron & Steel Co. Ltd.* AIR 1958 Bombay 155; *Indian Iron and Steel Co. Ltd* AIR 1958 Calcutta 234; *Report of the Santhanam Committee on Prevention of Corruption* 1962, Section 11, 'Social Climate' Paragraph 11.5; *Report of the Expert Committee on 'Companies and MRTP Acts'* 1978, Chapter XIII pages 99-104; *Jyoti Basu* v. *Debi Ghosal* [1982] 3 SCR 318, 326, 327; *Halbury's Law of England*, Fourth Edition, Volume 15, Paragraph 721, referred to.

ORIGINAL JURISDICTION : Writ Petition No. 1177 of 1979.

Under Article 32 of the Constitution of India.

Soli J. Sorabjee, Harish N. Salve and *Laxmi Kant Pandey* for the Petitioner.

K. Parasaran, Attorny General, *T.S. Krishnamurty Iyer* and *Miss A. Subhashini* for the Respondents.

The Judgment of the Court was delivered by

CHANDRACHUD C.J. The petitioner, Dr. P. Nalla Thampy Thera, is not an intermeddler or busy body. He is a public-spirited citizen whose motives in filing this petition are to be admired even if his contentions may not merit acceptance. By this petition under Article 32 of the Constitution, he challenges the validity of Explanation 1 to section 77(1) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") which gives a *carte blanche* to political parties to spend unlimited monies for the election of the candidates sponsored by them. In practice, insofar as our little knowledge of political affairs goes, sky is the limit for such expenditure : Some call it millions, some call it billions.

The particular provision of the statute which is under consideration here, has a short, though significant history. A judgment of this Court led to its enactment. That judgment, to which one of us, Bhagwati J , was a party, was delivered on October 3, 1974 in *Kanwar Lal Gupta* v. *Amar Nath Chawla.*(1) Section 77(1) of the Act, as it stood then, read thus :

> "Every cadidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent, between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive."

Section 77(3) provides that the total of the said expenditure shall not exceed such amount as may be prescribed, that is to say, the amount prescribed by the Rules framed under the Act. The expenditure prescribed for a Parliamentary constituency in the Union Territory of Delhi was Rs. 10,000. The question before the Court in *Kanwar Lal Gupta* was whether the successful candidate, Amar Nath Chawla, had incurred or authorised expenditure in connection with his election exceeding the ceiling of Rs. 10,000. Noting that what section 77(1) prohibited was not only the incurring but also the authorising of excessive expenditure and that such authorising may be implied or express, the Court observed :

(1) [1975] 2 S.C R 259.

"When the political party sponsoring a candidate incurs expenditure *in connection with his election*, as distinguished from expenditure *on general party propaganda*, and the candidate knowingly takes advantage of it or participates in the programme or activity or fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorised the political party to incur such expenditure and he cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure, but his political party has done so. A party candidate does not stand apart from his political party and if the political party does not want the candidate to incur the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate. The same proposition must also held good in case of expenditure incurred by friends and supporters directly in connection with the election of the candidate. This is the only reasonable interpretation of the provision which would carry out its object and intendment and suppress the mischief and advance the remedy by purifying our election process and ridding it of the pernicious and baneful influence of big money."

On November 7, 1974, Bill No. 104 of 1974 was introduced in the Lok Sabha in order to get over the judgment in *Kanwar Lal Gupta*. The Statement of Objects and Reasons of that Bill reads thus :

"STATEMENT OF OBJECTS AND REASONS

Section 77 of the Representation of the People Act, 1951 provides that the total of the expenditure in connection with an election incurred or authorized by the candidate or his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof shall not exceed such amount as may be prescribed. Rule 90 of the Conduct of Elections Rules, 1961, seeks to lay down the maximum election expenses for a parliamentary constituency and an Assembly constituency in respect of

various States and the Union territories. Clause (6) of section 123 of the Representation of the People Act has specifically included the incurring or authorizing of expenditure in contravention of section 77 as a corrupt practice, which, if established, would not only vitiate the election, but also result in disqualifying the candidate for a period of six years under section 8A of the said Act.

In the Election Law, the emphasis has been on imposing a curb on an individual incurring expenditure in connection with his election in excess of the prescribed limit. The provision contained in section 77 of the Act is very specific in this respect and the intention that the curb is on the expenditure incurred or authorized by the candidate has found support in the judicial pronouncements on the point. The expression "incurred or authorized" had not been construed so as to bring within its purview the expenditure incurred by a political party in its campaign or by any person other than the candidate unless incurred by such third person as the candidate's agent. In other words, the provisions of section 77 and clause (6) of section 123 have been intended and understood to be restraints on the candidate's election expenditure and not on the expenditure of a political party.

However, in the recent case of *Kanwar Lal Gupta* v. *A.N. Chawla and Others* (Civil Appeal No. 1549 of 1972 decided on 3rd October, 1974), the Supreme Court has interpreted the aforementioned expression "incurred or authorized" as including within its scope expenses incurred by a political party or other person referred to above. In view of the effect which such interpretation might have particularly with reference to the candidates against whom election petitions are pending, it became urgently necessary to clarify the intention underlying the provisions contained in section 77 of the Representation of the People Act, 1951, namely, that in computing the maximum amount under that section any expenditure incurred or authorized by any other person or body of persons or political parties should not be taken into account. As Parliament was not in session, the President

promulgated on 19th October, 1974, the Representation of the People (Amendment) Ordinance, 1974.

The Bill seeks to replace this Ordinance."

By section 2 of the Amending Act, which is called. The Representation of the People (Amendment) Act, 1974, two Explanations were added to section 77(1), out of which Explanation 1 is directly relevant for our purpose. Those Explanations read thus :

"*Explanation 1.*—Nothwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the purposes of this sub-section :

Provided that nothing contained in the Explanation shall affect—

(a) any judgment, order or decision of the Supreme Court whereby the election of a candidate to the House of the People or to the Legislative Assembly of a State has been declared void or set aside before the commencement of the Representation of the People (Amendment) Ordinance, 1974;

(b) any judgment, order or decision of a High Court whereby the election of any such candidate has been declared void or set aside before the commencement of the said Ordinance if no appeal has been preferred to the Supreme Court against such judgment, order or decision of the High Court before such commencement and the period of limitation for filing such appeal has expired before such commencement.

Explanation 2. — For the purposes of *Explanation 1*, "political party" shall have the same meaning as in the Election Symbols (Reservation and Allotment) Order, 1968, as for the time being in force." A

The argument of Mr. Sorabjee, who appears on behalf of the petitioner, may be summed up thus : (1) It is the essence of fair elections that any individual or any political party, howsoever small, should be able to contest an election on a footing of equality with any other individual or political party, howsoever rich and well financed it may be, and no individual or political party should be able to secure an advantage over others by reason of its superior financial strength. (2) The rationale of imposing a limit on expenditure incurred or authorised by a candidate in an election is to eliminate, as far as possible, the pernicious influence of big money in the electoral process which leads to the worst form of political corruption. Limitation on election expenditure is imperative for ensuring the purity of the electoral process. (3) It is indisputable that availability of large funds and resources to an individual backed by a political party supporting him would confer greater and undue advantage on him over an individual who is without any links with affluence or wealth. (4) Such a consequence is anti-democratic because it denies to the citizen the right to have full and effective participation in the electoral process. (5) Explanation 1 to section 77(1) strikes at the very heart of democracy inasmuch as is not only permits but encourages and legitimises the influence of big money in the electoral process and thus militates against the fairness and purity of the electoral process. Furthermore, it makes a mockery of and nullifies the salutary object of imposing a ceiling on a candidate's expenditure, which provision is a beneficent provision enacted in the interests of purity and genuineness of the democractic process. The impugned provision, far from suppressing the mischief of baneful influence of big money directly promotes it and thereby sullies the purity of the electoral process. Consequently, it goes against the 'basic requirement of the Constitution' and violates a basic and essential feature of the Constitution and, consequently, is arbitrary. (6) The impugned provision is further violative of article 14, because it sanctions serious discrimination between one political party or individual and another on the basis of money power. It makes the wealth of affluence of the political party supporting the candidate the decisive factor in the outcome of elections. It introduces wealth and affluence as a measure of a candidate's qualifications or prospects of B C D E F G H

success, which is to 'introduce a capricious or irrelevant factor'. (7) Once the franchise is granted to the electorate, provisions may not be made nor conditions imposed which are inconsistent with article 14 of the Constitution, irrespective of the fact that the right of franchise is not a fundamental right guaranteed in Part III of the Constitution.

Shri Krishnamoorthy Iyer, who appears on behalf of the Union of India, contends that Explanation 1 to section 77(1) of the Act was introduced in order to restore the law as expounded in the decisions of this Court, prior to the decision in *Kanwar Lal Gupta*. Those decisions, according to learned counsel, are : *Rananjaya Singh* v. *Baijnath Singh*(1), *Ram Dayal* v. *Brijraj Singh*(2) and *Magraj Patolia* v. *R.K. Birla*(3). It is urged that though these decisions have been considered in *Kanwar Lal Gupta*, the Court was not right in holding that the view taken in those decisions was not at variance with the view taken by it. In support of this argument, our attention was drawn to the observations made by Beg J. in *Smt. Indira Gandhi* v. *Raj Narain*(4) to the following effect :

> "After examining the catena of cases, I think, with great respect, that the decision of this Court in *Kanwar Lal Gupta's* case could be understood to point in a direction contrary to that in which the previous cases were decided. Hence, it appears to me that the amendment made by Act 58 of 1974 by adding the Explanation 1 to Section 77 of the Act could be justified as merely an attempt to restore the law as it had been understood to be previous to the decision of the Court in *Kanwar Lal Gupta's* case."

Counsel also relies on various decisions of the High Courts in which it was held, prior to the introduction of Explanation 1 to section 77(1), that the expenses incurred by political parties in connection with the election of their candidates do not fall within the mischief of section 77(1) read with section 123(6) of the Act. The provision contained in Explanation 1 is attempted to be justified by the respondents on the ground that political parties have come to stay in our

(1) [1955] 1 S.C.R. 671,
(2) [1970] 1 S.C.R. 530.
(3) [1971] 2 S.C.R. 118.
(4) [1976] 2 S.C.R. 347.

country, that they are indispensable for the proper functioning of democracy and, therefore, no exception can be taken if a political party incurs expenditure to ensure the success of the candidates sponsored by it. Explanation 1 treats all political parties equally and no violation of Article 14 is involved. Counsel contended finally that legislative policies bearing upon matters governing elections are not open to judicial review.

The principal theme of the petitioner's argument is 'purity of the election process'. All other arguments converge upon that theme and are intended to give strength and succour to it. There is a vast amount of literature on the need to preserve the purity of elections. There is a perceptible awareness amongst political observers, if not amongst active politicians, that one of the ways to ensure that elections are free and fair is to weed out the influence of big money which, to use an expression which has become a household word, is more black than white. The Lok Sabha Debates, while Explanation 1 was being added to section 77(1) of the Act, show that there was a consensus amongst the Members of the House that election expenses must be effectively controlled, which was also reflected in the fact that in almost all countries of the world where representative form of Government prevails, provisions as to election expenses are invariably made. On October 18, 1979, the Election Commission of India circulated a letter to all recognised national and State parties, proposing revision of the maximum limits of election expenses. In the 'Notes' appended to that letter, the Commission says that the election "expenditure should be at such reasonably low level as not to defeat the very purpose of fixing a ceiling on election expenses, i.e. curbing the influence of 'money power' on elections". While the Janata Government was in power, it had introduced Bill No. 153 of 1977 to amend the Act by deleting, *inter alia*, Explanation 1 which was introduced in Section 77(1) by Amending Act 58 of 1974. The Statement of Objects and Reasons of that Bill, insofar as it relates to the proposed deletion of Explanation 1 says : "It is considered that the amendments made in the Representation of People Act, 1951 far from ensuring free and fair elections may have the effect of increasing money power. It is, therefore, proposed to amend the Act to restore the position that obtained earlier". The Bill eventually lapsed.

In *Kanwar Lal Gupta* one of us, Bhagwati J., observed :

(1) Vol. XLVII, No. 21-27, 12-20 December, 1974 page 279.

> "The other objective of limiting expenditure is to eliminate, as far as possible, the influence of big money in the electoral process. If there were no limit on expenditure, political parties would go all out for collecting contributions and obviously the largest contributions would be from the rich and affluent who constitute but a fraction of the electorate. The pernicious influence of big money would then play a decisive role in controlling the democratic process in the country. This would inevitably lead to the worst form of political corruption and that in its wake is bound to produce other vices at all levels." (P. 266)

In *Vatal Nagaraj* v. *R. Dayanand Sagar*(1) Krishna Iyer J., speaking for the Court, observed :

> "Money power casts a sinister shadow on our elections and the political payoff of undue expenditure in the various constituencies is too alluring for parties to resist temptation. ... . The likely evasion of the law by using big money through political parties is a source of pollution of the Indian political process. To channel funds into the campaign for specific candidates getting around the requirements of the law by establishing party committees is all too familiar in this and some other countries."

The decision of the Bombay High Court in *Tata Iron & Steel Co. Ltd.*(2) exhibiting "considerable uneasiness of mind and a sinking feeling in the heart", expressed the view that any attempt on the part of any business house to finance a political party is likely to contaminate the very spring of democracy. In *Indian Iron and Steel Co. Ltd.*,(3) the Calcutta High Court pointed out the dangers involved in political parties being financed for election purposes by large business houses. The High Court observed : "in the bid for political favouritism by the bait of money, the company who will be the highest bidder may secure the most unfair advantage over the rival trade companies". The Court lamented that such a state of affairs

(1) [1975] 2 S.C.R. 384 399.
(2) A.I.R. 1958 Bombay 155.
(3) A.I.R. 1958 Calcutta 234.

will mark the advent of the voice of the big business in politics and pollute the political life of the country. A

The Report of the Santhanam Committee on Prevention of Corruption(1) says :

> "The public belief in the prevalance of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well members of the Government party. It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principles in relation to collection of funds and electioneering. It has to be frankly recognised that political parties cannot be run and elections be fought without large funds. But these funds should come openly from the supporters or sympathisers of the parties concerned.
>
> If even one family in three pays one rupee a year to a political party, the total annual contribution will be more than what is needed for all legitimate purposes of all political parties in India. It is the reluctance and inability of these parties to make small collections on a wide basis and the desire to resort to short cuts through large donations that constitutes the major source of corruption and even more of suspicion of corruption."

B C D E F

The Report of the Expert Committee headed by Justice Sacher on 'Companies and MRTP Acts' deals(2) extensively with the evils flowing out of the donations made to political parties by big business houses and points out the dangers involved in allowing the money power to play a role in the electoral process of our country. (paragraph 13.12). The Committee recommended that section 293A of the Companies Act which prohibited contribution by companies to political parties should be further strengthened in the manner indicated by it in paragraph 13.18. G H

(1) 1962 Section 11, 'Social Climate', paragraph 11.5.
(2) 1978, Chapter XIII, pages 99-104.

In England, before the passing of the Representation of the People Act, 1949, the view had been expressed that expenses incurred without the authority of the candidate or election agent for promoting or procuring the election of a candidate might not require to be returned as election expenses, provided the expenses were incurred by persons who were outsiders not agents, and accordingly did not have any part in the conduct or management of the election. It is now provided by the aforesaid Act that certain expenses with a view to promoting or procuring the election of a candidate at an election must not be incurred by any person other than the candidate, his election agent and persons authorised in writing by the election agent. If any person incurs, or aids, abets, counsels or procures any other person to incur, any expenses in contravention of this provision, he is guilty of a corrupt practice. (See Halsbury's Laws of England, Fourth Edition, Volume 15, paragraph 721).

We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14. On that question we find it difficult, reluctantly though, to accept the contention that Explanation 1 offends against the right to equality. Under that provision, (i) a political party or (ii) any other association or body of persons or (iii) any individual, other than the candidate or his election agent, can incur expenses, without any limitation whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of section 77(1). It is urged that, by reason of this provision, affluent political parties get an unequal and unfair advantage over other parties or associations which do not command the same money power and therefore, the guarantee of equality is violated. The answer to this contention is that Explanation 1 classifies all political parties or associations in one group and confers upon them the same or similar advantage. Political parties or, politically motivated associations or bodies of persons or, individuals interested in political happenings, are characterised by common attributes, the dominant attribute being that they engage themselves in activities of a political nature. Elections constitute the core of such activities. A classification of this nature bears reasonable relationship with the

object of the statute that expenses incurred by those who fall within the particular group should not be regarded as expenditure incurred or authorised by the candidate or his election agent. It is then no answer to say that all political parties are not equally situated in the wealth which they command. Were such an argument open, the limit set upon election expenses by Rule 90 shall also have to be regarded as violative of the guarantee of equality because, a fairly large number of contesting candidates, particularly the independents, would not be in a position to spend as large an amount as rupees one lakh, which is the permissible limit in large constituencies. Classification has to be broadly reasonable in order to sustain the challenge of unconstitutionally. One cannot dissect that process and discover shades within shades to nullify it on the ground of inequality. It is a stark fact of life that an independent who contests an election on his own, that is, without the support of a political party, is at a considerable disadvantage as compared with candidates supported by political parties. But, that does not violate the rule of equality. It is not the election law which creates such inequalities. Inequalities exist apart from that law and are, unfortunately, implicit in the unequal positions in which the citizens find themselves. What the law does is to allow, in an equal measure, all political parties, associations or bodies of persons or individuals (other than the candidate or his election agent) to incur expenses in connection with the election of a candidate, which need not be included in the return of election expenses which the candidate is required to file.

Though Explanation 1 clubs associations, bodies of persons and certain individuals together with political parties, it is plain that the benefit conferred by that provision goes largely, though not exclusively, to political parties. It is the political parties which sponsor candidates, that are in a position to incur large election expenses which often run into astronomical figures. We do not consider that preferring political parties for exclusion from the sweep of monetary limits on election expenses, is so unreasonable or arbitrary as to justify the preference being struck down upon that ground. In the first place, the statute does not make the affluence of a political party an electoral standard for acquiring eligibility prescribed by the Explanation. Secondly, it is not an unwise policy, to the extent that we can examine the wisdom of legislative policies, to ensure reasonable reduction in the number of contesting candidates, which can be done by conferring special privileges upon political parties. It is a matter of common knowledge that in the

recent elections to the Lok Sabha and the Legislative Assemblies, the printing of the ballot papers posed a serious problem to the Election Commission since, the number of contesting candidates in certain constituencies was absurdly large. In any democratic system of Government, political parties occupy a distinct and unique place. They are looked upon as guardian angels by their members though, occasionally, they fail to discharge the benign role of a guardian, leave alone the angelic part of it. It is through them that the generality of people attempt to voice or ventilate their grievances. Considering, also, the power which they wield in the administration of Governmental affairs, a special conferment of benefits on them in the matter of modalities governing the election process cannot be regarded as unreasonable or arbitrary. That may, perhaps, help explain why in *Kanwarlal Gupta* the Court drew a distinction between the expenses incurred by a political party specifically in connection with the election of a particular candidate and the expenditure incurred by it on general party propaganda, the latter not being includible in the return of election expenses which the candidate has to file. The rationale of that decision, though not expressed in so many words, is that by reason of the important position which political parties occupy in the democratic set up, they are entitled to incur expenditure for projecting their programmes and popularising their policies. Explanation 1 only takes one step ahead, important though. It obliterates the dividing line drawn in *Kanwarlal Gupta*, between expenses incurred 'in connection with' the election of a particular candidate and expenses incurred on 'general party propaganda'. All persons, except the candidate and his election agant, are now free to incur expenditure of the former kind too, without the constraints of ceiling imposed upon election expenditure by section 77(3) read with Rule 90 of the Conduct of Election Rules, 1961. Whether Explanation I restores the law as it was understood before *Kanwarlal Gupta* or, it makes an innovation is irrelevent for deciding upon its validity. Every law, whether restorative or innovative, has to be tested on the touchstone of the Constitution.

It is evident that a certain class of individuals has been included in Explanation 1 out of abundent caution, so as to avoid the challenge that they have been discriminated against in comparison with political parties and associations or bodies of persons. It is true that individuals cannot match their spending ability with the

financial prowess of political parties or trade unions. But, that takes one back to the same point, though in a different garb : All political parties are not equally affluent and therefore those that command big money get an unfair advantage over the others. Election laws are not designed to produce economic equality amongst citizens. They can, at best, provide an equal opportunity to all sections of society to project their respective points of view on the occasion of elections. The method, somewhat unfortunate, by which law has achieved that purpose, is by freeing all others except the candidate and his election agent from the restriction on spending, so long as the expenditure is incurred or authorised by those others. The argument, that individuals are not able to reap the benefit of Explanation 1 effectively by reason of the paucity funds at their command, has the same answer as the argument that every contesting candidate cannot afford to spend as large a sum as rupees one lakh and, therefore, those who can spend that much have an unfair advantage over those who cannot. If the argument that different political parties have been treated equally though they are situated unequally, or that individuals have been discriminated against either *inter se* or in relation to political parties and associations to correct, the only method which would measure up to the required constituational standard is the one in which the State would have to allocate funds from its own exchequer in order to enable the various candidates to contest elections. That would be the fairest form of fairness. But, that is a far cry.

Counsel for the petitiones urged that Explanation 1 renders the main provision in section 77(1) nugatory, by taking away with one hand what is given by the other. Assuming that this is so, the Explanation would not become unconstitutional for that reason. The argument really bears upon the interpretation of the section and the Explanation, and not upon the validity of the Explanation. We do not agree that the Explanation denudes the section of its meaning and makes it purposeless. Section 77(1) deals with the expenditure 'incurred or authorised by' a candidate or his election agent, in connection with the election. It is obligatory to keep a separate and correct account of such expenditure. Explanation 1 deals with the expenditure incurred or authorised by a political party or any other association or body of persons or by an individual other than the candidate or his election agent. It is not obligatory for the candidate or his election agent to keep a separate and correct account of such expenditure. That is because of two reasons. In the first

A place, such expenditure is not incurred or authorised by the candidate or his election agent and therefore, in the very nature of things, they cannot keep an account of that expenditure. Secondly, the argument that expenditure of the kind described in Explanation 1 must be deemed to be incurred or authorised by the candidate or his election agent, is met by the provision in the Explanation that it shall not B be so deemed. Section 77(1) on the one hand and Explanation 1 on the other, deal with two different situations wherefor, the latter cannot render the former meaningless.

While we are on this question, we would like to point out that C if an expenditure which purports to have been incurred, for example, by a political party, has in fact been incurred by the candidate or his election agent, Explanation 1 will not be attracted. It is only if the expenditure is in fact incurred or authorised by a political party or any other association or body of persons, or by an individual (other than the candidate or his election agent) that the Explanation will D come into play. The candidate cannot place his own funds in the power or possession of a political party, or a trade union or some other person and plead for the protection of Explanation 1. The reason is that, in such a case, the incurring of the expenditure by those others, is a mere facade. In truth and substance, the expenditure is incurred by the candidate himself because, the money is his. E What matters for the purpose of Explanation 1 is not whose hand it is that spends the money. The essence of the matter is, whose money it is. It is only if the money expended by a political party, for example, is not laid at its disposal by the candidate or his election agent that Explanation 1 would apply. In other words, it must be F shown, in order that Explanation 1 may apply, that the source of the expenditure incurred was not the candidate or his election agent. What is important is to realise that Explanation 1 does not create a fiction. It deals with the realities of political situations. It does not provide that the expenditure in fact incurred or authorised by a G candidate or his election agent, shall not be deemed to be incurred or authorised by them, if the amount is defrayed by a political party. That would be tantamount to creating a fiction. The object of the Explanation is to ensure that the expenditure incurred, for example, by a political party on its own, that is, without H using the funds provided by the candidate or his election agent shall not be deemed to be expenditure incurred or authorised by the candidate or his election agent. If the expenditure is incurred from out of the funds provided by the candiate or his election agent

section 77(1) and not Explanation 1 would apply. It is necessary to make this clarification since, the use in Explanation 1 of expressions which are generally used when the legislative intent is to create a fiction, is apt to cause confusion and misunderstanding. The reason why the expression "shall not be deemed to be" is used in Explanation 1 is that the Parliament wanted to get over the effect of the judgment of this Court in *Kanwar Lal Gupta*. Similarly, the reason why the expression "shall not ever be deemed to have been" is used in the Explanation is that the intention of the Parliament was to get over the effect of that judgment retrospectively, except to the extent mentioned in clauses (a) and (b) of the Proviso to the Explanation.

A

B

It is essential that the limited range of Explanation 1 ought not to be enlarged. The ceiling placed on election expenses is a basic commandment of the Act, not a pious edict. Its object is to keep a check on the expenditure incurred by candidates on their own elections, directly or through their election agents. They cannot be permitted to resort to subterfuges in order to evade the restraint imposed by sections 77(1) and 77(3) of the Act. Homage to the principle of free and fair elections has to be real, not formal.

C

D

The petitioner is not unjustified in criticising the provision contained in Explanation 1 as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity. But, it is not for us to lay down policies in matters pertaining to elections. If the provisions of the law violate the Constitution, they have to be struck down. We cannot, however, negate a law on the ground that we do not approve of the policy which underlies it. Can the Court, for example, strike down Rule 90 on the ground that the limit of rupees one lakh is too high in the Indian context ? We may have our own preferences and perceptions but, they cannot be used for invalidating laws.

E

F

Insofar as election laws are concerned, there is yet another impediment to contend with. The right to contest an election or to vote at it is not a Common Law right. As observed by Chinnappa Reddy, J. in *Jyoti Basu* v. *Debi Ghosal*(1) :

G

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a funda-

H

(1) [1982] 3 S.C.R. 318, 326, 327.

A mental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. Concepts B familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those relating to the trial of election disputes, is what the statute lays down....We have already referred to the C Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the Statute. What does the Act say ?"

D

What does the Act say ? It says through Explanation 1 that persons other than the candidate or his election agent may, on their own, release their purse strings and never tie them again.

E

We have already said that the question as regards the constitutional validity of Explanation 1 has to be determined regardless of the consideration as to whether the said Explanation restores the law as it stood before the decision of this Court in *Kanwar Lal Gupta* F or whether it introduces a new provision altogether. We have decided upon the constitutionality of the Explanation on its own terms. It is, therefore, unnecessary to consider the pre-Explanation decisions of this Court in *Rananjaya Singh* v. *Baijnath Singh*, *Ram Dayal* v. *Brijraj Singh* and *Magraj Patolia* v. *R.K. Birla*, except to extract a passage from the last of these three cases, which reads G thus :

"Now coming to the corrupt practice of incurring expenditure beyond the prescribed limit, in several decisions this Court has ruled that it is not sufficient for the H petitioners to prove merely that the expenditure more than the prescribed limit had been incurred in connection with the election, he must go further and prove that the

excess expenditure was incurred with the consent or under theauthority of the returned candidate or his election agent." A

In the result, the Writ Petition and the Civil Miscellaneous Petitions are dismissed. There will be no order as to costs.

B

A.P.J. *Petition dismissed.*