

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.11334 OF 2015
ALONG WITH
CIVIL APPLICATION NO.3379 OF 2015**

**Shri Vijay Waman Deshmukh]
Age about 46 years, Occ. Social Work]
R/at S. No.10, Unnati Nagar,]
Gadital, Hadapsar, Pune 411 028]..... Petitioner.**

Versus

- 1] Pune Municipal Corporation]
A Body constituted under BPMC Act]
Through the Commissioner of Pune]
Municipal Corporation, Pune Municipal]
Corporation Building, Shivajinagar,]
Pune 411005]
]**
- 2] Shri Vijay Zumbar More]
Age 42 years, Occ : Business]
R/at F1, Amariata CHS, Gadital,]
Hadapsar, Pune – 411 028]
]**
- 3] Chief Election Commission]
State Election Commission]
Government of Maharashtra]
Mumbai]
]**
- 4] Returning Officer]
Ward No.44, Seat B,]
Pune Municipal Corporation]
Pune 411 005]
]**
- 5] Nambiyar Babubhai Prabhakaran]
Age 30, Occupation : Business]
R/at S. No.259, Mhetre Mala]
Pandhare Mala, Hadapsar,]
Pune 411028]
]**
- 6] Chavan Deepak Bhanudas]**

- Age 30, Occ : Business,]
R/at S.No.234, Gadital,]
Near Maruti Mandir,]
Hadpsar, Pune 411 028]
]
- 7] Gondhale Prakash Narayan]
Age 49, Occ. Agriculturist,]
R/o S. No.18/5C, Tejdeep Niwas]
Sankalp Housing Society, Gondhale]
Nagar, Hadpsar, Pune – 411028]
]
- 8] Raut Raju Bhojram]
Age 44 Occ. Service]
R/at Flat No.B/1/03, Suyash Park Society]]
S.No.18/5A, Shanti Mandir Chowk]
Gondhale Nagar, Hadpsar, Pune-411028]
]
- 9] Walake Ratnadeep Kumar]
Age 36, Occ. Social Worker]
R/o S.No.13, Satav Wadi]
Babulal Chawl, Hadpsar,]
Pune 411 028]
]
- 10] Shinde Sanjaykumar Kushabrao]
Age 40, Occ. Business]
R/o Row House No.10, Amarnager]
Housing Society, Pune Solapur Road,]
Gadital, Hadpsar, Pune 411028]
]
- 11] Bhambure Shailesh Shashikant]
Age 31, Occ. Service.]
R/o, B-14, Indrapark, Gadital,]
Hadpsar, Pune – 411028]
]
- 12] Jagtap Salil Suresh]
Age 34, Occu. Agriculturist,]
R/o B-4/5, Amariata Housing Society]
Gadital, Hadpsar, Pune – 411028]
]
- 13] Dhumal Vinod Shivaji]
Age 28, Occ. Business,]
R/o S. No.13, Shivaratan Building]
Shramik Colony, Satav Wadi]
Pune 411028]

- 14] Shinde Sanjay @ Vitthal Laxman]
 Age 31, Occ. Social Work]
 R/o S.No.311/9, Gali No.7,]
 Shinde Chawl Sasane Nagar,]
 Hadpsar, Pune 411028]
]
 15] Memon Yusup Indris]
 Age 37, Occu. Service]
 R/o Sr.No.15, Jijamata Vasahat,]
 Hadpsar, Pune 411028]..... Respondents.

WITH
 WRIT PETITION NO.10730 OF 2015

Shri Vijay Zumber More]
 Age 42 years, Occ : Business,]
 R/o. F-1, Amarlata Co-operative]
 Housing Society, Gadital Hadapsar,]
 Pune – 411 028]..... Petitioner.

versus

- 1] Pune Municipal Corporation,]
 A body incorporated under the]
 BPMC Act, notice to be served on]
 The Commissioner of PMC]
 Pune Municipal Corporation Bldg.]
 Shivajinagar, Pune – 411005]
]
 2] Chief Election Commission]
 State Election Commission]
 Government of Maharashtra]
 Mumbai]
]
 3] Returning Officer,]
 Ward No.44, Seat B,]
 Pune Municipal Corporation, Pune]
]
 4] Shri Deshmukh Vijay Waman,]
 Aged 46 years, Occ : Social work]
 R/o. S.No.10, Unnati Nagar,]
 Gadital, Hadapsar, Pune]..... Respondents.

Mr. Balkrishna D Joshi along with Shri Virendra Pethe and Ms. Darshna Pawar for the Petitioner in Writ Petition No.11334 of 2015 and for the Applicant in Civil Application No.3379 of 2015 and for the Respondent No.4 in Writ Petition No.10730 of 2015.

Mr. S M Gorwadkar, Senior Advocate a/w Mr. Niranjan A Mogre for the Petitioner in Writ Petition No.10730 of 2015 and for the Respondent No.2 in Writ Petition No.11334 of 2015

Mr. Sachindra B Shetye a/w Mr. M R Bhora for the Respondent No.3 in Writ Petition No.11334 of 2015 and for the Respondent No.2 in Writ Petition No.10730 of 2015.

CORAM : R. M. SAVANT, J.

DATE : 29th April 2016

ORAL JUDGMENT

1 Rule in both the above Petitions, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 06/10/2015 passed by the learned Principal Judge of the Small Causes Court, Pune by which order the Election Petition being No.9 of 2012 filed by the Respondent No.2 herein came to be allowed and the Petitioner Shri Vijay Waman Deshmukh in Writ Petition No.11334 of 2015 (i.e. the Respondent No.4 in the Election Petition) came to be unseated as a Corporator of the Pune Municipal Corporation from Ward No.44 B, Hadapsar, Pune.

In so far as Writ Petition No.10730 of 2015 is concerned, the same has been filed by the Election Petitioner Shri Vijay Zumber More (i.e. the

Respondent No.2 in Writ Petition No.11334 of 2015), challenging the same order i.e. the order dated 06/10/2015 in so far as it rejects the prayer of the said Petitioner of being declared elected from the said ward in place of the Petitioner in Writ Petition No.11334 of 2015.

The Petitioner in Writ Petition No.11334 of 2015 i.e. Shri Vijay Waman Deshmukh is the Respondent No.4, and the Respondent No.2 in the said Writ Petition i.e. Shri Vijay Zumber More is the Election Petitioner in the Election Petition No.9 of 2012. The parties would therefore be referred to as per their nomenclature in the Trial Court. The Petitioner herein i.e. Vijay Waman Deshmukh would be referred to as the Respondent No.4, and the Respondent No.2 herein Vijay Zumber More would be referred to as the Election Petitioner.

3 The facts giving rise to the filing of the above Petitions, in brief, can be stated thus :-

The elections to the General Body of the Pune Municipal Corporation were held on 16/02/2012. The Respondent No.4 and the Election Petitioner contested the elections from Ward No.44 B, Hadapsar, Pune of the said Pune Municipal Corporation as candidates of their respective parties. It is an undisputed position that the Respondent No.4 – Vijay Deshmukh was declared elected from the said ward whereas the Election Petitioner Vijay More has secured the 2nd highest votes. However, prior thereto the Respondent No.4

had filed his nomination form along with the affidavit as mandated to which no objection was taken by the Election Petitioner at the time of scrutiny. After the elections were over the Election Petitioner filed the instant Election Petition No.9 of 2012 for setting aside the election of the Respondent No.4 on the ground/grounds mentioned in the said Election Petition. In the context of the challenge raised in the above Petition it would be apposite to refer to the averments made in the Election Petition. Paragraphs 6, 7, 8 and 10 of the Election Petition are material and reproduced herein under for the sake of ready reference :-

- “6) It is submitted that Respondent No.4 i.e. Vijay Wamanrao Deshmukh in the Affidavit of relevant Criminal character, cases, proceeding and in the relevant property column submitted false contents from column no.1(1) upto false PAN Card number which is not his own and also concealed the relevant true information of his criminal involvement in crime and property as also the pending Criminal Session Case No.64 of 1997 lodged against him by Pune Rural Police and where charge-sheet has been filed before the Hon'ble Sessions Judge, Baramati, Pune wherein the Respondent No.4 shown as a “Absconding” accused in the said Session Case un/s 395, 411 of Indian Penal Code. The said fact was not mentioned by Respondent No.4 in the said Affidavit purposefully alongwith nomination application before relevant authority on oath. On the contrary the Respondent No.4 in the column and subsequent columns of this Affidavit stated, said columns are “Not attracted” or falsely mentioned “Non-Applicable” for him which is breach of Law and non compliance of disclosed truth facts essential of the Affidavit and the Respondent No.4 ought to have mentioned the said material facts in the said columns of Affidavit. The copy of nomination application with the false Affidavit and the certificate copy of charge-sheet attached herein.

- 7) The Petitioner states and argued that non-compliance of regards pending criminal cases in the nomination form, Affidavit, and upon the knowledge the said fact immediately put up written objection before the Competent Election authority on 23/2/2012 that the Respondent No.4 submitted false Affidavit and contesting the said Election. The copy of said objection letter attached herein.
- 8) The Petitioner submits that, the Respondent No.4 being not qualified to contest the general election of PMC held on 16/2/2012, his election as a member from Ward No.44 seat B is void and has affected the result of the election from that ward/constituency. Hence result so declare for the election conducted in the Ward No.44 Seat No.B based on false information of Respondent No.4 which was false to his own knowledge and hence is illegal and void ab initio.
- 10) It is submitted that, because of above all false information provided by Respondent No.4 it is highly affected on the result of Ward No.44 Seat B especially because Respondent No.4 was not qualified as per election norms and rules as mentioned above. As Respondent No.4 was not legally qualified and by furnishing false information in Affidavit Respondent No.4 has elected by fraud and hence liable to disqualify. Therefore the Respondent No.4 would be disqualified in contesting the elections as he willfully filed a false Affidavit in the nomination form regarding his Criminal background.”

Hence save and except the facts stated in the paragraphs mentioned herein above, there were no other facts stated in the Election Petition.

4 The Respondent No.4 in the Election Petition filed his written

statement and questioned the maintainability of the Election Petition on the ground that the material facts or particulars were not stated. It was averred that under which provision the Election Petition was filed was not stated. It was therefore averred that the Election Petition as filed was not maintainable. The relevant excerpts of the written statement of the Respondent No.4 i.e. paragraphs 2, 9, 15 and 16 are material and are reproduced herein under for the sake of ready reference :-

- “2) The Respondent submits that the Petition filed by the Petitioner is not maintainable because it is not mentioned by the Petitioner under which section petition filed and petitioner has not given the details in the petition as required by the provisions of law. Therefore petition of the petitioner is not maintainable, hence be dismissed.
- 9) The Respondent submits that the petition filed by the petitioner is not covered by provisions of law and it is not filed as per the provisions of law. Therefore petition filed on the grounds mentioned in the petition is not maintainable, hence be dismissed.
- 15) The Respondent submits that information submitted in nomination paper by the respondent along with the document is proper and legal. There is no fraud made by the respondent. The petitioner has not pleaded the fraud. The Respondent further submits that there is no criminal background of the respondent and the cases referred by the petitioner in the petition in which respondent was not involved and those cases are political in nature. There is no reason arose for filing the petition against the respondent, hence petition of the petitioner is not maintainable, be dismissed.
- 16) That the contents of para 13-a to 13-g of the petition are not true and correct, hence denied by the respondent. Petitioner be put to the strict proof the same. The Respondent submits that the petition is not

in proper form and there are no required details and information given by the petitioner in petition. Therefore petition of the petitioner is not maintainable, be dismissed.”

5 The Election Petitioner filed an application for amendment of the Election Petition to inter alia incorporate the facts relating to the criminal cases pending against the Respondent No.4, in the Election Petition. The said Application was numbered as Exhibit 51. The said application was opposed to on behalf of the Respondent No.4 on the ground that after the limitation period is over, the facts cannot be allowed to be incorporated. The said application (Exhibit 51) came to be rejected by the learned Principal Judge of the Small Causes Court, Pune by order dated 11/02/2013. The Election Petitioner carried the matter to this Court by way of Writ Petition being No.2673 of 2013. The said Writ Petition came to be withdrawn by the Election Petitioner for taking appropriate steps.

6 The Trial Court on the basis of the pleadings of the parties framed the following issues :-

- 1) Whether petitioner proves that Respondent No.4 Vijay Deshmukh did not mention the fact regarding pendency of criminal Sessions Case No.64/1997, pending Sessions Court, Baramati, purposely, as alleged?
- 2) Whether petitioner proves that respondent No.4 indulged into corrupt practices and he was not even qualified to contest the election, as alleged?

- 3) Whether petitioner is entitled for the relief of setting aside the election of respondent No.4 from Ward No.44/B of PMC, as prayed for?
- 4) Whether petitioner proves that he is entitled for the declaration as a elected councilor of Ward No.44B of PM?
- 5] What order?

7] The parties led evidence in support of their respective assertions. The Election Petitioner Vijay More examined himself, whereas the Respondent No.4 in the Election Petition Shri Vijay Deshmukh examined himself as well as two other witnesses namely Sandip Sanjay Garud and Popat Kondiba Rokade. The Election Petitioner also filed various documents which have been referred to in Paragraph 11 of the impugned order. The Election Petition thereafter proceeded to trial.

8] The Trial Court on the basis of the material on record answered all the issues against the Respondent No.4 and held that the Elections were vitiated on account of the fact that the Respondent No.4 had suppressed the information which was to be supplied through the affidavit which was to be submitted along with the nomination form. The Trial Court accordingly unseated the Respondent No.4 herein as a Municipal Corporator from the said Ward No.44 B, Hadapsar, Pune. The Trial Court recorded a finding that the Respondent No.4 has deliberately suppressed the fact of Sessions Case No.64 of 1997, material information in respect of the bank account was suppressed,

that since at the time of scrutiny of the nomination, the Election Petitioner did not have the said information, the objection to the nomination of the Respondent No.4 could not be taken at the time of scrutiny, that the Election Petitioner herein has succeeded in proving the Respondent No.4 has suppressed material information on the date of submitting his nomination, that the affidavit submitted with the nomination form was without the requisite information highlighting the criminal antecedents and therefore there is an attempt to suppress and the same is undisputedly amounting to undue influence and therefore amounts to corrupt practices. A finding was also recorded that the Respondent No.4 is not qualified to contest the election and therefore the Election Petitioner is entitled for the relief of setting aside of the election of the Respondent No.4. However, though the Trial Court unseated the Respondent No.4 as a Corporator of the Pune Municipal Corporation, it did not grant the relief to the Election Petitioner of being declared as elected in place of the Respondent No.4. As indicated above it is the said order dated 06/10/2015 which is taken exception to by way of the above Writ Petition No.11334 of 2015 as also the Election Petitioner has filed his own Writ Petition being No.10730 of 2015 impugning the said order dated 06/10/2015 in so far as it rejects his prayer for being declared as elected in place of the Respondent No.4.

9 During the course of hearing of the above Petitions, the learned

counsel Shri S B Shetye appearing for the Respondent – State Election Commission has produced the instructions issued by the State Election Commission dated 15/03/2004 in respect of the affidavit to be filed by the candidate along with the nomination form and in which affidavit details of the criminal cases pending against the candidate, bank account of the candidate and PAN number of the candidate are to be provided. In so far as the criminal cases are concerned, in terms of the requirement of the said affidavit, a candidate has to mention the criminal cases which are filed/pending against him and in respect of which the offence is punishable by punishment of more than 2 years and in which a charge-sheet has been filed. The learned counsel Shri S B Shetye has also produced the subsequent order dated 07/07/2008 issued by the State Election Commission by which the earlier information in respect of the criminal cases was clarified. However, it is required to be noted that the aforesaid material was not placed before the Trial Court by the said Respondent – State Election Commission whilst the Election Petition was pending though it was a party to the Election Petition.

10 Heard the learned counsel for the parties.

11 ***SUBMISSIONS ON BEHALF OF THE PETITIONER HEREIN
(RESPONDENT NO. 4 IN ELECTION PETITION) BY THE
LEARNED COUNSEL SHRI B. D. JOSHI***

a] That the Election Petition is bereft of material particulars in respect

of the alleged criminal cases pending against the Petitioner herein (Respondent No.4) and therefore the Election Petition ought to have been dismissed on the said ground. In support of the said contention, the learned counsel sought to place reliance on the judgments of the Apex Court reported in 1976 SC 744 in the matter of Udhav Singh v/s. Madhav Rao Scindia; AIR 1986 SC 1253 in the matter of Azhar Hussain v/s. Rajiv Gandhi; AIR 1987 SC 1577 in the matter of Dhartipakar Madan Lal Agarwal v/s. Rajiv Gandhi and 1987 SC 1926 in the matter of Samar Singh v/s. Kedar Nath and others, as well as the judgment of a learned Single Judge of this Court reported in 2016(2) Mh. L.J. 613 in the matter of Satish Mahadeorao Uke v/s. Devendra Gangadhar Fadnavis.

- b] That in terms of the law laid down in respect of furnishing material particulars in an Election Petition, it was obligatory on the part of the Respondent No.2 herein (i.e. the Election Petitioner) to give details of the criminal cases and whether the charge sheet has been filed or not so that the Petitioner herein could have an opportunity to deal with the said fact. However, the Election Petition is bereft of such material particulars and ought to have been dismissed.

- c] That the Trial Court has erred in permitting the Election Petitioner to lead evidence in respect of the said cases when there were absolutely no pleadings in that regard. The evidence is therefore dehors the pleadings and the Trial Court has therefore disregarded the principles governing the approach to evidence and thereby has committed grave errors. Reliance is sought to be placed on the judgment of the Apex Court reported in (1999) 9 SCC 386 in the matter of Jeet Mohinder Singh v/s. Harinder Singh Jassi.
- d] In so far as corrupt practice and fraud is concerned, there are absolutely no pleadings in that regard so that an issue in respect of corrupt practice or fraud could be framed.
- e] The Trial Court has erred in recording a finding in respect of the said Case No.64 of 1997 when the details in respect of the said case were not given by the Election Petitioner.
- f] The Trial Court failed to appreciate that the said case was an old case and that the name of the accused and the Petitioner herein (i.e. Respondent No.4) is the same i.e. Vijay Waman Deshmukh, the Petitioner herein could not be said to be absconding as the

Petitioner herein is a Municipal Corporator for a period of about 10 years and could have been very well served with the charge-sheet etc.

- g] The Trial Court erred in recording a finding that the Respondent No.4 has not disclosed the loan taken when the same was not even the case of the Election Petitioner and the case was that only the column in respect of the bank account was kept blank;
- h] That the findings arrived at by the Trial Court are not on the basis of the standard of proof required in an Election Petition.
- i] That the Trial Court has not framed the issues which are arising out of the pleadings and which are germane to an Election Petition.
- j] That having regard to Section 16 of the Bombay Provincial Municipal Corporation Act, 1949, the violation of the directions of the Election Commission is not a ground for a challenge to the election of a returned candidate;

**12 SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2
HEREIN (i.e. ELECTION PETITIONER IN THE ELECTION
PETITION) BY THE LEARNED SENIOR COUNSEL SHRI
S.M.GORWADKAR :-**

- i] The learned Senior Counsel sought to counter the submissions made on behalf of the Petitioner herein Shri B D Joshi as regards absence of material particulars by relying upon paragraphs 6, 7, 8 and 10 and contending that the said particulars were enough to put the Respondent No.4 to the Election Petition to notice. It was therefore the submission of the learned Senior Counsel that the Election Petition does not lack in material particulars.
- ii] That assuming the Election Petition lacks in material particulars in respect of the criminal cases, the fact that the Petitioner herein had kept the columns in respect of bank account and had mentioned the wrong PAN card number was fatal to the acceptance of the nomination of the Petitioner herein. Reliance is sought to be placed on the judgment of the Apex Court reported in (2015) 3 SCC 467 in the matter of Krishnamoorthy v/s. Sivakumar and others.
- iii] That assuming appropriate issues are not framed, the same does not vitiate the order passed by the Trial Court as the parties proceeded to trial on the basis of the said issues and were knowing what the rival case was. Reliance was sought to be placed on the

judgments of the Apex Court, reported in *AIR 1963 SC 884* in the matter of *Nedunuri Kameswaramma v/s. Sampati Subba Rao* and *1969 (1) SCC 741* in the matter of *Shaik Mohammed Umar Saheb v/s. Kaleskar Hasham Karimsab and others*

iv] The learned Senior Counsel also placed reliance on Section 403 of the Bombay Provincial Municipal Corporation Act, 1949 to contend that non-compliance of the details to be given in the nomination form would entail disqualification of the Petitioner herein and his unseating as a Corporater.

13 Having heard the learned counsel for the parties, I have considered the rival contentions. In the instant case, filing of the Election Petition is referable to Section 16 of the Bombay Provincial Municipal Corporation Act, 1949 (for short “the said Act”). For the sake of ready reference the said provision is re-produced herein under :-

16. Election petitions (1) If the qualification of any person declared to be elected a councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the State Election Commissioner of a nomination or of the improper rejection or refusal of a vote, or by reason of a material irregularity in the election proceedings, corrupt practice, or any other thing materially affecting the result of the election, any person enrolled in the municipal election roll may at any time within ten days

after the result of the election has been declared, submit an application to the Judge for the determination of the dispute or question.

(2) The State Election Commissioner may, if it has reason to believe that an election has not been a free election by reason of the large number of cases in which undue influence or bribery has been exercised or committed, by order in writing, authorise any officer of the Commission to make an application to the Judge at any time within one month after the result of the election has been declared for a declaration that the election of the returned candidate or candidates is void.

(2A) No election to any Corporation shall be called in question except by an election petition presented to the Judge referred to in sub-section (1) and no Judge other than the Judge referred to in sub-section (1) shall entertain any dispute in respect of such election.

(3) The Judge shall decide the applications made under sub-section (1) or (2) after holding an inquiry in the manner provided by or under this Act.

Explanations.---For the purposes of this section—

(1) "corrupt practice" means one of the following practices, namely:--

- (a) any gift, offer or promise by a candidate or his agent or by any person with the connivance of a candidate or his agent of any gratification, pecuniary or otherwise, to any person whomsoever, with the object, directly or indirectly of inducing a person to stand or not to stand as, or to withdraw from being, a candidate at an election or a voter to vote or refrain from voting at an election or as a reward to a person for having so stood or not stood or for having withdrawn his candidature or a voter for having voted or refrained from voting;
- (b) any direct or indirect interference or attempt to interfere on the part of a candidate or his agent

or of any other person with the connivance of the candidate or his agent with the free exercise of any electoral right, including the use of threats of injury of any kind or the creation or attempt to create fear of divine displeasure or spiritual censure, but not including a declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with a legal right;

- (c) the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person whether living or dead or in a fictitious name or by a person for a voting paper in his own name when, by reason of the fact that he has already voted in the same or some other ward, he is not entitled to vote;
- (d) the removal of a voting paper from the polling station during polling hours by any person with the connivance of a candidate or his agent;
- (e) the publication by a candidate or his agent or by any other person with the connivance of the candidate or his agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election;
- (f) any acts specified in paragraphs (a), (b), (d) and (e) when done by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent;
- (g) the application by a person at an election for a voting paper in the name of any other person, whether living or dead, or in a fictitious name, or for a voting paper in his own name when, by

reason of the fact that he has already voted in the same or another ward, he is entitled not to vote; or

- (h) the receipt of, or agreement to receive, any gratification of the kind described in paragraph (a) as a motive or reward for doing or refraining from doing any of the acts therein specified;

(2) A corrupt practice shall not be deemed to have been committed in the interests of a returned candidate if the Judge is satisfied that it was of a trivial and limited character which did not affect the result of the election, that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, that it was committed without the sanction or connivance or contrary to the orders of the candidate or his agents, and that the candidate and his agents took all reasonable means for preventing the commission of corrupt practices at the election.

A reading of the said provision therefore makes it clear that the said provision can be invoked if the election is to be questioned on the ground of improper rejection of a nomination, or improper reception of nomination or refusal of a vote or by reason of a material irregularity in the election proceedings, corrupt practice, or any other thing materially affecting the result of the election. The said provision also postulates as to what amounts to a corrupt practice under the said provision.

In so far as Section 403 of the said Act is concerned, the same reads thus :-

403. Procedure in election inquiries (1) If an application is made under section 16 for a declaration that any particular candidate shall be deemed to have

been elected, the applicant shall make parties to his application all the candidates who were duly nominated for the seat or seats in the ward in question, whether or not the said candidates have been declared elected, and shall proceed against the candidate or candidates declared elected.

(2) The applicant shall, whenever so required by the Judge, deposit in the Court a sum of five hundred rupees in cash or Government securities of equivalent value at the market rate of the day as security for any costs which the applicant may be ordered to pay to other parties to the said application.

(3) If, after making such inquiry as he deems necessary, the Judge finds that the election of a returned candidate has been procured or induced or the result of the election has been materially affected by any corrupt practice, or any corrupt practice has been committed in the interests of a returned candidate or the result of the election has been materially affected by the improper acceptance or rejection of any nomination or by reason of the fact that any person nominated was not qualified or was disqualified for election, or by the improper reception or refusal of a vote or by the reception of a vote which is void, or by any non-compliance with the provisions of this Act or any rules made thereunder relating to the election, or by any mistake in the use of any prescribed form, or the election has not been a free election by reason of the large number of cases in which bribery or undue influence has been exercised or committed, he shall declare the election of the returned candidate to be void and if he does not so find he shall confirm the election of the returned candidate.

(4) All applications received under section 16—

- (a) in which the validity of the election of councillors elected to represent the same ward is in question shall be heard by the same Judge, and
- (b) in which the validity of the election of the same councillor elected to represent the same ward is in

question shall be heard together.

(5) If an application is made under section 16 that any particular candidate (other than the candidate declared to have been elected) shall be deemed to have been elected, then the returned candidate or any other party may give evidence to prove that the election of the person in whose favour such declaration is sought would have been void, if he had been declared elected and an application had been presented calling in question his election.

If the Judge is of opinion –

- (i) that in fact any candidate in whose favour the declaration is sought has received a majority of the valid votes, or
- (ii) that but for the votes obtained by the returned candidate by corrupt practices, such candidate would have obtained a majority of the valid votes;

the judge shall after declaring the election of the returned candidate to be void declared the candidate in whose favour the declaration is sought, to have been duly elected.

(6) The Judge's order under this section shall be conclusive.

(7) Every election not called in question in accordance with the foregoing provisions shall be deemed to have been to all intents a good and valid election.

Reading of the said provision therefore discloses that the said provision lays down the procedure for the trial of an Election Petition under the said Act and contemplates setting aside the election for the reasons mentioned therein, one of the reasons mentioned therein is the mistake in the use of any prescribed form. Hence it is Section 16 of the said Act which can be said to be the main

substantive provision under which the Election Petition can be filed. In so far as Section 16 of the said Act is concerned, as contended by the learned counsel for the Respondent No.4, it does not refer to any directions issued by the Election Commission either of the State or of the Centre, the violation of whose directions would be a ground for challenging the elections.

14 In so far as the directions issued by the State Election Commission are concerned, in respect of filing of the affidavit by the candidates by giving their personal information, the same is referable to the law which is developed in respect of bringing probity in public life. One of the outcomes of the said development is the introduction of Section 33A in the Representation of People's Act, 1971. The essence of the mandate of Section 33A is now sought to be replicated in so far as the elections to the local bodies are concerned. Hence a candidate is required to file an affidavit in the form containing details of his personal particulars. Hence the violation of the directions of the Election Commission would have to be seen from the said perspective. This is in so far as the statutory parameters under which an Election Petition filed under the said Act is required to be adjudicated.

15 Now coming to the issues that are required to be framed. There can be no gainsaying of the fact that the issues are framed in respect of only those facts which are alleged by one of the parties and denied or not admitted

by other party, and the issues are to be framed to determine the real controversy involved in the pleadings of the parties. In so far as the Election Petitions are concerned, be it either those of local bodies or assembly or parliament, the Election Petition challenging the elections to the local bodies or legislature or parliament, the basis requirement or the fundamental requirement is that the material facts or particulars on the basis of which the cause of action for filing the Election Petition has arisen must be pleaded . In the instant case, as indicated above, it is the contention of the learned Senior Counsel Shri S M Gorwadkar appearing on behalf of the Election Petitioner that such material particulars find a place in Paragraphs 6, 7, 8 and 10 of the Election Petition. It is required to be noted that in the written statement filed by the Respondent No.4 to the Election Petition, excerpts of which have already been reproduced herein above, the Respondent No.4 has categorically questioned the maintainability of the Election Petition on the ground of material particulars having not been given meaning thereby that the Election Petition is lacking in material particulars, and has therefore sought the dismissal of the Election Petition on the said ground. However, though it has been so averred, the Trial Court has not framed an issue in that regard though raised by the Respondent No.4 which in my view, is the most important issue in an Election Petition where a challenge is raised to the election of a returned candidate and where an issue is raised as regards lack of material particulars or facts. It is also required to be noted that an issue as regards non-compliance of

the directions of the State Election Commission was also required to be framed as the affidavit which is to accompany the nomination form is pursuant to the directions issued by the State Election Commission. This is required especially in the light of the fact that unseating of a returned candidate is sought on the ground that in the affidavit filed by the Respondent No.4 there are blanks. A reading of the issues framed by the Trial Court shows that the Trial Court has not framed issues in respect of which the parties are at issue in the Election Petition. The Trial Court as can be seen has framed an issue viz. "as to whether the Respondent No.4 has indulged into corrupt practices and he was not even qualified to contest the elections as alleged". As indicated above the Election Petition is bereft of any case of corrupt practice being set up as also the case of fraud in respect of which case the Election Petitioner was obliged to first set up a case of corrupt practice and then give material particulars, if he is alleging corrupt practice or fraud. By framing the said issue in the manner framed, the Trial Court has clubbed two issues into one which have no connection with each other. In so far as corrupt practice is concerned, as indicated above, it is not even the case of the Election Petitioner in the Election Petition that the Respondent No.4 has indulged in any corrupt practice and therefore the question that begs an answer as to how in the absence of any pleadings, the Trial Court could have framed the said issue. In so far as qualification to contest the election is concerned, the same would be part of the aspect as to whether non-compliance of the directions of the State Election Commission

would amount to a disqualification to contest the elections. Hence having regard to the issues framed, the same can be said to be not in consonance with the pleadings of the parties. It is therefore not possible to gloss over the said aspect by holding that though proper issues were not framed, since the parties knew what they were litigating at the order passed by the Trial Court is not vitiated.

16 It is required to be noted that though an application for amendment Exhibit-51 filed by the Election Petitioner was rejected the Election Petitioner has filed his affidavit of evidence and in the said affidavit has mentioned the criminal cases and given the details of the criminal cases allegedly pending against the Respondent No.4. It is required to be noted that in respect of the said information, it is stated by the Election Petitioner in his affidavit of evidence that the said information he has got from one Shri Madhav Kishanrao Jagtap – the Assistant Election Officer. Pertinently the said Shri Madhav Jagtap has not been examined by the Election Petitioner. It is in the said context that the learned counsel appearing for the Petitioner herein Shri B D Joshi submitted that it is one more circumstance where the evidence has been allowed to be led de hors the pleadings. Hence an issue in that regard was also required to be framed.

17 Now coming to the judgments cited on either side i.e. the

judgments cited in *Madhav Singh's* case, in *Azar Hussain's* case, *Dhartipakar Madan Lal Agarwal's* case, in *Samar Singh's* case and lastly in *Satish Mahadeorao Uke's* case (supra) by the learned counsel for the Petitioner herein Shri B D Joshi in support of his contention that the Election Petition is lacking in material particulars and therefore is required to be dismissed on the said ground, as also the judgments in *Krishnamoorthy's* case, *Nedunuri Kameswaramma's* case and in *Shaik Mohd. Umar Saheb's* case cited by the learned Senior Counsel appearing of the Election Petitioner Shri S M Gorwadkar, are concerned, it is not necessary for this Court to go into the applicability of the said judgments at this stage having regard to the final directions that this Court is inclined to issue in the above Petitions.

The learned counsel for the Respondent No.4 Shri B D Joshi vehemently urged that the impugned order is required to be set aside and the Election Petition is required to be dismissed on the ground of lack of material particulars or facts in terms of the law laid down by the Apex Court in the Judgments (supra) cited by him. It is not possible to accept the said contention of the learned counsel for the Respondent No.4 in the absence of the matter being examined by the Trial Court from the said angle, by framing an issue in that regard and answering the said issue.

18 It is also not possible to accept the contention urged on behalf of

the Election Petitioner by the learned Senior Counsel Shri S M Gorwadkar that assuming that in respect of criminal cases, material particulars are not pleaded but the fact remains that the Election Petitioner has kept blanks in the affidavit and therefore in terms of the law laid down by the Apex Court in *Krishnamoorthy's* case (supra), the order passed by the Trial Court against the Respondent No.4 can be sustained. In so far as the said contention is concerned, the said exercise would have to be carried out by the Trial Court and an issue would have to be framed in that regard, it is not possible for this Court to record a finding that though the Election Petition lacks in material particulars in respect of the alleged criminal cases against the Respondent No.4, nevertheless the Respondent No.4 is required to be unseated on account of the blanks that he has kept in the affidavit. Since such an issue was not framed and answered, it is not possible to accept the said contention.

19 In so far as the contention of the learned Senior Counsel Shri S M Gorwadkar for the Election Petitioner, that though the issues framed may be defective but since the parties knew what they were litigating at, the order is not vitiated on the said ground in support of which reliance was placed on the judgment of *Shaik Mohd. Umar Saheb's* case (supra). In the instant case it is required to be noted that it is not one or two issues which were not properly framed, but the instant case is a case where basic issues arising out of the pleadings have not been framed. The most important issue being whether the

Election Petition lacks in material particulars. Though the learned counsel appearing for the Petitioner herein (i.e. Respondent No.4) Shri B D Joshi sought to give justification for keeping the blanks or not giving the information in respect of the criminal cases that were allegedly pending against the Respondent No.4, it is not necessary for this Court to go into the said aspect at this stage. In my view in the instant case on account of the fact that proper issues were not framed by the Trial Court, the same has affected a proper disposal of the Election Petition, and thereby resulting in a failure of meeting out proper justice to the parties. The impugned order dated 06/10/2015 therefore stands vitiated on the ground that proper issues were not framed.

20 The finding recorded by the learned Principal Judge of the Small Causes Court, Pune cannot be independently taken so as to come to a conclusion that the Respondent No.4 has fallen foul of the statutory mandate and unseat the Respondent No.4 in the absence of any issue/issues framed in that regard. The exercise of considering the findings recorded by the Trial Court and then referring it to issue or issues would be like putting the cart before the horse. The said aspect is required to be considered in the context of the fact that in an Election Petition the standard of proof is different than one in a Civil Suit which is based on a preponderance of probabilities. During the course of hearing of the above Petitions, it was suggested to the learned counsel for the parties that to avoid delay in disposal of the Election Petition, the issues can be

re-framed with the consent of the parties and that the Trial Court may be directed to decide the said issues on the basis of the material both documentary as well as oral which is already on record. Though the learned counsel appearing for the Respondent No.4 Shri B D Joshi had shown some inclination, the said suggestion was not acceptable to the learned Senior Counsel Shri S M Gorwadkar for the Respondent No.2 herein (i.e. the Election Petitioner). This Court was therefore left with no alternative but to carry out the said exercise itself. For the reasons afore-stated, the impugned order dated 06/10/2015 is required to be quashed and set aside, and is accordingly quashed and set aside, and the Election Petition is remanded back to the Trial Court for a de-novo consideration of the same. The issues framed by the Trial Court would stand set aside and would stand substituted by the following issues :-

- [i] Whether Election Petition No.9 of 2012 suffers from non-disclosure of material particulars or facts and is therefore required to be dismissed on the said ground?
- [ii] Whether non-filing of the information in the affidavit to be filed along with the nomination can be a ground for challenging an election under Section 16 of the Bombay Provincial Municipal Corporation Act, 1949?

- [iii] Whether there was wrongful acceptance of the nomination of the Respondent No.4 to the Election Petition and thereby the election to Ward No.44 B, Hadapsar, Pune has been materially affected ?
- [iv] Whether the evidence in respect of the criminal cases could have been accepted in the absence of any pleadings ?
- [v] Whether the Respondent No.4 to the Election Petition can be unseated for keeping blanks in respect of the bank account and for mentioning wrong PAN Card number?
- [vi] Whether the Respondent No.4 to the Election Petition is required to be unseated as a Corporator from Ward No.44 B, Hadapsar, Pune ?
- [vii] Whether the Election Petitioner proves that he is entitled for a declaration as a elected candidate of Ward No.44 B, Hadapsar, Pune in place of the Respondent No.4 to the Election Petition ?

The above re-framed issues are exhaustive and no further issues are required to be framed, since the re-framed issues are to be tried on the basis of the material which is already on record.

21 The instructions issued by the State Election Commission on 15/03/2004 and the subsequent order dated 07/07/2008 would be taken on record by the Trial Court and marked as Exhibits.

22 Since the impugned order unseating the Petitioner is set aside, the Trial Court is directed to hear and decide the said Election Petition in terms of the issues now framed latest by 31/08/2016. It is clarified that the Trial Court would decide the said issues on the basis of the existing material and evidence on record. Needless to state that the contentions of the parties are kept open for being urged before the Trial Court. Further needless to state that the Election Petition would be tried on its own merits and in accordance with law uninfluenced by the observations, if any, made in the instant order. However, no bye elections to be held to the said Ward No.44 B, Hadapsar, Pune pending consideration of the Election Petition on remand.

23 Writ Petition No.11334 of 2015 is allowed to the aforesaid extent. Rule in Writ Petition No.11334 of 2015 is accordingly made absolute. In view of the order as above disposing of Writ Petition No.11334 of 2015, Civil Application No.3379 of 2015 does not survive and the same to accordingly stand disposed of as such.

24 In so far as Writ Petition No.10730 of 2015 is concerned, in view of the fact that the impugned order is set aside and the matter is relegated back to the Trial Court for a de-novo consideration, the said Writ Petition No.10730 of 2015 has turned infructuous and is accordingly disposed of as such. Rule in Writ Petition No.10730 of 2015 to accordingly stand disposed of.

25 At this stage, the learned Senior Counsel appearing for the Respondent No.2 herein (i.e. the Election Petitioner) Shri S M Gorwadkar seeks stay of the instant order for a period of four weeks from date. The learned counsel appearing for the Petitioner herein (i.e the Respondent No.4) Shri B D Joshi opposes the same. In the facts and circumstances of the present case, the instant order is stayed for a period of four weeks from date.

[R.M.SAVANT, J]