

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ELECTION PETITION NO.19 OF 2009

Eknath S/o. Chandrabhan Ghogare
Age : 52 Years, Occ. Agriculture
& Business, Resident of Loni (Kd.)
Tq. Rahata, Dist. Ahmednagar. ..PETITIONER

VERSUS

Radhakrishna S/o. Eknathrao Vikhe Patil,
Age : 55 Years, Occ. Agri.
& Social Work, President
Pravara Rural Education Society
Loni, Tq. Rahata, Dist. Ahmednagar. ..RESPONDENT

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Mr. Vikram S. Undre and Mr. P. R. Katneshwarkar,
Advocate for the Petitioner.
Mr. V. D. Hon, Senior Counsel i/b Mr. Ajinkya
Deshmukh, Advocate for the Respondent.

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CORAM : S. V. GANGAPURWALA, J.

DATED : 29th JUNE, 2018.

ORAL JUDGMENT:-

1. The petitioner assails the election of the respondent for the Maharashtra Legislative Assembly from Constituency No.218 - Shirdi, Taluka Rahata, District Ahmednagar.

2. The respondent is the returned candidate from Constituency No.218 - Shirdi held for the Maharashtra Legislative Assembly in the year 2009.

3. The petitioner is a voter to the said election.

4. The petitioner has assailed the election of respondent as a returned candidate on the ground of corrupt practice. The ground of corrupt practices are detailed in the Election Petition pursuant to which issues are framed by this Court at Exhibit '14'. The following issues are framed on 05.05.2011:-

ISSUES

1. Does the petitioner prove that the respondent committed corrupt practice during the Assembly Election in the year 2009 while contesting the election from Shirdi Constituency No.2018, held in the year 2009 as alleged in the election petition?
2. Does the petition prove that during the Assembly Election, the respondent used the funds/financial aid of Padmashri Dr. Vitthalrao Vikhe Patil Sah. Karkhana for enhancing his prospects?
3. Does the petition further prove that the respondent, with the help of his agent, and with the consent of other persons, utilised religious public places for the prospects of election?
4. Does the petition further prove that the respondent has published and procured services of the Government Officials to enhance his prospects during the election, as alleged?
5. Does the petitioner further prove that respondent has organized programme of Teacher's Day on 05.09.2009 and thereby committed breach of Code of Conduct?
6. Does respondent prove that the election petition is not maintainable in the

present form, for the grounds stated in para no.1(a) to (d) of his written statement?

7. What order?

5. To substantiate the contentions of the petitioner, the petitioner has examined himself at Exhibit '43' and has examined witnesses at Exhibits '52', '53', '55', '56' and '57'.

6. Mr. Katneshwarkar, the learned counsel for the petitioner strenuously contends that the petitioner had filed an application under Order XXI Rule 12 of the Code of Civil Procedure, requiring the respondent to admit or deny the documents. The respondent did not deny the documents, as such the documents are deemed to be admitted. The admitted documents need not be proved. The learned counsel submits that each and every issue and the ground of corrupt practice has been proved by examination of independent witnesses. The averments made in the petition and the statement of the petitioner are corroborated by the oral evidence of witnesses. The respondent has not stepped into the witness box. The evidence of the petitioner is not controverted by the respondent by stepping into the witness box, as such, the evidence of the petitioner is not controverted. The evidence of the petitioner has not been disproved, as such, is required to be relied upon. The learned counsel further submits that with regard to the issue no.2, the petitioner

has examined Vilas Bhikulal Mundada at Exhibit 51 and Babanrao Nathuji Kadu at Exhibit 56. Both of them have categorically stated in their evidence that the Karkhana is in the hands of respondent and the respondent made Karkhana to pay extra amount of Rs.400/- in the account of members without vouchers only with a view, to lure the voters. The members of the Karkhana are voters of the election for the members of Maharashtra Legislative Assembly of Shirdi Constituency. The extract of the account is also produced on record to substantiate the said fact. The evidence of these witnesses goes unchallenged. The learned counsel further submits that the religious places were used by the respondent for propagating his candidature and luring the voters to vote in his favour. The pamphlets were distributed on 25.09.2009. The meeting was held in the premises of the temple. The respondent was present and even meeting was held in the house of one Bhaskar Digambar Kharde. The evidence of witnesses corroborates the allegations of the petitioner. It is well settled principle that religious places cannot be used for canvassing the candidature and the same amounts to corrupt practice. The learned counsel further submits that the respondent prevailed upon to organize the Krushi Saptah at Shirdi at Babhaleshwar, which is a part of the Shirdi Constituency. In the said function, pamphlets were distributed and appeal was made to the voters to

vote for the respondent. The evidence of Balasaheb Vikhe would prove the said fact. The respondent in his capacity as Education Minister also got organized programme on Teacher's Day and in the said programme the teachers were felicitated. The said function every year is held at Mumbai but only because the respondent was contesting the election in the year 2009, it was held at Babhaleshwar. The respondent using his position of Education Minister had got organized the said function and had distributed pamphlets and lured the voters. He is also guilty of giving assurances to the employees of the Shirdi Sansthan that they would be made permanent. The learned counsel submits that all these facts have been proved by the independent evidence and also the documents are filed such as the extract of account, extract of the news in the newspaper which are not denied by the respondent. The election of the respondent deserves to be set aside on the ground of corrupt practice.

7. Mr. Hon, learned senior counsel for the respondent submits that the respondent had filled his nomination on 25.09.2009. He was a candidate on and after 25.09.2009. The allegations made prior to the said date would be of no avail, as the respondent was not a candidate till that date.

8. The learned senior counsel further submits that the pleadings are vague. The names of the

persons are not given in the pleadings and only some hearsay evidence is led. The learned senior counsel further submits that the respondent was not required to step into the witness box, as the petitioner has not proved its case. The respondent has denied the case of the petitioner and the witnesses in the cross-examination. The bare statement of the witnesses without any corroborative evidence cannot be relied upon. The learned senior counsel submits that as the Election Petition is false and frivolous, same deserves to be dismissed with costs.

9. I have considered the submissions canvassed by the learned counsel for the respective parties, so also gone through the evidence.

10. The petitioner has not produced a single original document which can be said to be a primary evidence as required under Section 64 of the Evidence Act. Section 64 of the Evidence Act requires the documents to be proved by primary evidence except in the case enumerate in Section 65 of the Evidence Act. The petitioner alongwith the petition nor on later stage has filed any original documents to be constituted as primary evidence. The petitioner has also not sought any permission to adduce secondary evidence. Apart from that, even the said document cannot be said to be proved.

11. The petitioner had given an application purportedly under Order XII Rule 1 of the Code of Civil Procedure. On the said application, this Court on 28.4.2017 had passed an order that the application is moved after the matter is fixed for cross-examination of the petitioner. The stage of admission, denial of the documents is over long back and the application is filed. In fact, the petitioner was expected to give notice to the respondent for admission / denial of the documents. In view of that, it cannot be said that documents are deemed to be admitted.

12. Heavy burden lay upon the petitioner to prove the documents relied upon. The extract of account issued by the Bank is not proved nor the same is in consonance with the Provision of Section 4 of the Bankers' Books Evidence Act, 1891. The said extract does not bear the certificate, as is required nor the said document is proved. The statement also does not whisper that it is an extract in respect of account maintained in ordinary and regular course of business as per Section 34 of the Indian Evidence Act. In the evidence of Mr. Vilas Mundada and Mr. Baban Kadu, it has also not been stated that entries therein are true and correct. In absence of all these requirements, the documents cannot be said to be proved. Moreover, it is not brought on record that the respondent is in any manner concerned with the

management of the said 'Karkhana'. In the written statement, the respondent has denied his association with the 'Karkhana' in whatsoever manner. It was burden cast upon the petitioner to prove that it was at the behest of the respondent, some additional amount was paid, so as to lure the voters to vote for him. No such evidence is led by the petitioner.

13. In respect of the allegations of the corrupt practice in the Krushi Saptah and the program organized to facilitate teachers on the Teacher's Day, no substantive evidence is coming forth, except the bald statement of witnesses i.e. Rajendra Pipada, Sanjay Kharde and one Mr. Balasaheb Vikhe. No pamphlets are produced on record. The teachers function, even, according to the petitioner was Government sponsored function. Nothing is brought on record to show that Government organized the function at the behest of the respondent. The evidence is too short in that regard. The same is with regard to the allegation of Krushi Saptah and about the respondent visiting the Bhagawati Mata Temple and holding meeting therein.

14. Unless the particular fact is proved, the burden never shifts upon the respondent to disprove the fact. Heavy burden lies upon the petitioner to prove a fact in issue and then only the burden

would shift upon the respondent to disprove the same. In the present case, the petitioner has not proved the averments made by him, the burden of proof upon the petitioner has not been discharged. In absence of substantive evidence, it would not be safe to negate the election of the respondent.

15. In light of the above, Election Petition is dismissed, however, with no order as to costs.

(S. V. GANGAPURWALA)
JUDGE