PETITIONER:
KANHAIYALAL VISHINDAS GIDWANI

Vs.

RESPONDENT:
ARUN DATTATRAY MEHTA & ORS.

DATE OF JUDGMENT: 16/11/2000

BENCH:
S.N.Hegde

JUDGMENT:

SANTOSH HEGDE, J.

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Being aggrieved by the judgment of the Designated Election Tribunal (High Court of Judicature at Bombay) dated 23rd July, 1999 in Election Petition No.2/98, the appellant abovenamed has preferred this appeal. For the sake of convenience, the parties will be referred to as they were arrayed in the election petition before the High Court.

The petitioner filed the aforesaid election petition before the High Court challenging the election of respondent No.1 to the Maharashtra Legislative Council which was held on 18th of June, 1998 on the ground that the nomination paper of respondent No.1 filed in the said election was invalid in law since the same was not subscribed by the proposers as required under Section 33(1) of the Representation of the People Act, 1951 (for short the Act) because the proposers did not consciously propose the nomination of respondent No.1 and they had signed only a blank form. He also contended that in the event of respondent No.1s election being declared invalid, he is entitled to be declared as the elected candidate.

Respondent No.1 opposed the election petition contending that the petition was barred by limitation as stipulated under Section 81 of the Act, and also for non-compliance of the mandatory requirements of Sections 83 and 86 of the Act. He further contended that since the petitioner had not objected to the validity of his nomination paper before the Returning Officer, he is estopped from questioning the same in a subsequent election petition. Respondent No.1 also specifically denied the allegation that the 10 Congress MLAs referred to in para 8 of the election petition, had at any point of time, signed a blank nomination paper. On the contrary, he asserted that the said 10 proposers signed his nomination paper when his name was already filled in the nomination paper. It was also alternatively pleaded that there is no statutory requirement that a proposer must sign a nomination paper only when it contains the name of the candidate.

Based on the pleadings in the petition, the High Court framed the following issues :-

1. Whether Petitioner proves that nomination form submitted by Respondent No.1 is invalid on the ground that the same was signed by 10 members of the legislative Assembly, as proposers when the same was blank, thereby provisions of Section 100(1)(d)(i) of the Representation of People Act are violated.

2. Whether election petition is barred by limitation having not been filed within 45 days from the date of election of Respondent No.1 viz. 18th June, 1998.

3. Whether copy of Election Petition supplied to respondent Nos.1 and 7 is not true copy and, therefore, Election Petition is liable to be dismissed on the ground of breach of provision of Section 81(3) read with Section 83 and 86 of the Representation of People Act.

4. Is Petitioner entitled to declaration that he is duly elected candidate.

5. Whether in the alternative, Petition is entitled to have fresh election for all the 10 seats.

6. To what relief petitioner is entitled to.

The High Court after considering the pleadings on record and the arguments of the parties, held issue Nos.2 and 3 against the respondent and no challenge has been made to the said findings of the High Court before us. In regard to the objection raised by the respondent No.1 as to the failure on the part of the petitioner to object to his nomination paper before the Returning Officer, the High Court came to the conclusion that once the challenge was to the improper acceptance of the nomination paper of the returned candidate, the same can be entertained by the High Court in an election petition also. In regard to the question as to the 10 proposers signing a blank nomination paper, the High Court after considering the evidence of PWs. 3 and 6 to 14, who are the 10 signatories to the nomination paper of respondent No.1, came to the conclusion that when the proposers subscribed their signatures to the nomination form of respondent No.1, it was blank. However, it came to the further conclusion that since the said proposers had the knowledge as to who the candidate was to be and that they had empowered the Party to propose such candidate by signing the nomination form hence it held that there was no invalidity attached to the said nomination. It also rejected the argument of the petitioner that there was any difference in the meaning of the two words signed and subscribed in the context in which they are used in the Act. In this appeal, Mr. R.F. Nariman, learned senior counsel appearing for the appellant-petitioner, contended that the High Court having rightly come to the conclusion that the nomination paper in question was a blank paper at the time when 10 proposers signed the same, it erred in coming to the conclusion that the subsequent insertion of the name of respondent No.1 would not vitiate the mandate of law. He contended that after the 1996 Amendment to the Act, by the inclusion of the first proviso in Section 33, the Legislature had intended that the persons proposing the name of a candidate who does not belong to a recognised political

party, had to do so consciously because the Act intended to eliminate frivolous candidature. He argued that the Legislature by using the word subscribed in place of the word signed with reference to a candidate not belonging to a recognised political party, statutorily required the proposer to do something more than merely sign the nomination paper. He further argued that when the same Statute uses two different words, it should be understood that the Legislature intended to use two different meanings. If so interpreted, he argued, the word subscribe used in the amended proviso meant something different from the word signed as found in the said Section with reference to the proposer of a recognised party candidate. He also contended that apart from the legislative intent even the ordinary dictionary meaning would indicate that the word subscribed meant something different from the word signed. Ascribing a wider meaning to the word subscribe, he contended, in the context of nominating a candidate would mean that there should be an element of application of mind by the subscriber which cannot be present if a nomination paper is being signed when it is blank. He also contended that it would be fallacious to hold that the expression subscribe would mean nothing more than what the word sign means. Thus, he contended, the High Court was not justified in coming to the conclusion that respondent No.1s nomination paper was valid even when it came to the conclusion that the same was signed by the 10 proposers when it was a blank nomination paper.

Mr. G L Sanghi, learned senior counsel representing the first respondent, questioned the finding of the High Court in regard to the fact that the nomination paper in question was blank when it was signed by the proposers or that the proposers did not know that the nomination paper was meant to be used by respondent No. 1. He contended that the High Court erred in accepting the evidence of the 10 proposers on its face value; more so in view of the latter finding of the High Court wherein it came to the conclusion that the 10 subscribers had signed the nomination paper knowing very well that the same would be used by their party for proposing an independent candidate. He strongly urged that it was not safe to rely on the evidence of PWs. 3 and 6 to 14 when they stated that they had no knowledge that they were proposing the name of respondent No.1, and that they had signed the nomination paper only to propose their party candidate. He also contended that in the context in which the Legislature has used the words subscribe and signed in Section 33, there is hardly any difference between the two and both the words merely intended to mean that the proposer had to sign the nomination paper in the space provided therein.

From the above arguments of the learned counsel, the following two points arise for our consideration :

1. Is the High Court justified in coming to the conclusion that the nomination paper signed by the 10 proposers was blank ? 2. Does the introduction of the word subscribed in Section 33(1) impose any obligation on the proposer of a nomination paper of a candidate not belonging to a recognised political party to apply his mind before appending his signature to such nomination form ?

We will now consider the first point framed by us for consideration in this appeal. While considering the

question whether the nomination paper was blank when signed by respondent Nos.3 and 6 to 14, the evidence of the election petitioner as PW-1 becomes irrelevant because he had no personal knowledge in regard to the signing of the nomination paper by the said proposers. The proposers who have actually signed the nomination paper have been examined in this case as PW-3 and 6 to 14. PW-3 is Raosaheb Ramrao Patil. He in his cross- examination stated that he signed a blank nomination form in the chamber of the Leader of Opposition on 2.6.1998 which was given to him by the Private Secretary to the Leader of Opposition Mr. Pichad. He admits that respondent No.1 was a likely candidate in the said election. He also states that it was the general practice of the party to obtain signatures on blank nomination forms. It is seen from his evidence that on receipt of the show cause notices from the party High Command, all the 10 proposers sat together and decided as to what explanation was to be given to the General Secretary of the AICC. PW-6 - A.G. Dhatrak - also states that he signed a blank form as a proposer in the Chamber of the leader of Opposition which was obtained by the Secretary to Mr. Pichad. He also admits that respondent No.1 was a likely candidate in the said election. He further admits that all the 10 MLAs who signed the nomination form sat together and prepared a reply to be sent to the party High Command. PW-7 - Shankarrao Jagtap - is a 5th term Member of the Legislative Assembly and was a former Speaker of the Legislative Assembly. He also stated that he signed the nomination paper on or about 2.6.1998 in the Chamber of the leader of Opposition when the form was blank. He stated that in the said form his signature is found at serial No.2. When he signed the said nomination paper, Mr. Raosaheb Ramrao Patil (PW-3) and Dalip Walse Patil (PW-13) were also present. According to him, many of the signatories signed the nomination paper in the presence of each other. It is seen from his evidence that on reading in the newspaper about the show cause notice issued by the AICC, all the 10 signatories came to Delhi, received the show cause notices and submitted their explanation. PW-8 is Kisanrao Sampatrao Jadhav whose signature is found at serial No.5 in the nomination form. He first stated that he signed the form on 3.6.1998 but later corrected himself to say that he signed it on 2.6.1998 which is in conformity with the evidence of PW-7. He is a 3rd term MLA and an Engineer by profession. He admits that he is somewhat familiar with the election law. Still he says that even though one signature of an MLA was enough to propose a party candidate, 10 signatures were taken as a measure of safety. This explanation, to our mind, is somewhat curious. He also admits that some of the signatories to the nomination form signed in his presence. He was aware of the fact that respondent No.1 was aspiring to become a candidate in the said election. PW-9 is Kushal Parasram Bophe whose signature is found at serial No.10 in the nomination form. He has stated that he did not know who he was proposing when he signed the nomination form. According to him, the Secretary to the Leader of Opposition had asked him to sign the nomination form, and he did not enquire whether the Leader of Opposition wanted him to sign the form or the Secretary himself wanted him to sign. He later stated that he was under the impression that Mr. Pichad, Leader of Opposition, must have told his Secretary to obtain his signature. He had also been a Member of Parliament earlier. PW-10 is Krishnarao Rakamajirao Desai whose signature is found at serial No.8. He also stated that he signed the nomination form when it was blank. PW-11

is Mr. Marotrao S. Kowase who says that his signature is found in the nomination form at serial No.4 and that he signed the same when the candidates name was not filled in. He further stated that when he received a show cause notice, he replied to the same but he does not remember the contents of the notice. He, however, admits that all the 10 MLAs who received the notices, replied to the same taking identical defence. He also stated that it is not open to party MLAs to sign a nomination paper as a proposer of any candidate without the directive from the party High Command. PW-12 is Deshmukh Sahebrao Sakojirao who also stated that he signed the nomination paper when it was blank and that his signature is found at serial No.3 therein. He stated that even though he did not receive a show cause notice, he read about issuance of the same in the newspaper and came to Delhi, got the notice and thereafter sent his reply. He also admits that like others he took the defence that he had signed a blank nomination form in the office of the leader of Opposition. He is a 4th term MLA. PW-13 is Dilip Walse Patil whose signature is found at serial No.1 in the nomination paper. He stated he signed the same on 2.6.1998 when it was blank, and he was asked by the staff of Mr. Pichad to sign the same. He stated that he does not remember the name of the staff member who had asked him to sign, and that it was the normal practice to sign a blank nomination form. On coming to know from the newspaper that show-cause notices have been issued to the signatories to the nomination form of respondent No.1, he came to Delhi, collected the show cause notice and replied thereto.

From the evidence of these witnesses, it is seen that all of them have stated that they signed blank nomination form because it was the practice of the party to obtain signatures on blank forms, and on coming to know of the issuance of show cause notice or in receipt thereof, they came to Delhi, collected the notices in cases where they had not received the same, and sat together and deliberated on the reply to be sent and agreed upon a common stand being taken and on the said basis, they sent in similar replies wherein all of them stated that they had signed a blank nomination form in the chamber of the Leader of Opposition. It is also clear from their evidence that all of them signed the nomination paper in the chamber of the Leader of Opposition Mr. Pichad either at the request of Mr. Pichad or his Secretary. These witnesses knew that only one signature was necessary if their party candidate was to be proposed, even then they all agreed to append their signatures to one nomination form. Many of them as a matter of fact signed the nomination paper in the presence of each other. The explanation given by some of the witnesses that it was as a measure of caution that 10 signatures were obtained on the same nomination form is extremely difficult to be accepted in the background of the fact that the law requires only one signature if the nomination paper is to be used for a party candidate of theirs. Therefore, the unified stand of these witnesses that they signed the nomination paper for a party candidate has to be rejected on that count only. The next stand as to the practice of the party to obtain signatures on the blank nomination form to be utilised by the party candidate subsequently will also have to be rejected because no registered party would develop a practice to collect signatures in advance for proposing a candidate not belonging to their political party and which requires 10 signatures to propose him as a candidate. Such practice, in our opinion, does not sound

logical. That apart, if as a matter of fact the party did evolve a practice of that nature of collecting so many signatures on one nomination form then we think the party would not have issued them a show cause notice because their act was in conformity with the party practice. On this score also, we are not inclined to accept the explanation of the said witnesses that all their signatures on one nomination paper were obtained as a practice of the party. It may be possible that the party might have evolved a practice to obtain advance signature on a nomination form to propose its candidate to be decided at a later date but since not more than one signature is required by law for proposing a party candidate, the party would not have taken more than one signature on a single nomination form. Such is not the case in hand. In the instant case it is the case of the said witnesses that they were asked to put their signatures on a single nomination form which would mean that the signatures were being obtained for proposing a candidate other than their party candidate. Therefore, the practice/custom put forth by these witnesses cannot be accepted. From the evidence, as noticed hereinabove, it is clear that these experienced legislators definitely had the knowledge that their signatures were being taken to propose a candidate who is going to contest the elections as an independent or will be used by a candidate not belonging to a registered political party. Therefore, the question to be decided is: whether these witnesses had either the knowledge who that candidate was going to be or whether the name of such candidate was already there in the nomination paper or not. While deciding this question of fact it becomes necessary to go into the conduct of these witnesses. Almost everyone of them knew respondent No.1 who till the date of filing of nomination paper was a party member of theirs. They also knew that he was aspiring to contest the said elections. From the records, it can be seen (See Ground No.8 of the S.L.P.) that respondent No.1 was previously a member of the said party as also a former Minister and a sitting MLC as a member of the Indian National Congress, whose term was to expire on 7.7.1998. The signature of respondent No.1 on the nomination form was obtained in the chamber of the Leader of Opposition who was a member of the Indian National Congress. These witnesses signed on the nomination form at the request of the said Leader of Opposition or his Secretary without questioning as to the candidate who was going to utilise the said nomination paper. These facts, if taken in the background of the fact that all these witnesses are experienced legislators, would lead to one and the only irresistible conclusion that they appended their signatures to the nomination form to propose a candidate who was not going to contest the election as a member of their political party but who was a person certainly known to them. That person in the context of the material available on record can be none other than respondent No.1. From the evidence of these witnesses it is also clear that it was not open to them to propose a candidate in regard to whom there was no directive from their High Command. Therefore, it is reasonable to infer that these candidates would not have signed a blank nomination form with 10 signatures lest the same should be misused and they be put into trouble. Hence, unless they were certain who that candidate was, they would not have signed the nomination form. Therefore, it is reasonable to presume, as is the normal practice, that the proposers signed the nomination form when the name of the contesting candidate whom they were proposing was incorporated in the

nomination paper, and in the instant case such name could have been only that of respondent No.1.

Inspite of the above inference of ours, we will have to still consider the evidence of these witnesses as to why all of them deposed that they signed a nomination form when it was blank. The answer to this question is not far to seek. It is to be noted that after the election of respondent No.1 these witnesses either came to know or received show cause notices issued by the party High Command seeking their explanation as to the circumstances under which they came to propose the name of respondent No.1. The evidence on record shows that all these witnesses after concerted plan decided to tell the High Command that the nomination paper was signed by them when it was blank and that they had intended to propose a party candidate. The language used in the reply and the evidence of these witnesses go to show that all of them together decided on the nature of the reply. That also shows that there was an effort to extricate themselves from the likely disciplinary action by the High Command. The High Command having accepted such explanation, these witnesses had no way out but to stick to that stand even before the court which they did in not a very convincing manner. Their parrot-like statement that they signed a blank nomination form runs counter to the ordinary commonsense and reasoning. Their conduct in not questioning the Leader of Opposition for having misused their signatures after they came to know that it was used for nominating respondent No.1, in our opinion, belies their statement that they were ignorant of the fact who they were proposing or that they signed a blank nomination form. It is to be noted that their evidence is in the nature of an interested witness because if they had deposed differently and admitted that they had signed the nomination paper of respondent No.1 then there was every likelihood of the High Command reopening disciplinary proceedings against them. Therefore, they had to stick to the stand that they had already taken in reply to the show cause notice. In view of this self-preservation instinct, it had become necessary for them to depose before the court that they had signed only a blank paper. In that view of the matter, their evidence cannot be accepted sans independent corroboration of the same. Their evidence could have been corroborated if Mr. Pichad or his Secretary who allegedly asked them to sign the nomination paper, were to be examined. But that not having been done, we must draw an adverse inference. Therefore, we are of the considered opinion that it is not possible to place reliance on the evidence of these witnesses in order to come to the conclusion that they signed a blank nomination paper. In our opinion, the normal practice (though not required by law) of proposing a candidate to an election would require the proposer to sign the nomination form when it contains the name of the candidate he intends to propose. Since the petitioner has propounded a practice contrary to the normal one, the burden lay on him to establish that the proposers in the instant case had signed a blank nomination paper, and he having failed to discharge the said onus his contention in this regard must fail.

At this stage, we must also notice that acceptance of this type of oral evidence on its face value will lead to serious repercussions on the results of elections held under the Act in this country. It is possible that a single disgruntled or motivated proposer by such evidence before

the Election Tribunal could upset the result of a valid election, therefore, courts should be extremely cautious and be on guard while scrutinising such evidence wherein the result of election of a validly elected candidate could be in jeopardy. It is necessary in such cases that the courts should seek independent corroboration. In the instant case even minimal corroboration is not forthcoming, as stated above. Hence, we decline to place reliance on the evidence of PWs.3 and 6 to 14.

To this extent, we are of the opinion that the finding of the High Court that the nomination form was blank when signed by these witnesses, has to be reversed because the said finding is based on the face value of the evidence of PWs.3 and 6 to 14 which we have held unacceptable without corroboration.

Even though the above finding of ours is sufficient to dismiss this appeal, it is necessary to deal with another aspect of the case which also arose for consideration before the High Court and in regard to which arguments were addressed before us also. As stated earlier, it is contended on behalf of the petitioner that first proviso to Section 33(1) of the Act imposes an obligation on the proposers of the nomination to apply their mind while proposing the name of an independent candidate. This argument is based on the language of 1st proviso to Section 33(1) which reads thus :

33. Presentation of nomination paper and requirements for a valid nomination.- (1) On or before the date appointed under clause (a) or section 30 each candidate shall, either in person or by his proposer, between the hours of eleven oclock in the forenoon and three o clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency: (emphasis supplied)

It is seen from Section 33(1) that a nomination paper of a registered party candidate has to be signed by an elector of the constituency as proposer while under the first proviso a nomination paper of a candidate not set up by a recognised political party has to be subscribed by 10 proposers being electors of the constituency. Based on that an argument is advanced that while the nomination paper of a party candidate has to be merely signed by a proposer, the Statute has deliberately cast a duty on the proposer of a candidate not belonging to a recognised political party to subscribe to such nomination form as against merely signing the same. It is contended by using the word subscribed, the Legislature has intended that in regard to a non-recognised party candidate the proposer should do something more than merely signing such nomination paper

i.e., there should be an element of application of mind by the subscriber before proposing such candidate; may be as to his suitability as a candidate. This, according to the appellant-petitioner, is clear from the deliberate language of the proviso. It is contended that it would be fallacious to hold that the expression subscribed would mean nothing more than the word signed as has been held by the High Court. The High Court rejecting the said argument noticed the fact that while the word sign is defined under Section 2(1) of the Act, the word subscribe is not defined either in the Act or under the Rules. It also considered the various dictionary definitions of the word subscribe with reference to the arguments addressed on behalf of the election petitioner. The High Court also noticed the observations of this Court in regard to use of the words subscribe and sign found in the Act in the case of Rattan Anmol Singh & Anr. v. Atma Ram & Ors. (1955 1 SCR 481) and came to the conclusion that there is no difference in the two expressions in the context in which they are used in the Statute. While coming to this conclusion the High Court also noticed the use of the word subscribed found in Section 33(1A) of the Act. We have carefully considered the arguments addressed in this behalf before us. It is true that when the same Statute uses two different words then prima facie one has to construe that these different words must have been used to mean differently. But then we will have to consider the context in which it is used. In the present case, it is to be noted that these two words are used with reference to proposing a candidate at an election contemplated under the Act. The word sign is used with reference to proposing a candidate of a recognised party candidate while the word subscribe is used for proposing the candidature of a non-recognised political party candidate. The argument of the petitioner is that the Legislature has deliberately by a subsequent amendment used a different word in regard to the candidate of an unrecognised political party to prevent frivolous candidature. It is also contended that apart from using the word subscribe the number of persons required to propose such candidates was also increased to 10 under the 1996 Amendment. By this it is argued that there is an obligation on the part of the proposer to apply his mind as to the suitability of the candidate to contest in such elections and the same should not be done mechanically. The petitioner has also placed reliance on the judgment of this Court in the case of Rattan Anmol Singh (supra). We are not inclined to accept this argument also. As held by the High Court, it is not for the first time in 1996 that the Legislature used this word subscribed in the Act. That word was in existence in the Statute since the year 1975 in Section 33(1A) of the Act which reads thus :-

(1A) Notwithstanding anything contained in sub-section (1), for election to the Legislative Assembly of Sikkim (deemed to be the Legislative Assembly of that State duly constituted under the Constitution), the nomination paper to be delivered to the returning officer shall be in such form and manner as may be prescribed:

Provided that the said nomination paper shall be subscribed by the candidate as assenting to the nomination, and

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, also by at least twenty electors of

the constituency as proposers and twenty electors of the constitutency as seconders; (b) in the case of a seat reserved for Sanghas, also by at least twenty electors of the constituency as proposers and at least twenty electors of the constituency as seconders; (c) in the case of a seat reserved for Sikkimese of Nepali origin, by an elector of the constituency as proposer: (emphasis supplied).

As per this sub-section, it is seen that in regard to all the categories of seats enumerated in sub-clauses (a) to (c), the nomination papers will have to be subscribed by the candidate as assenting to the nomination paper and by the proposers and seconders as such. Therefore, it is seen in this Section that the Legislature uses the word subscribed both in regard to the candidate as well as the proposers and seconders which would negative the distinction drawn by the petitioner in regard to the use of the words subscribed and signed in Section 33(1) and so also the legislative intent sought to be incorporated by the petitioner. In the context in which the word subscribed is used in Section 33(1A) shows that the Legislature did not intend to use this word in any manner differently from the use of the word signed. Therefore, we are not inclined to accept the argument of the petitioner that when the Legislature used the word subscribed in Section 33(1) of the Act, it intended it to mean something more than merely signing.

As stated above, the petitioner in support of the above contention has relied on the following observations of this Court in the case of Rattan Anmol Singh (supra):

The learned counsel for the respondent analysed the Act for us and pointed out that the word subscribe is only used in Chapter I of Part V dealing with the Nomination of Candidates while in every other place the word sign is used. We do not know why this should be unless, as was suggested by the learned Solicitor-General, the Legislature wished to underline the fact that the proposer and seconder are not merely signing by way of attesting the candidates signature to the nomination form but are actually themselves putting the man forward as a suitable candidate for election and as a person for whom they are prepared to vouch, also that the candidates signature imports more than a mere vouching for the accuracy of the facts entered in the form. It imports assent to his nomination. We think the learned Solicitor-General is probably right because section 33 speaks of

a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination. (emphasis supplied).

The above observations of this Court cannot be accepted as a ratio laid down. In our opinion, it is only an observation without laying down the principle which the petitioner is trying to deduce in his arguments. This view of ours is clear from the following further discussion of this Court in the said case :

Now if subscribe can mean both signing, properly so

called, and the placing of a mark (and it is clear that the word can be used in both senses), then we feel that we must give effect to the general policy of the Act by drawing the same distinction between signing and the making of a mark as the Act itself does in the definition of "sign. It is true the word "subscribe" is not defined but it is equally clear, when the Act is read as a whole along with the form in the second schedule, that subscribe can only be used in the sense of making a signature and as the Act tells us quite clearly how the different types of signature are to be made, we are bound to give effect to it. x x x (emphasis supplied).

For this reason also we agree with the finding of the High Court that the expression subscribe in the proviso cannot be read differently from the expression sign used in Section 33. Therefore, this contention of the petitioner is also rejected. For the reasons stated above, the appeal is dismissed with costs.