

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION IN ELECTION PETITION NO.11 OF 2017
AND
ELECTION PETITION NO.5 OF 2017

Pandurang Arjun Madkaikar,
s/o late Arjun Madkaikar,
major of age, Indian National,
residing at House No.290/1,
Ella, Old Goa, Tiswadi, Goa.

... Applicant

Versus

Xavier Fialho,
Son of Santan Anthony Fialho,
Aged 38 years, residing at House No.136,
Above Canara Bank,
Old Goa, Tiswadi, Goa-403402.

... Respondent

Shri Pankaj Pai Vernekar and Shri Abhishek Sawant,
Advocates for the Applicant/Original Respondent.
Shri V.P. Thali, Advocate for the Respondent/Original
Petitioner.

Coram : NUTAN D. SARDESSAI, J.

Reserved on : 3rd MAY, 2018

Pronounced on : 4th JULY, 2018

ORDER :

The returned successful candidate at the last assembly elections whose election has been challenged under Section 80 read with Section 80A and 100 of the Representation of the People Act, 1951, Act for short hereinafter, has sought for the summary rejection/dismissal of the said Election Petition under Section 83 of the Act read with Order VII Rule 11(a) &

(d), CPC, 1908.

2. The parties would hereinafter be referred to as the applicant and the respondent for brevity's sake.

3. It was the case of the applicant that at paragraph 4 of the petition, the respondent had made a reference to the purported bank details of the Goa Bagayatdar Sahakari Kharedi Vikri Saunstha Maryadit, 'Bagayatdar Saunstha' for short, at paragraph 5 the purported mode of business operation and the manner of issuance of the gift coupons of the said Bagayatdar Saunstha while the bank details of the Madkaikar Navchaitanya Trust had been spelt out at paragraph 6 of the petition. However, the contents of the paragraphs 4,5 & 6 have not been substantiated with a single supporting document nor has the respondent revealed the source of knowledge with reference to the averments in the said three paragraphs. A reference has been made to the alleged purchase of 4000 coupons bearing serial no.120101 to 124100 on 30/12/2016 by the Trust at paragraph 8 of the petition, the payments whereof were allegedly made by the

respondent in the Bicholim Urban Co-operative Bank Ltd., Panaji at Patto Panaji vide the cheques bearing no.016251, 016252, 016253, 016253 and 016254 all dated 26/12/2016 and that these cheques were credited in the bank account of the Bagayatdar Saunsta on 31/12/2016. However, once again not a single document has been produced to substantiate the veracity of the said averments and that the contents were affirmed to be true to the knowledge of the respondent as derived from the records of investigation pertaining to the FIR No.21/2017.

4. The respondent has willfully and deliberately omitted the documents on the basis of which he is suing and on the basis of which he is in the petition, as had the documents been produced, the same would have gone against the respondent. It was otherwise incumbent on the respondent to produce these material documents to substantiate the averments in the petition and in order to enable the applicant to meet his case effectively and avoid being taken by surprise in the course of the trial. It was alleged at paragraph 13 that after filing of the nomination on 11/01/2017, the applicant started

his campaign in Cumbarjuva constituency and started giving gift coupons which were purchased and issued by the Bagayatdar Sauntha on 30/12/2016 to the electors from the said Cumbarjuva constituency. It was further alleged at paragraph 13 that he had purchased many gift coupons issued by the Bagayatdar Sauntha on 28/01/2017 and distributed the same to the electors from Cumbarjuva constituency three of which dated 28/01/2017 were bearing distinct numbers 128423, 128424 & 127209.

5. It was further the case of the applicant that as per the respondent's case in the petition at para 15, he had alleged that on 30/01/2017 he had learnt about the distribution of the gift coupons by the applicant from 'some of the electors' from the Cumbarjuva Constituency and that the gift coupons were handed over to the respondent by the two electors whose names were not known to him. Besides, the distribution of the gift coupons was found on the facebook by Prakash Naik, one of the contestants from the other constituency. These contents of the petition from para 13 to 15 had been verified based on the information received by the respondent from the

electors of Cumbarjuva Constituency. These allegations are completely devoid of material facts and material particulars and have been made in a most casual manner. Neither the date nor time of the distribution of the said coupons has been averred nor the place in Cumbarjuva Constituency where the said coupons were distributed have been stated.

6. The names of the recipients/beneficiaries of the said coupons have not been mentioned nor the serial numbers of the gift coupons alleged to have been distributed by the applicant have been mentioned. A categorical averment is made regarding the purchase of the gift coupons dated 28/01/2017 by and in the name of the applicant but no document is produced in support thereof. Moreover, at paragraph 20 a reference has been made to the handing over of the four gift coupons all dated 30/12/2016 by Mr. Victor Antonio Pereira, Anesh Vijaykumar Shet, Sadanand Mukund Tivrekhar and Suraj Kanta Naik to the respondent being gifted to them by the applicant as a gratification to vote for him in the 2017 assembly election. However, the date and the time when the alleged gift coupons were purportedly distributed

has not been averred. This averment was a material fact since the charge of corrupt practice in this regard could have been maintained only if the corrupt practice was alleged to have been committed subsequent to 13/01/2017 i.e. the date of filing the first set of nomination, and therefore in the absence of such material averment, no cause of action has been disclosed against him.

7. The respondent at paragraph 20(ii) has alleged that on 02/02/2017, one Bhalchandra Usgaonkar had handed over five gift coupons dated 30/12/2016 to the respondent stating that the same were handed over to him by five electors from the constituency and who had told him that they were gifted to him by the applicant as a gratification to vote for him in the election. However, neither the names nor any other details of the said alleged five electors have been stated in the petition nor the date and time when the alleged coupons were handed over by the said five electors to Shri Bhalchandra Usgaonkar has been stated. The disclosure of the date and time when the purported gift coupons were allegedly distributed by the applicant to the alleged five electors was extremely material

since the charge of corrupt practice could have been maintained against the applicant only if the gift coupons were alleged to have been distributed by him subsequent to 13/01/2017. A reference has been made at paragraph 22 of the petition to an alleged letter dated 01/02/2017 addressed by the Managing Director of the Bagayatdar Saunstha to the Returning Officer of the Cumbarjuva Constituency wherein the details of the gift coupon dated 30/12/2016 bearing no.120101 to 124100 have been mentioned.

8. A reference has been made to a letter dated 18/02/2017 addressed by the Managing Director of the Bagayatdar Saunstha to the Police Sub-Inspector, Old Goa Police Station and to another letter dated 20/02/2017 at paragraph 25 allegedly addressed by the Ponda Branch of the Goa State Co-operative Bank Ltd. to the Police Sub-Inspector, Old Goa Police Station giving the details of the cheques through which 4000 gift coupons were allegedly purchased by the applicant in the name of the Trust. Although elaborate details of these letters have been stated in the petition, no copies of such letters have been annexed alongwith the petition. These

letters constitute material documents on the basis of which the respondent was suing and upon which he had founded his case for non-production of such material documents. The respondent at para 23 of the petition had alleged that Shri Shirin V. Naik had handed over to the respondent five gift coupons two dated 30/12/2016 while three were dated 28/01/2017 which were allegedly handed over to him by the three electors from Cumbarjuva constituency on 3/02/2017 stating that the same were distributed to them by the applicant while campaigning.

9. The respondent did not report the fact regarding the alleged illegal distribution of the gift coupons to the Officer nor has it been averred that the five gift coupons were allegedly distributed by the applicant to the three alleged electors as an allurement or illegal gratification to vote for him. A reference was made at para 29 to the alleged purchase of further such gift coupons by the applicant but the date of purchase or distribution thereof has not been stated by the respondent and quite on the contrary it was admitted that the payment towards the purchase of gift coupons was

made by a cheque bearing no.270444 drawn by one Shri Vishnu R. Tivrekar having account with the State Bank of India, Old Goa Branch. Said Tivrekar was not the election agent of the applicant nor has it been averred in the petition and it is otherwise not the case of the respondent that Tivrekar bought these coupons to give to the voters as an illegal gratification in the elections. Material facts must be pleaded by the respondent in order to obtain the relief as prayed for. However, it is clearly evident that no material facts have been pleaded and the petition does not spell out any cause of action against the applicant. The petition therefore is liable to be summarily dismissed.

10. Moreover, whenever a party sues upon a document or relies on a document in his possession or power, he shall enter such document in a list and shall produce the same in Court in terms of Order VII Rule 14 CPC. In the absence thereof the petition is liable to be dismissed under Order VII Rule 11(a) CPC or principles analogous thereto. An Election Petition is required to be verified in the manner laid down in the Code of Civil Procedure and in terms of Section 83(c) of

the Act. The verification of the pleadings was not as per the prescribed procedure and the supporting affidavit also did not disclose the source of information of the respondent in respect of the alleged corrupt practices. There has been no averment in the petition that the result of the election was materially affected by the alleged acts of corrupt practices committed by the applicant and on that count too the petition deserved to be dismissed summarily. The Election Petition therefore be rejected by invoking the provision of Section 83(1)(a) to (c) of the Act and Order VII Rule 11(a) & (d) of the CPC.

11. The respondent opposed the application on the premise that it was misconceived in law and had been filed with an oblique motive to achieve an ill design of protracting the trial. The Election Petition was filed on the ground that the returned candidate had committed the corrupt practice of bribery and that his election was void in terms of Section 100(1)(b) of the Act. An election petition shall be dismissed in terms of Section 86 of the Act only if it does not comply with the provision of Section 81, 82 or Section 117 of the Act. In a given case therefore even if the Court finds there is non-

compliance with Section 83 or any of the provisions of the said Section, the petition cannot be dismissed without holding or continuing with the trial of the petition. There is no allegation in the application that there is non-compliance of Section 81, 82 or Section 117 of the Act and therefore the petition cannot be dismissed on the grounds set out in the application. The petition does not suffer from the vice of lack of pleadings either with regard to any material fact or the material particulars with respect to the allegations of corrupt practice. The various allegations of the absence of material facts or material particulars made in the application under reply qua the averments made in the various paragraphs of the petition do not amount to lack of pleadings of any material fact or material particulars.

12. The applicant has already filed his written statement rebutting or admitting as the case may be, the allegations made in the petition which would not have been possible if the material facts or material particulars as alleged were lacking. There is also no basis in the plea that the verification of the pleadings in the petition is not in accordance with Section

83(1)(c) of the Act or that the supporting affidavit does not disclose the source of information of the election petitioner in respect of the alleged corrupt practice. The petition cannot be rejected even if in a given case there is breach of Order VII Rule 14 of CPC. Assuming that there is non-production of material document or non-compliance with Order VII Rule 14 of CPC, even then the Election Petition cannot be rejected in view of Section 86 of the Act. The application therefore is liable for dismissal with costs.

13. Heard Shri Pankaj Pai Vernekar, learned Advocate for the applicant, who submitted at the outset that the essential ingredient of corrupt practices had to specify the date and time of commission of such corrupt practices. He adverted to the pleadings in the petition and reiterated his case that there was non-disclosure of the details of the amount in the bank or of the Trust. There was also no reference to the date and time when the applicant gave the gift coupons or that the coupons were distributed to the people. There was no corrupt practice indulged in by the applicant in terms of Section 123(1)(a) of the Act. There was no averment that the gift

coupons were given to the voters. He placed reliance in **Manohar Joshi V/s. Nitin Bhaurao Patil & Anr. [(1996) 1 SCC 169]**, **Azhar Hussain V/s. Rajiv Gandhi [1986 (Supp) SCC 315]**, adverted to Section 83(a) & (b) apart from Section 86 which admittedly did not include Section 83 and placed further reliance in **Adam Narsayya Narayan V/s. Praniti Shinde & Ors. [2017 (4) Bom.C.R. 415]**, **Annarao Govindrao Patil V/s. Amit Vilasrao Deshmukh & Ors. [2016 (7) Bom.C.R. 609]**, **G.M. Siddeshwar V/s. Prasanna Kumar [(2013) 4 SCC 766]** and **Samant N. Balkrishna & Anr. V/s. George Fernandez & Ors. [1969 (3) SCC 238]**.

14. Shri Pankaj Pai Vernekar, learned Advocate for the applicant further referred to Section 87 of the Act and submitted that the provisions of CPC were applicable and that Order VII Rule 14 CPC was applicable by virtue of Section 87 of the Act to the petition under Section 83 of the Act. Though the respondent had verified the contents of the petition as true to his own knowledge yet no reasons were assigned why the respondent had not produced the documents to

substantiate his case. There was no cause of action disclosed for non-compliance with Order VII Rule 14 of CPC and therefore the petition was liable to be rejected. He next pointed out whether the respondent had shown that the result of the election was materially affected due to the commission of the corrupt practice and in that context relied in **Samant N. Balkrishna & Anr. V/s. George Fernandez & Ors. [1969 (3) SCC 238]**. The petition was therefore to be rejected under Order VII Rule 11(a) CPC read with Section 83 of the Act.

15. Shri V.P. Thali, learned Advocate for the respondent at the outset sought to bring about the distinction between Section 100(1)(b) and 100(1)(d)(ii) and submitted that the petition in **Samant N. Balkrishna** (supra), was under Section 100(1)(d)(u) of the Act. He next adverted to the various averments in the petition and submitted that there was no basis to allege that the petition was lacking in material facts and material particulars. He read Section 83 (a), (b) and (c) in the context of Section 86 of the Act and submitted that Section 83 could not be read into Section 86 of the Act.

Reliance was placed in **Murarka Radhey Shyam Ram Kumar V/s. Roop Singh Rathore & Ors. [AIR 1964 SC 1545]**. He next adverted to the requirement of Section 83(1) (a) and 83(1)(b) of the Act in the context of material facts and in the absence of which the petition was liable to be dismissed. It was his contention that the gift coupons were purchased by the applicant and given to the voters. He then adverted to the relevant paragraphs of the petition and submitted that there were neither any material facts nor any material particulars missing in the petition and therefore the preliminary objection to the tenability of the petition was without any basis. It was also not open to the applicant to contend that there was no corrupt practice at his instance. He placed reliance in **Mohan Rawale V/s. Damodar Tatyaba alias Dadasaheb & Ors. [(1994) 2 SCC 392]**, **Sardar Harcharan Singh Brar V/s. Sukh Darshan Singh & Ors. [(2004) 11 SCC 196]**, **Ashwani Kumar Sharma V/s. Yaduvansh Singh & Ors. [(1998) (1) SCC 416]**, **Ashraf Kokkur V/s. K.V. Abdul Khader & Ors. [(2015) 1 SCC 129]**, **Jagabhandhu Behera V/s. Subrat Tarai & Ors. [(2016) 6 SCC 256]** and **Kailash V/s. Nanhku & Ors.**

[(2005) 4 SCC 480].

16. It was his contention that there was a sharp distinction between the cause of action and non-disclosure of the cause of action and in that context placed reliance in **Srushti Vision & Ors. V/s. Shri Ulhas Buyao [2000 (1) Bom.C.R. 873]**.

All the relevant details of the distribution of the coupons were duly given in the petition and there was no basis in the contention on behalf of the applicant to the contrary. Section 83(1)(b) required the respondent petitioner to give as full statement as possible and which he had given in the petition.

He distinguished the judgment in **Adam Narsayya Narayan** (supra), and **Annarao Govindrao Patil** (supra), and submitted that there was no basis in the contention on behalf of the applicant that the documents were not given and therefore there was non-disclosure of the cause of action and lack of material facts. He had given the recitals at paragraph 4 and he was not required to prove the corrupt practice in the petition which contained explicit details about the corrupt practice indulged in by the applicant. He reiterated the judgment in **Mohan Rawale** (supra), that in **Ashwani**

Kumar Sharma (supra), **F.A. Sapa** (supra) and **Ashraf Kokkur** (supra), as also that in **Nanhku** (supra), and pressed for the dismissal of the application for rejection of the petition.

17. Shri P. Pai Vernekar, learned Advocate for the applicant submitted that the provisions of Order VII Rule 14 CPC applied to the proceedings under the Act. The cause of action was not disclosed from the material on record. He placed reliance in **P.A. Aziz V/s. K.V. Thomas [2015 (1) KLJ 462]** and in **C.P. John V/s. Babu Palissery & Ors. [(2014) 10 SCC 547]** and submitted that the judgments in **H.D. Revanna V/s. G. Puttaswamy Gowda & Ors. [(1999) 2 SCC 217]** and **Murarka Radhe Shyam** (supra), were clearly distinguishable. For that matter he also distinguished the judgment in **Mohan Rawale** (supra), & **F.A. Sapa** (supra). On a parting note he once again adverted to Section 100(1)(b) and 100(1)(d)(ii) of the Act and pressed for the rejection of the petition under Section 86 read with Order VII Rule 11 CPC. i would advert to their submissions in the light of the relevant provisions of the Act and the judgments

relied upon (supra), and in view thereof decide the application appropriately.

18. Section 83 of the Act reads that:

83. Contents of petition – (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

In other words, the election petition should not only contain a concise statement of the material facts on which the petitioner relies but shall set forth the full particulars of any corrupt practice alleged by the petitioner including **as full a statement as possible** of the names of the parties alleged to

have committed such corrupt practice and the date and place of the commission of each such practice, duly signed by the petitioner and verified in the manner prescribed under the Code in the verification of pleadings. It is therefore to be seen in the light of Section 83 of the Act whether the petition filed by the respondent adheres to these predicates which are interdependent.

19. The respondent petitioner at para 8 had alleged that the applicant had purchased from the Bagayatdar Sauntha 4000 gift coupons on 30/10/2016 with distinct serial numbers in the name of the Trust for the total value of ₹20,00,000/- vide four cheques maintained by the Trust in Bicholim Urban Co-operative Bank all dated 26/12/2016. The respondent petitioner at para 13 of the petition had alleged that in the course of his campaigning the applicant started distributing the gift coupons purchased by him to the electors from his constituency alongwith the BJP party manifesto as a gratification to induce the electors to vote for him. This paragraph does not indicate the full particulars of the corrupt practice nor does it contain as full a statement as possible and

the date and place of the commission of such practice. It broadly states that he started distributing the gift coupons to the electors from his constituency without in any manner spelling out the date and place of the commission of such practice. The respondent petitioner had alleged that many more such gift coupons issued by the Bagayatdar Saunstha on 28/01/2017 were purchased by the applicant and distributed to the electors which do not bear any further details and does not constitute the corrupt practice as required under Section 83(1)(b).

20. At para 15, the respondent petitioner alleged that this fact of distribution of the gift coupons by the applicant was brought to his notice while campaigning at Carambolim Village and two of the electors whose names he did not know handed over two of such gift coupons to him. No further details are forthcoming about such gift coupons, the names of the electors and the numbers of the gift coupons and to that extent too the said pleading is vague. Although the respondent petitioner claimed that he had lodged a complaint to the Returning Officer of the constituency and pressed for

immediate action vide his letter dated 31/01/2017 through his election agent, what was relied and produced on record was only the letter and not the copies of the two said gift coupons. It was his claim that the Returning Officer had brought this fact to the knowledge of the election flying squad and the Old Goa Police Station had registered an FIR against the applicant under Section 171-E and 188 IPC. Thereafter the respondent petitioner alleged that the four electors with distinct names and voter identity had handed over the four gift coupons to him which were earlier handed over by the applicant. There was no reference whatsoever to the date and place when the gift coupons were allegedly handed over to them by the applicant i.e. after the filing of the nomination and when the election process was on or otherwise.

21. Reference was made to another named elector handing over five gift coupons on 02/02/2017 to the respondent petitioner being those gifted by the applicant but again without spelling out the period of time or the date and place when such gift coupons were actually handed over to him by the applicant. The respondent petitioner claimed that by his

letter dated 02/02/2017 he had brought these facts to the notice of the Returning Officer of the Constituency and annexed the nine gift coupons but what was actually produced alongwith the petition was only the letter without the gift coupons. It was alleged at paragraph 23 of the petition that on 03/02/2017, the election agent of the petitioner had handed over to the respondent petitioner five gift coupons bearing distinct numbers as being those handed over to him on 03/02/2017 by the three electors to whom they were distributed by the applicant while campaigning in the constituency. Here too there was non-compliance with the predicates of Section 83(1)(b) of the Act. It was alleged at paragraph 29 of the petition that one Vishnu R. Tivrekar had deposited a cheque with Bagayatdar Sauntha towards the purchase of further such gift coupons but it was not shown from any material that the said Tivrekar was either the election agent of the applicant or acting at his behest. Rather the respondent petitioner in the petition had reproduced the reply of the applicant admitting that he had purchased the coupons via cheque payment and that the distribution of such coupons was much prior to the date when he filed the

nomination form and when the Code of Conduct was not in force.

22. Thus from a bare reading of the averments in the petition filed by the respondent petitioner, there are no material facts and details to show that the applicant considering the period from 11/01/2017 to 02/03/2017 had distributed the gift coupons to the electors from his constituency and as a gratification to induce the electors to vote for him in the said elections. Section 86 of the Act deals with the trial of election petitions and provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act. Section 81 deals with the presentation of petitions and provides that an election petition calling in question any election may be presented on one or more of the grounds specified in Sub-section 1 of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their

election are different, the latter of those two dates. Every petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Section 82 provides who are the parties to the petition and reads thus :

82. Parties to the petition - A petitioner shall join as respondents to his petition -

(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

23. Section 100 deals with the grounds for declaring election to be void. Sub-section (1) reads that :

(1) Subject to the provisions of sub-section (2) if the High Court is of the opinion -

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government or Union Territories Act, 1963; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice but the High Court is satisfied -

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the

candidate or any of his agents,
then the High Court may decide that the election of
the returned candidate is not void.

In other words, in order to declare the election to be void it is incumbent on the respondent petitioner to set out that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent, or that the result of the election, in so far as it concerns a returned candidate, has been materially affected or by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent.

24. Section 123 deals with the corrupt practices and provides different categories to be corrupt practices for the purpose of this Act and reads thus:

123. Corrupt practices.—The following shall be deemed to be corrupt practices for the purposes of this Act:—

(1) "Bribery", that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or [to withdraw or not to withdraw] from being a candidate at an election, or

- (b) an elector to vote or refrain from voting at an election, or as a reward to—
 - (i) a person for having so stood or not stood, or for [having withdrawn or not having withdrawn] his candidature; or
 - (ii) an elector for having voted or refrained from voting;
- (B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—
 - (a) by a person for standing or not standing as, or for [withdrawing or not withdrawing] from being, a candidate; or
 - (b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature.

25. In **Manohar Joshi** (supra), the Hon'ble Apex Court held that in order to constitute the corrupt practice it must be shown that the act was done during the election campaign between the date when the returned candidate became a 'candidate' and the date of poll, and that it was the act of the candidate or his agent or any other person with his consent. Unless all these constituent parts of the corrupt practice are pleaded to constitute the cause of action raising a triable issue and are then proved by evidence, the corrupt practice cannot be held to be pleaded and proved. If the act attributed is by the display of a video cassette recorded sometime earlier, the display being between the above dates in the constituency, a

mere display of the video cassette does not prove all the constituent parts of the corrupt practice, inasmuch as it must also be pleaded and proved that such display was by the candidate or his agent or any other person with his consent. Where the display of the cassette is attributed to any other person with the consent of the candidate, the liability of the candidate for commission of the corrupt practice results vicariously from the act of the other person done with the consent of the candidate. In such a case, the constituent part of the corrupt practice is the act done by any other person, not by the candidate himself or his agent for whose act the candidate's consent is assumed, with the authorisation for the act being done by any other person with the candidate's consent. This distinction between the act amounting to corrupt practice done by the candidate himself or his election agent and any other person with his consent has to be kept in view. This has relevance also for the purpose of Section 99 of the Act.

26. **Azhar Hussain** (supra), was an appeal challenging the order pursuant to which the election petition was dismissed on

the ground that it did not comply with the mandatory requirement of furnishing material facts and particulars enjoined by Section 83 of the Act and it did not disclose a cause of action. In the brief facts the respondent was elected as a member of the Lok Sabha from the Amethi constituency of Uttar Pradesh in the general elections held on 24/12/1984 and was declared elected having secured the highest votes. The appellant Azhar, an elector from the Amethi constituency filed the election petition giving rise to an appeal. The election of the returned candidate was challenged on the ground of alleged corrupt practices as defined under the Act. The respondent upon being served, instead of filing the written statement, raised preliminary objections to the maintainability of the petition on a number of grounds inter alia contending that the petition was lacking in material facts and particulars and was defective on that account, and that since it did not disclose any cause of action it deserved to be dismissed. This application was heard alongwith that for amendment and disposed off by the judgment under appeal upholding the preliminary objection raised on behalf of the respondent. It was contended on behalf of the appellant

Azhar that since the Act did not provide for the dismissal of an election petition on the ground that the material particulars necessary to be supplied in the election petition as enjoined by Section 83 of the Act were not incorporated in the election petition inasmuch as Section 86 of the Act which provides for summary dismissal of the petition does not advert to Section 83 of the Act there is no power in the court trying election petitions to dismiss the petition even in exercise of powers under the Code of Civil Procedure. It was further contended that even if the Court has the power to dismiss an election petition summarily otherwise than under Section 86 of the Act, the power cannot be exercised at the threshold and even if the powers under the CPC can be exercised by the Court hearing election petitions worse comes to worst, an election petition can be rejected under Order VII, Rule 11 of the CPC, but in no case it can be dismissed.

27. In **Azhar Hussain** (supra), the Apex Court considered Section 83 and Section 86 (1) of the Act with the explanation to appreciate the argument that where the legislature wanted to provide for summary dismissal of the election petition, the

legislature had spoken on the matter. The intention was to provide for summary dismissal only in case of failure to comply with the requirement of Sections 81, 82 and 117 and not Section 83 of the Act. In that context a reference was made to Section 81 and 82 apart from Section 86 to further the argument that inasmuch as Section 83(1) was not adverted to in Section 86, it followed that non-compliance with the requirements of Section 83(1), even though mandatory, did not have lethal consequence of dismissal. Nevertheless since CPC applied to the trial of an election petition by virtue of Section 87 of the Act, the Court trying an election petition can act in exercise of the powers of the Code including Order VI Rule 16 and Order VII Rule 11(a) of the Act.

28. In **Azhar Hussain** (supra), the Apex Court observed that the fact that Section 83 does not find place in Section 86 of the Act does not mean that powers under the CPC cannot be exercised. The Apex Court considered its judgment in **Hardwari Lal V/s. Kanwal Singh [(1972) 1 SCC 214]** and observed that in view of this pronouncement there is no

escape from the conclusion that an election petition can be summarily dismissed if it does not furnish the cause of action in exercise of the powers under the Code of Civil Procedure. It reiterated the law as laid down in **Udhav Singh V/s. Madhav Rao Scindia [(1977) 1 SCC 511]** that all the primary facts which must be proved by a party to establish a cause of action or his defence are material facts. In the context of a charge of corrupt practice it would mean that the basic facts which constitute the ingredients of the particular corrupt practice alleged by the petitioner must be specified in order to succeed on the charge. Whether in an election petition a particular fact is material or not and as such required to be pleaded was dependent on the nature of the charge levelled and the circumstances of the case. All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of Section 83(1)(a) and therefore an application in election petition can be and must be dismissed if it suffers from any such vice. The Apex Court further held that the principle laid down is that the pleading in regard to matters

where there is scope for ascribing an alleged corrupt practice to a returned candidate in the context of a meeting of which dates and particulars are not given would tantamount to failure to incorporate the essential particulars and that inasmuch as there was a possibility that witnesses could be procured in the context of a meeting at a place or date convenient for adducing evidence, the High Court should not even have permitted evidence on that point. In other words, no amount of evidence could cure the basic defect in the pleading and the pleading as it stood must be construed as one disclosing no cause of action.

29. In **Adam Narsayya Narayan** (supra), the returned candidate filed an application for summarily dismissing the election petition in view of the facts, circumstances and grounds set out therein namely amongst others that the allegations of corrupt practice made in the election petition were vague and lacking in material facts and material particulars. The election petitioner did not have personal knowledge and the allegations were based on hearsay. The learned Single Judge of this Court considered the judgment in

Azhar Hussain (supra), **F.A. Sapa** (supra), **Jagabandhu Behera** (supra), and **Annarao Patil** (supra), being the judgments on the issue of dismissal of the election petition on the ground of non-compliance with Section 83 of the Act. On considering the averments in the petition qua the allegations of corrupt practice, the learned single Judge found that the pleadings did not specify the test laid down by the judgments of the Apex Court and therefore it had to be held that the election petition lacked in material facts in so far as the allegations of corrupt practice are concerned and were also vague. In that view of the matter, the petition had to be dismissed on the application of Order VII Rule 11(a) of the Code of the Civil Procedure on the ground that the allegations made did not make out a cause of action.

30. In **Annarao Patil** (supra), the respondent no.1, the returned candidate had filed an application for the rejection of the plaint under Order VII Rule 11 CPC. It was the case of the petitioner that the respondent no.1 was an influential person being the son of the Ex-Chief Minister of Maharashtra and used his influence in the election process. He had spent

an amount more than the permissible limit of ₹28,00,000/- and indulged in corrupt practices. Besides, it was alleged that he had not shown expenditure of many events in the returns and concealed his expenditure. The respondent no.1 had filed his written statement and besides also raised objection under Order VII Rule 11 CPC being whether the petition suffered on the count of non-compliance with the provisions of Sections 81, 82 and 83 of the Act, whether the petition suffered on the count that there were no full particulars of the corrupt practice which the petitioner alleged and full statement of the names of the parties alleged to have committed the corrupt practice and whether the election petition was maintainable as it did not contain concise statement of material facts on which the petitioner relied. The learned Single Judge considered Section 100 of the Act, Section 80, 81 and 83 thereof and observed that in view of these provisions and the interpretation done by the Apex Court, the date, the place of corrupt practice and the names of the persons who committed the corrupt practice was required to be mentioned in the pleadings. Besides, the learned Judge considered Section 86 dealing with the trial of election petitions and corrupt practices

as contained in Section 123 of the Act apart from relying in **Azhar Hussain** (supra), and in that view of the matter allowed the application for rejection of the petition and rejected the petition.

31. In **G.M. Siddeshwar** (supra), a three Judge Bench of the Apex Court considered Section 86 of the Act which made no reference to Section 83 thereof and so, prima facie, an election petition could not be summarily dismissed under Section 86 of the Act for non-compliance with the provisions of Section 83 thereof. It considered an earlier three Judge Bench judgment which held that since an election petition is required to be tried as nearly as possible in accordance with the procedure applicable under the CPC to the trial of suits, an election petition could nevertheless be dismissed if it did not disclose a cause of action. It considered the earlier judgment in **Azhar Hussain** (supra) and held on a consideration of the various judgments that although non-compliance with the provisions of Section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-

compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold.

32. Section 87 of the Act prescribes the procedure to be followed before the High Court in an election petition and provides that every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits subject to the provision of the Act and any rules made thereunder. In view of this clear mandate, Order VII Rule 14 CPC would clearly apply to this petition. In terms of Order VII Rule 14 CPC when the plaintiff sues upon a document or relies upon a document in his possession or power in support of his claim, he shall enter such document in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint. Sub-section 3 provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced

or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. In other words, in terms of Rule 14, the plaintiff or as in the present case, the petitioner to the election petition who sues on a document or relies on a document in his possession or power shall enter such document in a list and shall produce it in Court when the petition is presented by him and shall at the same time deliver a copy thereof to be filed with the petition. A reading of the pleadings at paragraph 24 to 29 which have been verified to be true to the own knowledge of the petitioner as derived from the records of investigation however do not substantiate the same with the production of documents. No good reasons too have been disclosed for the non-production thereof and therefore in that context there appears force in the contention of Shri Pankaj Pai Vernekar, learned Advocate for the applicant that the petition is liable to be rejected.

33. It was the contention of Shri Pankaj Pai Vernekar, learned Advocate for the applicant that the respondent petitioner had failed to show that the result of the election

was materially affected due to the alleged commission of corrupt practice by the applicant. The difference in votes between those of the respondent petitioner and the applicant were more than 8,000.

34. In **Samant N. Balkrishna** (supra), it was held that the petitioner had failed to establish in the manner laid down by this Court, that the result of the election was materially affected in so far as the respondent was concerned and in that view of the matter dismissed the appeal. In **Jagabandhu Behera** (supra), the Apex Court on a consideration of the matter was of the view that the material particulars have been given in para 7(B) and therefore the said para forming a part of the election petition was ordered to be restored and so far as the rest of the part was concerned, in their opinion, the High Court was right while striking them off. **Sardar Brar** (supra), filed an election petition under Section 80, 80-A and 81 of the Act seeking to set aside the election of the respondent no.1 on the ground that the nomination of one of the respondents was improperly accepted which had resulted in the result of the election being materially affected and that

the respondent no.1 was guilty of having committed corrupt practice of obtaining the assistance of a police officer within the meaning of Section 123(7) of the Act. The Apex Court considered Section 83 of the Act and the rules framed thereunder and found on the basis of the material on record that the High Court had not been right in directing the dismissal of the petition at the threshold by forming an opinion that the averments made in the petition were deficient in material facts and allowed the appeal.

35. In **Ashraf Kokur** (supra), the question which arose for consideration in this case before the Apex Court was whether the averments in the election petition disclosed a cause of action as required under Order VII Rule 11(a) CPC while dealing with the judgment which dismissed the election petition in limine as it did not disclose the complete cause of action or a triable issue. The Apex Court considered the judgments in **G.M. Sidheswar** (supra) and **Azhar Hussain** (supra) and in the factual matrix took a view that the election petition having disclosed a cause of action should not have been thrown out at the threshold and setting aside the

impugned judgment allowed the appeal. This was in the given facts of that case and which does not buttress the contention of Shri V.P. Thali, learned Advocate for the respondent petitioner that there was disclosure of material facts as required in terms of Section 80 of the Act.

36. **Murarka Radhe Shyam** (supra), was elected to the House of the People at the third general elections held in the month of February, 1962. He was elected from a constituency known as the Jhunjhunu Parliamentary Constituency in Rajasthan. Two election petitions were filed for setting aside the election of the appellant. One of these was filed by one Ridmal Singh who stated that he was an elector in the said constituency. Another application was filed by one Balji who was also an elector in the said Parliamentary Constituency and whose nomination paper was rejected by the Returning Officer. The appellant raised preliminary objection to the maintainability of the two petitions which were dealt with by the Election Tribunal and dismissed the preliminary objection giving rise to two Writ Petitions in the High Court at Rajasthan at their instance and which were dismissed by the High Court

giving rise to the Special Leave Petition before the Apex Court. He claimed that the two petitions were not maintainable and should have been dismissed by the Election Tribunal as there was non-compliance with the mandatory provisions of Section 82 of the Act and besides Balji whose nomination paper was rejected and who was not a contesting candidate was improperly impleaded as a respondent to the election petition. In so far as the defects in verification of the petition was concerned, the Apex Court found that though the averments made in some of the paragraphs of the petition were true to the personal knowledge of the petitioner and the averments were verified to be true on the basis of advise and information received by the petitioner from legal and other sources, the petitioner had not stated in so many words that the advise and information received was believed by him to be true.

37. In **Murarka Radhe Shyam** (supra), the Election Tribunal took a view that this defect in verification was a matter which came within clause (c) of sub-section (1) of Section 83 and the defect could be removed in accordance

with the principles of CPC. The Apex Court agreed with the view expressed by the Election Tribunal and set out that the Tribunal might dismiss an election petition which did not comply with the provisions of Section 81, 83 or 117 of the Act. This judgment was in the facts of that case and does not advance the case of the respondent petitioner that the petitioner fulfilled all the predicates of Section 83 of the Act and/or that the preliminary objections to its maintainability were not tenable. **Ashwani Kumar** (supra), in the facts of that case held that concise statement of material facts is mandatory under Section 83 (1) of the Act. However, furnishing evidence in support of such material facts is not essential for the maintainability of the petition and failure to furnish material particulars in support of the material facts and the allegations was not fatal to the election petition.

38. In **C.P. John** (supra), a two Judge Bench of the Apex Court observed that a reading of Section 83(1)(b) was to the effect that such particulars should be complete in every respect and when it relates to an allegation of corrupt practice it should specifically state the names of the parties who are

alleged to have committed such corrupt practice and also the date and place where such corrupt practice was committed. In other words, the particulars relating to corrupt practice should not be lacking in any respect. One who reads the averments relating to corrupt practice should be in a position to gather every minute detail about the alleged corrupt practice such as the names of the person, nature of the alleged corrupt practice indulged in by such persons, the date, the time, the place and every other detail relating to the alleged corrupt practice. It was observed at para 19 thus:

“19. To put it differently, when the election petition is taken up for consideration, the Court which deals with such an election petition, should be in a position to know in exactitude as to what is the corrupt practice alleged as against the parties without giving any room for doubt as to the nature of such allegation, the parties involved, the date, time and the place, etc. so that the party against whom such allegation is made is in a position to explain or defend any such allegation without giving scope for any speculation. In that context, both Sections 83(1)(a) and (1)(b) and the proviso play a very key role since the election petitioner cannot simply raise an allegation of corrupt practice and get away with it, inasmuch as the affidavit to be filed in respect of corrupt practice should specifically support the facts pleaded, as well as, the material particulars furnished.”

39. On a consideration of all the pleadings duly denied by

the applicant/respondent and the judgments on the point, the respondent original petitioner had failed to set out the material facts and to rely on the material documents to bring home the case of the corrupt practice indulged in by the applicant respondent to the core. It was not only the case of defective verification but that there were no pleadings on material facts as required in terms of Section 83(1)(b) of the Act. The respondent petitioner had also failed to show from the material on record how the result of the election was prejudicially affected due to the commission of the alleged corrupt practice by the applicant/original respondent. The petition as such does not disclose a cause of action and lacks in material facts and particulars apart from the non-production of the material documents. Therefore in exercise of the powers under Order VII Rule 11 of the CPC there is every basis to allow the application of the applicant/original respondent and dismiss the election petition.

NUTAN D. SARDESSAI, J.

NH

40. Shri S. Naik holding for Shri V.P. Thali, learned Advocate for the respondent/original petitioner seeks stay of this order which is opposed by Shri Pankaj Pai Vernekar, learned Advocate for the applicant. However, in the interest of justice the same is stayed for a period of four weeks from today.

NUTAN D. SARDESSAI, J.

NH