

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ELECTION PETITION NO.10 OF 2014**

Shri. Suresh Krishnarao Patil
Age : 55 years, Occ. : Social service,
Having address at A/102, Orchid,
Behind Jain Temple, Govandi,
Mumbai – 400 088

.... Petitioner

Vs.

Shri. Abu Asim Azmi,
Age : 59 years, Occ.: Social service,
Having address at Sentinel House No.2,
4th Floor, Haji N.A. Azmi Marg,
Colaba, Mumbai – 400 005

.... Respondent

Mr. Mukesh Vashi, Senior Counsel alongwith Mr. Ashutosh Kulkarni
alongwith Mr. Sanjay Gawde alongwith Mr. Akshay Shinde, for the
Petitioner.

Mr. A.V. Anturkar, Senior Counsel alongwith Mr. Sandip Phatak
alongwith Mr. K.H. Khatri, for the Respondent.

Coram : Smt. R.P. SondurBaldota, J.

Date : 18th November, 2015.

JUDGMENT :

1). The petitioner and the respondent alongwith 19 others
contested election to Maharashtra Legislative Assembly, held on 15th

October, 2014 from Constituency No.171, Mankhurd Shivajinagar Legislative Assembly. The petitioner was the candidate of political party- Shivsena and the respondent was the candidate of political party- Samajwadi. The results of the election were declared on 19th October, 2014. The respondent secured highest number of votes i.e. 41,719 and was declared elected. The petitioner secured second highest votes of 31,782. On 29th November, 2014, the petitioner filed the present petition under Section 81 of the Representation of the People Act, 1951 ("The Act" for short) for declaration that election of the respondent to the Maharashtra Legislative Assembly is null and void on the ground that the respondent had incurred disqualification in view of Section 8(1) (a) read with Section 100(1)(a) of The Act.

2 A brief statement of the pleadings in the petition reads as under:

By the judgment and order dtd.30th April, 2012 passed by the Metropolitan Magistrate, 15th Court, Mazgaon, Mumbai in C.C. No.112/PW/2005, the respondent was convicted of the offences punishable under Sections 153, 153-A (1)(a), 153(A)(1)(b) read with Section 34 Indian Penal Code and sentenced to suffer rigorous imprisonments of different periods, the maximum of which was of two years. In his affidavit in Form 26 filed as required under Rule 4A of the Conduct of Election Rules, 1961, the respondent disclosed the fact of his conviction and merely mentioned that he has obtained stay in the Appeal being C.A. No.120 of 2012. In his appeal, the respondent had moved an application for suspension of sentence and for grant of bail. That application was granted and the respondent was released on bail.

Then at paras 6F and 6G, the petitioner sets out his grounds of challenge in following terms :

“6F The petitioner categorically states that the afore-mentioned conviction against the Respondent has not been stayed by the Appellate Court. The Petitioner states that there is a vast difference between “suspension of sentence” and “stay to conviction”. In other words, the conviction of the Respondent continues even as on date and thus, the Respondent stands disqualified. The Petitioner further states that no order has been obtained by the Respondent for staying his afore-mentioned conviction under provisions of Section 389 of the Code of Criminal Procedure.”

“6G The Petitioner states that the disqualification having not been stayed in accordance with the provisions of Section 389(1) of the Code of Criminal Procedure and/or not having been set aside as on the date of nomination, the Respondent was disqualified for being chosen as a member of Legislative Assembly.”

3). The respondent has filed his written statement dtd. 23rd June, 2015 contending that the petition filed is without cause of action and hence liable to be rejected. He next contends that the cause of action, even if any, does not survive, in view of stay of conviction already obtained by him and further his appeal against conviction itself having been allowed by the Sessions Court by it's order dtd. 17th March, 2015. According to him, the petitioner has intentionally suppressed these facts from the court and filed the petition in order to take revenge for losing in the election. The other contention of the respondent is that the petition suffers from non-joinder of necessary parties i.e. the other contestants of the election.

4). The issue framed for consideration of the court on the rival pleadings is:

1 Whether the dis-qualification under Section 100(1)(a) read with Section 8(1)(a) of Representation of People Act, 1951 is attracted where conviction of the respondent in C.C. No.112/PW/2005 is stayed by the appellate court, by it's order dtd. 23rd September, 2014?

The parties have not led evidence in the petition considering the nature of the ground of challenge to the election and the issue framed.

5). Mr. Anturkar, the learned Senior Counsel appearing for the respondent submits that the sole ground of challenge to the election of the respondent by the petitioner is of alleged failure on the part of the respondent in obtaining stay of his conviction in the criminal proceedings. Therefore with production of the order dtd. 23rd September, 2014 passed on the respondent's application for suspension of his conviction, the petition is rendered infructuous as for want of cause of action. Therefore, it is liable to be rejected under Order 7, Rule 11 Code of Civil Procedure. Further in any case, according to him on production of the order dtd. 23rd September, 2014 passed by the Sessions Court on the application of the respondent, suspending his conviction, the allegation of dis-qualification does not survive and the petition is liable to be dismissed straight-away.

6). Mr. Vashi, the learned advocate appearing for the petitioner submits, on the other hand, that the petition as filed fulfils

the requirement of Section 83 of The Act, which provides for the contents of an election petition. He points out that Section 83 requires that the election petition shall contain only a concise statement of material facts, on which the petitioner relies and full particulars of any corrupt practices that the petitioner alleges. He submits that, the petition herein contains the statement of material facts relating to disqualification of the respondent and the question of stating particulars does not arise since there are no allegations made of corrupt practices on the part of the respondent. His further submission is that the scope of enquiry under Order 7, Rule 11 CPC into the adequacy of the pleadings in an election petition, must be limited to find out whether the facts as pleaded disclose a cause of action. In this connection, he relies upon decision of the Apex Court in Ashraf Kokkur vs. K.V. Abdul Khader and Others, reported in (2015) 1 Supreme Court Cases, page 129. In the decision cited, identical question as regards the sufficiency of the contents of the petition was considered by the Apex Court for the purpose of the argument for rejection of the petition under Order 7, Rule 11 CPC. The Apex Court observes therein as under:

“22. After all, the inquiry under Order 7, Rule 11(a) CPC is only as to whether the facts as pleaded disclose a cause of action and not complete cause of action. The limited inquiry is only to see whether the petition should be thrown out at the threshold. In an election petition, the requirement under Section 83 of the RP Act is to provide a precise and concise statement of material facts. The expression “material facts” plainly means facts pertaining to the subject-matter and which are relied on by the election petitioner. If the party does not prove those facts, he fails at the trial”

On the very aspect, Mr. Vashi relies upon one more decision of the Apex Court i.e. the decision in Samant N. Balkrishna and Another vs. George Fernandez and Others, reported in 1969(3) Supreme Court Cases, Page 238, wherein the Apex Court has distinguished between the “material facts” and the “particulars” in the following terms:

29.....“The Section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case, he will have to meet.”

7). The petition alleges disqualification under Section 8(1)(a) read with Section 100(1)(a) of The Act, i.e. disqualification on conviction of the respondent for an offence punishable under Section 153(A) Indian Penal Code with no stay of conviction obtained in the appeal preferred against the conviction. It's perusal shows that, the material facts relating to the disqualification have been set out in the petition which have also been reproduced hereinabove. Therefore, the requirement of Section 83 of the Act are fully met. It is well established position in law that for the purpose of finding out whether the pleadings of the petitioner discloses cause of action, the averments therein alone are required to be taken into consideration and the defence of the respondent for that purpose is irrelevant. In the circumstances, it

cannot be said that the petition as filed does not disclose cause of action and hence is not liable to be rejected under Order 7, Rule 11 CPC.

8). The petition specifically alleges absence of stay of the order of conviction. This ground of challenge became infructuous on the disclosure by the respondent in his written statement that, he had infact, prior to filing of his nomination papers for the election, obtained order of stay of his conviction from the Sessions Court. In the circumstance, the petition is liable to be dismissed without any further discussion because the cause of action pleaded therein of absence of order of stay of conviction is no more available to the petitioner.

9). However, Mr. Vashi, argues across the bar that the order of the Sessions Court dated 23rd September, 2014 cannot be treated as an order under Section 389 of the Cr.P.C. and therefore the same has to be ignored for the purpose of the present petition. According to him, the order suffers from several defects. Firstly, the respondent had applied for suspension and not stay of conviction. The order of the Sessions Court produced by the respondent is also of suspension of conviction and not of stay of conviction. There is substantial difference between the stay of conviction and suspension of conviction. The other defects in the order as pointed are, (i) the attention of the Appellate Court was not specifically invited to the consequences of absence of stay of conviction, (ii) the application of mind in exercise of the power by the Appellate Court was without circumspection and caution and not in a judicious manner, and (iii) the order does not record reasons. Mr. Vashi argues that, stay to the conviction should be granted only in rare

and exceptional cases, and the conviction cannot be stayed only on the ground that the applicant may not be able to contest election.

10). Even while contesting on merit the ground taken by Mr. Vashi in his arguments, Mr. Anturkar, has a preliminary objection thereto. He submits that the objection now raised to the order under Section 389 Cr.P.C. produced by the respondent is not taken anywhere in the election petition. The petitioner has infact come with a case that the respondent had applied only for suspension of the sentence to the Sessions Court and not for stay of the conviction. As such, the order dated 23rd September, 2014 was not even within the contemplation of the petitioner. Therefore, merely because the respondent has produced the order in his defence, the petitioner cannot be permitted to raise objections thereto without laying down foundation therefor in the pleadings. Mr. Anturkar, submits that the pleadings in a petition to challenge election must be scrupulously scrutinised and strictly construed. The grounds of challenge to the election must be specifically stated and mere quoting of the words of the section does not amount to stating material facts. Mr. Vashi, seeks to counter the objection with a submission that, para 6F & 6G of the Election Petition specifically states that the disqualification having not been stayed in accordance with the provision of Section 389(1) of the Cr.P.C. and/or not having been set aside as on the date of nomination, the Respondent was disqualified for being chosen as a Member of Legislative Assembly. He lays emphasis upon the words “in accordance with the provision of Section 389(1) of the Cr.P.C.” used at para-6G of the petition. He further submits that, even in the written statement, there is not a

slightest grievance made that the respondent is not able to understand the case of the petitioner for want of sufficient pleadings. On sufficiency of the pleadings, reliance is sought to be placed again on the decision of the Apex Court in *Ashraf Kokkur* case (supra).

11). The petition as filed proceeds on the basis of the total absence of order of stay of conviction of the respondent. Subsequently, during the course of the arguments, it is sought to be submitted for the first time that, the order relied upon the respondent is defective and not in accordance with Section 389 Cr.P.C. This amounts to raising an entirely different ground of inadequacy/illegality of the order of stay of conviction. There is no foundation in the pleadings for this new ground of challenge to the election.

12). In a similar situation, the Apex Court in its decision in Hari Shanker Jain vs. Sonia Gandhi, reported in (2001) 8 Supreme Court Cases, page 233, relied upon by Mr. Anturkar, has with the following observations refused to permit enlargement of the grounds taken in the petition. The relevant observations of the Apex Court read as follows :-

“23. Section 83(1)(a) of RPA, 1951 mandates that an election petition shall contain a concise statement of the material facts on which the petitioner relies. By a series of decisions of this Court, it is well settled that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of

Civil Procedure, 1908. The expression “cause of action” has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of court. Omission of a single material facts leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. (See Samant N. Balkrishna v. George Fernandez, Jitendra Bahadur Singh v. Krishna Behari.) Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In V.S. Achuthanandan v. P.J. Francis, this Court has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead “material facts” is fatal to the election petition and no amendment of the pleadings is permissible to introduce such materials facts after the time-limit prescribed for filing the election petition.”

“30.While we appreciate the forensic ability of the learned petitioner-in-person, but regret we must, in view of settled law, state that the plea so raised can neither be entertained nor adjudicated upon. There are two hurdles staring at the petitioner. Firstly, the manner and the enlarged dimension in which the plea has been projected before this Court does not find reflected in the election petition. No foundation has been laid in the pleadings by stating all relevant material facts enabling the Court the court to enter into examining such a plea of far-reaching consequences and implications.....”

13). The Apex Court in the above decision, has held that the

material facts required to be stated are those facts which can be considered as materials supporting the allegations made. Omission of a single material leads to incomplete cause of action and statement of the claim becomes bad. The petitioner herein initially alleged absence of the order of stay of conviction and stated so in the petition by way of a material fact. That is the only material fact stated in the petition. The question is, whether that would be sufficient for the new ground taken. The answer to the question must be 'No'. For the ground of inadequacy or illegality of the order of stay of conviction, the first material fact would be existence of the order of stay of conviction and the other material facts would be the facts concerning the defects in the order. These material facts are missing from the petition. This renders the petitioner's statement of claim, bad. Therefore, the second contention taken across the bar must also be rejected and the petition dismissed without any further discussion. However, extensive arguments have been advanced on the merits of the new ground of challenge to the election. Therefore, I only consider it appropriate to deal with the same.

14). Few facts are required to be stated for appreciation of the ground of inadequacy/illegality of the order of stay of conviction. The respondent had challenged his conviction in C.C. No. 112/PW/2005 by preferring Criminal Appeal No. 120 of 2012. By the order dated 11th May, 2012 passed therein, his sentence was suspended and he was released on bail. Later i.e. on 26th August, 2014 he filed the criminal application at Exhibit-13 seeking pre-ponement of the hearing of the appeal. In the alternative, he sought suspension of his conviction by the

Sessions Court in exercise of its jurisdiction under Section 389 Cr.P.C. In the application, he mentioned that he is a member of the Maharashtra Legislative Assembly and also the President of the Samajwadi party, Maharashtra Unit. He had contested the last assembly election from two constituencies i.e. Shivaji Nagar, Mankhurd and Bhiwandi and had won from both the seats by big margin. He later gave up his Bhiwandi seat and retained Shivaji Nagar seat. In view of the prospect of the elections to the Maharashtra Legislative Assembly taking place in the first week of October, 2014, he desired that the hearing of the appeal be preponed and the appeal decided. In the alternative, the order of conviction was required to be suspended because otherwise he would stand disqualified to contest the election, in view of the decision of the Apex Court in Navjot Singh Sidhu V/s. State of Punjab reported in (2007) 2 SCC page 574. He averred in the application that, if he is not able to contest the election on account of his conviction, it would not only be his personal setback but also a big setback to his party. The same would cause irreparable injury to him. He claimed that, he had a good chance of succeeding in the appeal because the evidence against him was cryptic and not convincing.

15). The Sessions Court, on 30th August, 2014 called for say of the State on the application. The say endorsed on the application on 23rd September, 2014 was “May be allowed subject to the outcome of appeal”. Then, on the same day the following order was passed by the Sessions Court.

“APP Mr. Raisinghani present for the state.
Appellant absent.
Adv Pasbola for the appellant present.

KB at 2.45 pm.

LO :

Appellant present.

Adv Ponda for the appellant present.

Heard Adv for the appellant.

Ld. APP has given reply to this application that application be allowed subject outcome of the appeal. As Ld APP has no objection to suspend the conviction of the appellant u/s 389 of Cr.P.C. 1973 following order passed :

ORDER

1. Application allowed.
 2. In view of the no objection by resp/state conviction of the appellant is suspended.
 3. Application Exh.3 disposed of accordingly.
- Adj for hearing on Exh.11 on 9.10.14.”

16). Mr. Vashi argues the order could be of no help to the respondent since it is of suspension of the conviction and not of stay of conviction. He submits that there is substantial difference between stay of conviction and suspension of conviction. In order to bring out the difference, he merely relies upon decision of the Apex Court in Lalsai Khunte Versus. Nirmal Sinha and Others reported in (2007) 9 SCC page 330. He has not elaborated any further on the submission.

17). In *Lalsai Khunte's* case (supra), the appellant before the Apex Court was convicted under Sections 420, 468 read with Sections 34 and 47 Indian Penal Code and punished for rigorous imprisonment for the maximum period of 2 years. Aggrieved by the order of his conviction, he filed appeal before the Sessions Court. By the interim order passed therein, the Sessions Court released the appellant on furnishing bond and security and suspended the judgment and order of conviction. The appellant, while filing his nomination for the election, had concealed the vital information of his conviction in the affidavit

filed by him. Later, when his election was challenged on the ground of disqualification on account of his conviction, he took up the defence that the execution of judgment and conviction was stayed by the Sessions Court. The question therefore, that arose for consideration in the proceedings was, whether the interim order as passed by the Sessions Court in the appeal proceedings, amounted to staying the conviction or not. It was contended by the petitioner, that the appellant's conviction was not stayed but suspended. Therefore, he was disqualified for contesting the election. The Apex Court, on considering of several decisions cited before it, held that the interim order passed by the Sessions Court had only suspended the order impugned in the appeal. The suspension did not amount to temporarily washing out the conviction. The conviction still remained. The only operation of the order and the sentence alone remained suspended and did not amount to temporarily stay of conviction. The Apex Court, noted that the application moved by the appellant before the Sessions Court was a routine application under Section 389 Cr.P.C. whereby the appellant sought for suspension of sentence. There was nothing in the application to suggest that the applicant therein had sought the stay of conviction in contradistinction to the suspension of sentence. The Apex Court opined that a specific order staying conviction had to be sought. Perusal of the entire text of the decision cited, makes it clear that, what fell for consideration of the Apex Court was not question of distinction between "suspension of order of conviction" and "stay of order conviction". What was sought to be contended by the appellant in the said proceedings was that, the order passed of suspension of the order impugned in the appeal pursuant to which he had been released on

furnishing bond and security amounted to stay of the conviction. This contention was not accepted by the Apex Court and it held that a separate specific order of stay of conviction had to be sought. In the case on hand, the respondent has subsequently obtained a separate order relating to his conviction which is of suspension of conviction.

18). It would be relevant to note that the term “stay” does not find mention in Section 389 Cr.P.C. The term used therein is of suspension....

“389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

[Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release;

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.]

(2) The power conferred by this section on an

Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.”

It is well established position of law today that, Section 389(1) Cr.P.C. confers power not only to suspend the execution of sentence and to grant bail but also to suspend the order of conviction. In the circumstances, the distinction sought to be drawn by Mr. Vashi between the terms 'suspension' and 'stay' is without merit.

19). Mr. Vashi, submits that the Apex Court has time and again by various judgments set down the parameters of Section 389 Cr.P.C. and refers to the following decisions :-

- (i) K.C. Sareen Vs. CBI, Chandigarh, reported in (2001) 6 Supreme Court Cases page 584.
- (ii) Kishori Lal V/s. Rupa and Others, reported in (2004) 7 SCC page 638.
- (iii) Navjyot Singh Siddhu V/s. State of Punjab & Ors. Reported in (2007) 2 Supreme Court Cases page 574.
- (iv) State of Punjab V/s. Deepak Mattu, reported in (2007) 11 SCC page 319.
- (iv) Jalal Ahmed Mazumdar V/s. State of Assam, reported in (2008) 3 Crimes page 188 (Gau).
- (v) State of Punjab V/s. Navraj Singh, reported in (2008) 11 SCC page 71.
- (vi) State of Maharashtra V/s. Madhukar Wamanrao Smarth, reported in (2008) 5 Supreme Court Cases page 721.
- (vii) Sanjay Dutt V/s. State of Maharashtra, reported in (2009) 5 Supreme Court Cases page 787.
- (viii) Shyam Narayan Pandey V/s. State of Uttar Pradesh, reported in (2014) 8 Supreme Court Cases page 909.
- (ix) Laxman Malhari Sable V/s. State of Maharashtra, reported in 1972 (2) Mh.L.J. page 780.

The statement of law that can be culled out from the decisions cited is that, the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if

the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case. The Appellate Court must record reasons in writing because recording of reasons indicates that there has been careful consideration of the relevant aspects and conviction cannot be stayed only on the ground that the appellant may not be able to contest election.

20). Mr. Anturkar, has an objection to this Court considering the merits of the order of stay of conviction. He submits that, the High Court functioning under the Representation of People Act, 1951 is an Election Tribunal, and does not possess the jurisdiction, which is otherwise available to it under different jurisdiction such as Civil Appellate Jurisdiction, Criminal Appellate Jurisdiction, Criminal Revision Jurisdiction or Criminal Inherent Jurisdiction etc. The only exceptions thereto are contempt jurisdiction and plenary jurisdiction of the High Court. The petitioner has invoked neither plenary jurisdiction of this Court nor the contempt jurisdiction. On the scope of this Court under The Act as Election Tribunal, Mr. Anturkar relies upon the decisions of the Apex Court in (i) P. Malaichami Versus. M. Andi Ambalam and Others, reported in (1973) 2 Supreme Court Cases page 170, (ii) Bhagwati Prasad V/s. Rajeev Gandhi reported in 1986 (4) Supreme Court Cases page 78, and (iii) Thampanoor Ravi V/s. Charupara Ravi reported in 1999 (8) Supreme Court Cases page 74.

21). By its decision in *Malaichami's* case (supra), the Apex Court has held that in deciding an election petition, the High Court is merely a Tribunal deciding an election dispute. Its powers are wholly the creature of the statute under which it is conferred the power to hear the election petitions. An election petition is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. In *Bhagwati Prasad's* decision (supra), when the question of citizenship of the returned candidate was raised by the petitioner, the Apex Court held that the Central Government has exclusive jurisdiction to decide the questions regarding loss of Indian citizenship and acquisition of citizenship of a foreign country. No other forum in India has power to decide the questions and even the High Court empowered to decide the election petition, cannot decide these questions raised in the petition. In other words, if no declaration is forthcoming from the Central Government as regards the citizenship of the returned candidate, it should proceed on the ground that the candidate concerned has not ceased to be an Indian citizen. The High Court, as an election tribunal cannot independently hold an enquiry into that question on its own. The third decision cited in *Thampanoor Ravi's* case (supra), involved question of dis-qualification on the ground of the returned candidate being an undischarged insolvent. The Apex Court, while holding that the High Court as an election tribunal, cannot go into the question of insolvency of the candidate observed as follows :

“12.The jurisdiction exercisable under the RP Act is a special jurisdiction conferred on the High Court by virtue of Article 329(b) of the Constitution. Therefore, even though the High Court may

otherwise exercise ordinary and extraordinary jurisdiction it would be difficult to envisage a situation that while trying an election petition in exercise of the jurisdiction conferred by the RP Act it can adjudicate upon the vires of the RP Act or any rule or order made thereunder and the election petition has to be tried in accordance with the provisions of the RP Act and thus the court cannot entertain and pronounce upon matters which do not fall within the ambit of Section 100 of the RP Act. Even an ordinary civil court will not have jurisdiction to decide questions arising under insolvency enactments; much less a special authority like the High Court when it is not invested with such power under the Insolvency Act.....”

22). As regards the order passed under Section 389 Cr.P.C. in particular, Mr. Anturkar submits that it is not open in the election petition for this Court to go into the merit or demerit of the order. In this connection, he relies upon the decision of Single Judge of this Court in Bharamu Subrao Patil Vs. Narsingrao Gurunath Patil, reported in 2001 (2) MH.L.J. Page 348, wherein the Court had held that once the power is exercised after the reasons are disclosed to the Court as to why suspension of conviction is sought, then there would be no conviction from the date of the sentence and the conviction is suspended. Such a candidate would be entitled to contest the election. Once, there was jurisdiction in the Sessions Court to decide the application under Section 389 Cr.P.C., whether it was rightly exercised or not is not a matter for the Election Tribunal to go into that being a discretionary order.

23). Mr. Vashi, responds with a submission that, there is no

dispute that the High Court acts as an Election Tribunal. But, as such it is completely justified to decide as to whether the respondent was disqualified on the date of his nomination. He submits that this Court is not called upon to decide the legality and correctness of the order of suspension. The Court has to only decide, as to whether the order of suspension of conviction of sentence is passed within the parameters of law so as to save the respondent from the consequences of disqualification. He argues that the order of suspension of conviction may be good under the criminal law but may not be good under the election law. According to him, the parameters for the validity and legality of the order suspending conviction in election law, are different from the parameters in criminal law. The parameters are as described in the abovementioned various decisions of the Apex Court under the election law.

24). Undoubtedly, as an Election Tribunal, this Court has jurisdiction and is justified in deciding as to whether the respondent was disqualified on the date of filing nomination for election. But the question to be considered is, if there is an order of a competent Court removing the disqualification, can this Court go behind the order to find out, whether the order was justified without there being a direct challenge to the order. It is well established legal position that, only an order which is non est and void ab-initio can be challenged at any stage, even in collateral proceedings.

25). The argument of Mr. Vashi is that, the Election Tribunal can go behind the order as far the election petition is concerned. This is

because, according to him, the parameters to judge the order of suspension of conviction for election law are different from those for criminal law. In my opinion, the argument is preposterous. The order of suspension of conviction is passed under Section 389 Cr.P.C. It is an interim order and hence a discretionary order. The parameters to decide an application for such order would be the parameters of Section 389 Cr.P.C. which cannot be different for different fields of law. It is to be noted that, every authority cited by Mr. Vashi on the parameters for an order under Section 389 Cr.P.C. is in the facts of either (i) for grant of the application or, (ii) refusal to grant the application, or (iii) challenge to the order of grant / refusal of the application. In all the three fact situations, the order was directly under the scrutiny of the Court for its validity. Therefore, the parameters laid down therein are the parameters under Section 389 Cr.P.C. and not any special parameters for election petition.

26). The specific argument of the petitioner is that the order of suspension of conviction passed by the Sessions Court in favour of the respondent is defective and really not an order of which the respondent can take benefit. In other words according to the petitioner, the order is defective and hence void. Mr. Anturkar, submits that, there is a vast difference between an order which is void and an order that is defective. He relies upon decision of the Apex Court in Balvant N. Viswamitra and Others Versus. Yadav Sadashiv Mule (Dead) Through Lrs and Others, reported in 2004 8 SCC page 706 in order to bring out the distinction. The relevant observations at para-9 reads as follows :-

“9.The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or

ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.”

There is no dispute in the present case as regards the competency or jurisdiction of the Sessions Court in deciding the application under Section 389 Cr.P.C. Hence, the order cannot be said to be void. In that case, it cannot be challenged in collateral proceedings. Hence, the Court cannot go behind the order to find out whether it is incorrect or defective.

27). Even if, despite the above legal and factual situation, the order is to be tested against the settled parameters, it is clear that, it would stand the scrutiny. The averments made in the application already noted above, are sufficient to specifically draw the attention of the Appellate Court to the consequences that may arise if the conviction is not stayed. The special facts of the case are also pleaded. There is an allusion to the nature of the evidence on record against the respondent. Next, the main prayer in the application was for hearing of the appeal and prayer for stay of conviction was an alternative relief sought. The prosecution was given sufficient time to put its say on the application and thereafter the application was decided. Since there was no serious

objection to the application, the Court was not required to give detailed reasons for allowing the application to suspend the conviction. In the circumstances, it is not possible to infer from the absence of reasons that there was no application of mind by the Appellate Court. Therefore, it cannot be said that the order is bad for want of reasons. Thus, even on merits, the challenge of the petitioner fails.

28). The Election Petition is dismissed. The office shall communicate this decision to the Election Commission and the Speaker of the Maharashtra State Legislature in compliance with Section 103 of The Act and Rule 19 of the Rules framed by this Court in regard to the election petitions under The Representation of the People Act.

(Smt. R.P. SondurBaldota, J.)